

<b>People v Scibilia-Carver</b>
2008 NY Slip Op 33004(U)
November 6, 2008
Steuben County Ct
Docket Number: 2007-84JC
Judge: Marianne Furfure
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

State of New York      County Court  
County of Steuben

---

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,  
- against -

DECISION and ORDER

No. 2007-84JC

MARK SCIBILIA-CARVER, CHRISTOPHER TATE,  
DANIEL BURNS, ELLEN GRADY, and  
RICHARD TODD SADLER,

Appellants.

---

*Appearances:*      *John C. Tunney, District Attorney* (Travis J. Barry, of counsel) Bath,  
for Respondent

*Schlather, Geldenhuys, Stumbar & Salk* (Raymond M. Schlather, of  
counsel) Ithaca, for Appellants

This matter has come before the Court on appeals from convictions for the crimes of Criminal Trespass in the Third Degree after a jury trial in the Village of Bath Justice Court. Appellants claim that the trial court committed errors which, as a matter of law, require their convictions be vacated and the accusatory instruments dismissed. First, they claim that the court erred in failing to dismiss the accusatory instruments due to facial insufficiency or failure to establish a prima facie case. They claim that the accusatory instruments failed to set forth the factual allegations necessary to plead one of the elements of Criminal Trespass in the Third Degree. Second, they contend that the court erred in denying their challenges for cause as to two potential jurors. Third, appellants claim that the trial court abused its

discretion in denying their motions for mistrial based on misconduct that allegedly occurred during the trial.

Respondent filed an affirmation in opposition arguing that appellants should have filed pre-trial motions to dismiss the informations as defective and that, even if they had done so, the informations were not defective; the trial court correctly denied appellants' motions for trial orders of dismissal; the trial court correctly exercised its discretion in denying appellants' application to remove two potential jurors for cause, and denying appellants' applications for a recess of the trial. The parties appeared for oral argument, after which the Court reserved decision.

The facts underlying these appeals are not disputed by the parties. On August 6, 2007, during regular business hours, a group of approximately 20 people went to the local office of Congressman Randy Kuhl to discuss the war in Iraq with him. The Congressman was not in his office at the time, nor was he expected to return that day. The group of people remained in the office until 5:00 p.m. when the office manager asked them to leave because she was locking the office for the night. Eventually, all but these five appellants left the premises. The five who did not leave were arrested and charged with Criminal Trespass in the Third Degree, a class B misdemeanor. A jury trial was held in the Village of Bath on September 7 and 8, 2007. The jury returned a verdict of guilty against each appellant. The appellants were sentenced on November 26, 2007. These appeals ensued.

Appellants contend that the trial court erred in failing to dismiss the accusatory instruments. They claim that the instruments were insufficient, as a matter of law, as they contained no allegation that the Congressman's office was fenced or enclosed in a manner designed to exclude intruders, as required by Penal Law Section 140.10[a]. Respondent argues that the trial court did not err in denying the motion to dismiss as appellants failed to move prior to trial for this relief and that the accusatory instruments were not defective.

Criminal Procedure Law Section 170.30[1] sets forth the procedural avenue available to a defendant who seeks to dismiss an accusatory instrument which he claims is fatally defective. Any motions to dismiss on this ground should be made within forty-five days after arraignment and before commencement of trial (CPL Section 255.20). However, the failure to allege an element of the crime in an information and/or supporting deposition is a non-waivable jurisdictional defect that is reviewable even if not raised until appeal (*People v. Alejandro*, 70 NY2d 133, 135 [1987]). Consequently, appellants' challenge to the sufficiency of the accusatory instrument was not waived by failing to raise it in a pre-trial motion and could be raised at trial, or on appeal.

As applicable here, a person commits the misdemeanor of Criminal Trespass in the Third Degree when he or she: 1) knowingly enters or remains unlawfully; 2) in a building or upon real property; 3) which is fenced or otherwise enclosed in a manner designed to exclude intruders. Proof that the building was fenced or

enclosed in a manner designed to exclude intruders elevates an act from the violation of trespass to the misdemeanor of criminal trespass in the third degree. “If knowingly entering or remaining unlawfully in any building were sufficient to establish third-degree criminal trespass, it would be unnecessary to include the further enumerated aggravating elements for trespass in particular buildings such as elementary and secondary schools or public housing projects . . .” (*People v. Moore*, 5 NY3d 725,726 [2005]).

The question raised in this appeal is whether the informations and supporting depositions here sufficiently alleged this aggravating element. Respondent concedes that the words “fenced or otherwise enclosed in a manner designed to exclude intruders” were not set forth. Nevertheless, respondent argues that the supporting depositions’ reference to the locking of the office doors sufficiently satisfy this element.

The Court of Appeals had occasion to address this issue in 2005. In *People v. Moore*, (5 NY3d 725) the Court discussed the legislative history behind the 1987 amendment to Penal Law Section 140.10(a) and the requirement that the criminal activity occur not just in a building, but a building which is fenced or otherwise enclosed in a way to exclude intruders. In *Moore*, the defendant was charged with being in a public building on a state university campus, after being notified he was barred from campus. The Court of Appeals ruled that the information was properly dismissed as facially insufficient because the charging document failed to allege

facts establishing this additional aggravating element. Other courts that have addressed the issue have dismissed charges where activities occurred in buildings open to the public and where there was an absence of allegations or proof of this additional element (*People v. Martinez*, 16 Misc 3d 1111(A) [N.Y. Dist. Ct. Nassau County 2007][church]; *People v. Warren*, 183 Misc 2d 864 [Monroe Co. Ct., 1997][hospital]; *People v. Santos*, 182 Misc 2d 762, 766 [Crim. Ct., New York County 1999][dentist office]).

Respondents' reliance on *People v Johnson* (13 Misc 3d 126 (A) [App. Term, 1<sup>st</sup> Dept, 2006]) is distinguishable. In *Johnson*, defendant was on the third-floor hallway of an apartment building that was marked by "no trespassing" and other signs that restricted access. Here, appellants entered the public office of an elected official during regular business hours and remained in the public areas. There were no allegations that there were signs or enclosures restricting public access. There were no allegations that the building was boarded up or fenced off. The allegation that the office door was capable of being locked is not the type of enclosure necessary to satisfy Penal Law Section 140.10 (a)'s aggravating element that the building be fenced or enclosed in a manner to extrude intruders. This interpretation is consistent with the other subdivisions of Penal Law Section 140.10 that refer to specific types of buildings, all of which one would expect to have doors with locks.

As the information and supporting depositions fail to allege facts establishing an essential element of the crime of criminal trespass in the third degree, the

accusatory instruments are jurisdictionally defective and the charges against each of the appellants must be dismissed. It is hereby

ORDERED that the conviction of each defendant is hereby reversed on the law and the charge is dismissed.

Dated: November 6, 2008  
Bath, New York

ENTER,



---

**Hon. Marianne Furfure**  
Acting County Court Judge  
Steuben County