STATE OF NEW YORK

COUNTY OF ONEIDA ROME CITY COURT

THE PEOPLE OF THE STATE OF NEW YORK, MEMORANDUM DECISION

vs.

Donald R. McCurduck,

Defendant. DOCKET NO. 44707

Patrick F. Scully, Esq., Asst. District Attorney of Oneida County,

for the People

John G. Leonard, Esq., Attorney

for the Defendant

PRESENT: Hon. Daniel C. Wilson, City Court Judge:

The defendant has moved this court by a motion which was filed with the court on September 15, 2008 and which was duly submitted to the court for decision on November 12, 2008 for an order seeking dismissal of the accusatory instrument herein for being defective upon its face pursuant to §170.35 of the Criminal Procedure Law, and for an order seeking

discovery and inspection of certain listed items, and for disclosure of exculpatory material pursuant to federal and state case law, and for dismissal of the charges upon the basis that the arrest was not based upon probable cause, and for relief pursuant to *People vs. Sandoval*, 34 NY 2d 371 (1974) and *People v. Ventimiglia*, 52 N.Y. 2nd 350 (1981) as to the use for cross examination purposes or upon the direct case of the people of any prior criminal convictions and/or bad acts of the defendant at a trial of this action, and for suppression of items of physical evidence as being obtained in violation of the defendant's rights under the United States and New York State Constitutions and for leave to submit any further motions necessitated by the relief obtained from this motion. The People have opposed said motion by an answering affirmation which was filed with the court and after due deliberation, the court determines the defendant's motion as follows:

The accusatory instrument herein which is labeled as an information states legal and factual allegations regarding an incident allegedly occurring on the 24th of July, 2008 and alleges a charge o Criminal Possession of a Controlled Substance in the 7th degree in violation of §220.03 of the Penal Law.

The accusatory instrument to be valid upon its face within the provisions of CPL 100.40 would in addition to the requirements of the reasonable cause to believe that the defendant committed the offense charged in the accusatory instrument, would also have to establish by, "nonhearsay allegations of the factual part of the information and/or of any supporting depositions" every element of the offense charged and the defendant's commission thereof.

An "information" (charging a misdemeanor or petty offense) must demonstrate "reasonable cause" and be legally sufficient for a prima facie case, a much more demanding standard than what is required for a felony complaint. *People vs. Alejandro*, 70 N.Y.2nd 133 (1987).

§100.15 of the Criminal Procedure Law does require that, " The factual part of such instrument must contain a statement of the complainant alleging facts of an evidentiary nature supporting or tending to support the charges."

The procedural requirements for the factual portion of a local criminal court information are, simply: that it state "facts of an evidentiary character supporting or tending to support the charges" (CPL 100.15 [3]; *see*, CPL 100.40 [1] [a]); that the "allegations of the factual part ... together with those of any supporting depositions ... provide reasonable cause to believe that the defendant committed the offense charged" (CPL 100.40 [1] [b]); and that the "[n]on-hearsay allegations [of the information and supporting depositions] establish, if true, every element of the offense charged and the defendant's commission thereof" (CPL 100.40 [1] [c]; *see*, CPL 100.15 [3]).

So long as the factual allegations of an information give an accused notice sufficient to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, they should be given a fair and not overly restrictive or technical reading (*see, People v. Casey, 95 N.Y. 2nd 354, 360; People v Jacoby*, 304 NY 33, 38-40; *People v Knapp*, 152 Misc 368, 370, *affd* 242 App Div 811; *People v Shea*, 68 Misc 2d 271, 272; *see also*,

People v Allen, 92 NY2d 378, 385; *People v Miles*, 64 NY2d 731, 732-733)

The *Alejandro* case actually involved a failure to satisfy the first requirement of CPL 100.40 (1) (c), in that there was a total absence of pleading of one of the elements of the crime of Resisting Arrest, i.e., that the defendant had resisted an "*authorized*" arrest (Penal Law §§ 205.30 [emphasis supplied]; *People v Alejandro, supra,* at 135-136). In the case at bar, the question would not be the pleading, but the proof on the face of the papers.

The accusatory states that:

The above allegations of fact are made by the Complainant herein (on direct knowledge and/or upon information and belief, with the sources of complainant's information and grounds for belief being the facts contained in the attached Supporting Deposition(s) of: _____

The accusatory instrument, although partially based "upon information and belief"does not have any supporting deposition attached nor does it show the officer's source of knowledge or its reliability.

As stressed by the court in *People v Alejandro* (supra), the unique function that an information serves under the Criminal Procedure Law is the reason the additional showing is required for a prima facie case. Unlike a felony complaint, a defendant can be tried on an information alone. Misdemeanor complaints are not tested by a preliminary hearing or a Grand Jury proceeding. With prosecution upon an indictment the People are not required to present at any stage before trial actual evidence demonstrating a prima facie case.

The "reasonable cause" standard defined in

2. CPL 70.10 (2) and referenced in CPL 100.40 (4) (b) is, not coincidentally, also the statutory standard for determining whether a person was lawfully arrested (*see* CPL 140.10 [1]). Moreover reasonable cause is the equivalent of probable cause *Fitzpatrick v. Rosenthal*, 809 NYS 2d 729 (4th Dept., 2006); (*see People v Maldonado*, 86 NY2d 631, 635; *People v Wharton*, 60 AD2d 291, 293, *affd* 46 NY2d 924, *cert denied* 444 US 880), the constitutional prerequisite for a lawful arrest. "The [constitutional] standard for arrest is probable cause, defined in terms of facts and circumstances sufficient to warrant a prudent [person] in believing that the (suspect) had committed or was committing an offense"' (*Gerstein v Pugh*, 420 US 103, 111, quoting *Beck v Ohio*, 379 US 89, 91). Where a demonstration of probable or reasonable cause is based on hearsay information, New York courts apply the *Aguilar-Spinelli* test, requiring that the hearsay affiant establish "that the informant had some basis for the knowledge ... transmitted ... and that [the informant] was reliable" (*Fitzpatrick v. Rosenthal*, supra.; *People v Bigelow*, 66 NY2d 417, 423; *see People v DiFalco*, 80 NY2d 693, 696; *People v Johnson*, 66 NY2d 398, 402; *see generally People v Davis*, 170 Misc 2d 987, 994; *People v Born*, 166 Misc 2d 757, 759-761).

The hearsay-based information or complaint before us fails to meet either prong of the *Aguilar-Spinelli* test. In *People v Parris* (83 NY2d 342), the Court of Appeals concluded that an arrest made by a police officer based on hearsay information imparted by a fellow officer and attributed to an eyewitness was unlawful under the "basis-of-knowledge prong of *Aguilar-Spinelli*" and thus was not based on the requisite probable cause (*id.* at 349-350). In so concluding, the Court reasoned that "the suppression court was relegated to reliance upon [the

hearsay information imparted to the arresting officer, and that officer's] conclusory characterization of the neighbor/informant as an eyewitness[,'] in order to determine the reliability of the information claimed to have established probable cause. This, however, is precisely what the *Aguilar-Spinelli* standard was designed to avoid" (*id.* at 350). The subject information also fails to establish the reliability of the informant prong of the *Aguilar-Spinelli* test, and since it is an "information", then it cannot be based upon hearsay at all.

No information was furnished to the court concerning whether the "information" came from an anonymous or a paid informant, in which event an independent showing of reliability would have been required, or whether those accounts came from an identified citizen informant, in which event there would be no need to furnish further evidence of reliability (*Fitzpatrick v. Rosenthal*, supra; *cf.*

2. *Parris*, 83 NY2d at 349-350; *People v Hicks*, 38 NY2d 90, 94-95; *People v Gamble*, 279 AD2d 478, 478-479, *lv denied* 96 NY2d 829).

No grounds for dismissal of the traffic infraction of Operating while Using a Mobile Phone or the simplified traffic information upon which it is charged, have been alleged by the defendant, so that the motion to dismiss would be denied as to that count.

Accordingly, the defendant's motion to dismiss the charge of Criminal Possession of a Controlled Substance in the 7th degree for the papers being defective upon their face would be in all respects granted. The court will reserve on the remaining motions so that the defendant may renew upon them if he is seeking a ruling regarding the traffic infraction.

This will constitute the decision and the order of the court.

ENTER:

Daniel C. Wilson,

Rome City Court Judge

DATE: December 8, 2008