People v McCoppin

2008 NY Slip Op 33444(U)

December 26, 2008

Supreme Court, Oneida County

Docket Number: 44646

Judge: Daniel C. Wilson

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State of New York
County of Oneida

Rome City Court

People of the State of New York

vs.

MEMORANDUM DECISION

Jamie L. McCoppin,
Defendant.

DOCKET NOS.
44646

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no opposition filed by District Attorney of Oneida County,
for the People

George F. Hildebrandt, 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 October 7, 2008 and which was duly submitted to the court for decision on October 31, 2008 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 the filing of a bill of particulars herein, and for an order compelling disclosure, and for an order suppressing an alleged statement as being obtained in violation of the defendant's rights under the New York State and United States Constitutions, and for an order seeking dismissal of the accusatory instruments herein charging Unlawfully Fleeing a Police Officer in a Motor Vehicle in the 3rd degree in violation of §270.25 of the Penal Law, Reckless Driving in violation of §1212 of the Vehicle and Traffic, two counts of Improper Passing in violation of §1123 of the Vehicle and Traffic Law, eight counts of Disobeying a Traffic Control Device in violation of §1110(a) of the Vehicle and Traffic Law, a charge of Speed in Excess of the State Speed Limit in violation of

§1180(b) of the Vehicle and Traffic Law for being defective upon their face, and for leave to submit any further motions necessitated by the relief obtained from this motion. The People have not opposed said motion either orally or in writing and after due deliberation, the court determines the defendant's motion as follows:

As to the defendant's motion to dismiss the accusatory instrument herein charging Unlawfully Fleeing a Police Officer in a Motor Vehicle in the 3rd degree in violation of §270.25 of the Penal Law, the statute reads as follows:

> A person is guilty of unlawful fleeing a police officer in a motor vehicle in the third degree when, knowing that he or she has been directed to stop his or her motor vehicle by a uniformed police officer or a marked police vehicle by the activation of either the lights or the lights and siren of such vehicle, he or she thereafter attempts to flee such officer or such vehicle by driving at speeds which equal or exceed twenty-five miles per hour above the speed limit or engaging in reckless driving as defined by
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> 1. section twelve hundred twelve of the vehicle and traffic law.

The accusatory instrument does not list the elements of Reckless Driving, but rather purports to incorporate it by reference to the section number.

The accusatory instrument alleges in the factual portion that:

> On the aforementioned date, time and place said defendant did intentionally, knowingly and unlawfully, flee from Trooper David D. Heinrich, the complainant herein, being a uniformed Trooper with the New York State Police, working out of SP Sylvan Beach in Troop D. I was westbound on State Route 49 in the City of Rome, Oneida County, in marked SP unit 1D40 and observed a 2006, Suzuki Motorcycle, black, N.Y. motorcycle registration 42FH46, heading east at a high rate of speed. I checked the speed of the approaching vehicle on the division issued Stalker Radar at which time it indicated the vehicle was traveling at 77mph in a 55 mph zone. I turned on said vehicle and immediately activated my emergency lights and sirens. The defendant then intentionally and knowingly continued to flee eastbound on SR 49. The defendant then continued to drive recklessly onto SR 46 where he disregarded a stop sign and attempted to pass on a double solid line into on coming traffic. The defendant then continued northbound on SR 46 into the inner district of the City of Rome defendant did disregard eight stop signs within the inner district of Rome. The pursuit lasted approximately 12 miles and ended when defendants(sic) motorcycle was located on Dealing and Expense Street between to

(sic) garages, City of Rome, Oneida County, NY. All contrary to the provisions of the statute of such case made and provided for by law.

As to the failure to allege the specific legal elements of reckless driving, the Court of Appeals has stated as to an indictment that :

> An indictment is jurisdictionally defective only if it does not effectively charge the defendant with the commission of a particular crime-for instance, if it fails to allege that the defendant committed acts constituting every material element of the crime charged [1]. (*People v. Iannone*, 45 N.Y.2d 589, 600, 412 N.Y.S.2d 110, 384 N.E.2d 656 [1978]). The incorporation by specific reference to the statute operates without more to constitute allegations of all the elements of the crime *People v. D'Angelo*, 98 N.Y. 2nd 733 (2002); (*People v. Ray*, 71 N.Y.2d 849, 850, 527 N.Y.S.2d 740, 522 N.E.2d 1037 [1988]; *People v. Motley*, 69 N.Y.2d 870, 872, 514 N.Y.S.2d 715, 507 N.E.2d 308 [1987]; *People v. Cohen*, 52 N.Y.2d 584, 586, 439 N.Y.S.2d 321, 421 N.E.2d 813 [1981]).

The 4th Department has also made such rule of pleading applicable to local court accusatories in *People v. Chianese* 41 A.D. 3rd 1168 (2007).

The other question would be whether the accusatory would be void for duplicity by not stating which theory of behavior by the defendant is legally alleged in the operation of the motor vehicle.

An accusatory must provide fair notice of the charge and of the time and place of the conduct underlying the accusation so the accused can defend the charge and establish the defense of double jeopardy against a subsequent prosecution for the same offense *(see,* 1. CPL 200.50; *People v. First Meridian Corp.*, 201 A.D. 2nd 145 (3rd Dept., 1994);*People v Davis*, 72 NY2d 32, 38; *People v Keindl*, 68 NY2d 410, 418). "If a count charges more than one offense, it fails to meet these requirements and is void for duplicity [citations omitted]" *(People v Davis, supra,* at 38; *see,* CPL 200.30 [1]). The prohibition against duplicitous counts also seeks to prevent the possibility that individual jurors might vote to convict on a count on the basis of different offenses *(see, People v Davis, supra,* at 38; *People v Keindl, supra,* at 418). A count

will not be found to be duplicitous, however, if the crime charged may by its nature "be committed either by one act or by multiple acts and readily permits characterization as a continuing offense over a period of time" *(People v Keindl, supra,* at 421; *see, People v Dunavin,* 173 AD2d 1032, *lv denied* 78 NY2d 965). In determining whether a particular count is duplicitous, a superior court will consider not only the indictment itself, as supplemented by any bill of particulars, but evidence presented to the Grand Jury as well *(see,* *150 *People v Sulkey,* 195 AD2d 1026, *lv denied* 82 NY2d 759; *People v Corrado,* 161 AD2d 658, 659). Accordingly, in a local court the court will consider the supporting depositions and the factual allegations of the complainant in the accusatory.

Additionally, in order for an information or a count thereof to be sufficient on its face, every element of the offense charged and the defendant's commission thereof must be supported by non-hearsay allegations of such information and/or any supporting depositions. §§ 100.15 and 100.40 Criminal Procedure Law.

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 accusatory does allege all the elements of the offense upon its face. *People v. Alejandro,* supra.

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, every element is alleged, but it also refers to unsubstantiated hearsay, by stating, "NYSP investigation ". As noted in *People v. Casey*, supra, a defect as in the case at bar would not be jurisdictional. *People v. Casey*, supra.

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 at p. 28; *People v. Bigelow*, 66 N.Y.2d 417, 423, 497 N.Y.S.2d 630, 488 N.E.2d 451; *see* *People v. DiFalco*, 80 N.Y.2d 693, 696, 594 N.Y.S.2d 679, 610 N.E.2d 352; *People v. Johnson*, 66 N.Y.2d 398, 402, 497 N.Y.S.2d 618, 488 N.E.2d 439; *see generally* *People v. Davis*, 170 Misc.2d 987, 994, 653 N.Y.S.2d 789; *People v. Born*, 166 Misc.2d 757, 759-761, 634 N.Y.S.2d 915). No basis for the officer's hearsay information is alleged in the information, nor may an information be based upon hearsay.

Therefore, the Court finds that the accusatory instrument charging Unlawfully Fleeing a Police Officer in a Motor Vehicle in the 3rd degree as above would not be sufficient upon its face. Accordingly, the defendant's motion to dismiss that accusatory would be in all respects granted.

As to the charges filed upon simplified traffic informations, CPL 100.10 (subd 2) and 100.25 in substance indicate that where a defendant receives a simplified traffic information and makes a timely request for a supporting deposition, he is entitled to the supporting deposition prior to trial and the failure to provide same mandates a dismissal (see *People v De Feo*, 77 Misc. 2d 523). Moreover, in order to be considered adequate, a supporting deposition in a case initiated by a simplified traffic information must set forth facts in a plain and concise manner which provide a reasonable cause to believe that the defendant committed every necessary element of the offense charged (CPL 100.25, subd 2). *People v. Key*, 1978, 45 N.Y. 2nd 111; *People v. Baron*, 1980, 107 Misc. 2nd 59 (N.Y. Sup. Ct., App. Term, 2nd Dept.).

In the instant matter the defendant contends that he never received the supporting deposition and no proof of service was filed with the court. The Assistant District Attorney does not contest these facts.

§100.25(2) of the Criminal Procedure Law in pertinent part provides as follows:

> Upon such a request, the court must order the complainant police officer or public servant to serve a copy of such supporting deposition upon the defendant or his attorney, within thirty days of the date such request is received by the court, or at least five days before trial, whichever is earlier, and to file such supporting deposition with the court together with proof of service thereof.

The Criminal Procedure Law by itself does not define "service" but it does provide in §60.10 as follows:

> Unless otherwise provided by statute or by judicially established rules of evidence applicable to criminal cases, the rules of evidence applicable to civil cases are, where appropriate, also applicable to criminal proceedings.

In this case the defendant is represented by an attorney, so that the rules for service upon an attorney would apply.

The Civil Practice Laws and Rules provides for service upon an attorney in §2103(b) as follows:

> (b) Upon an attorney. Except where otherwise prescribed by law or order of court, papers to be served upon a party in a pending action shall be served upon the party's attorney. Where the same attorney appears for two or more parties, only one copy need be served upon the attorney. Such service upon an attorney shall be made:
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> 1. by delivering the paper to the attorney personally; or
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> 2. by mailing the paper to the attorney at the address designated by that attorney for that purpose or, if none is designated, at that attorney's last known address; service by mail shall be complete upon mailing; where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period; or
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> 3. if the attorney's office is open, by leaving the paper with a person in charge, or if no person is i in charge, by leaving it in a conspicuous place; or if the attorney's office is not open, by depositing the paper, enclosed in a sealed wrapper directed to the attorney, in the attorney's office letter drop or box; or
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> 4. by leaving it at the attorney's residence within the state with a person of suitable age and discretion. Service upon an attorney shall not be made at the attorney's residence

unless service at the attorney's office cannot be made; or

5. by transmitting the paper to the attorney by facsimile transmission, provided that a facsimile telephone number is designated by the attorney for that purpose. Service by facsimile transmission shall be complete upon the receipt by the sender of a signal from the equipment of the attorney served

indicating that the transmission was received, and the mailing of a copy of the paper to that attorney. The designation of a facsimile telephone number in the address block subscribed on a paper served or filed in the course of an action or proceeding shall constitute consent to service by facsimile transmission in accordance with this subdivision. An attorney may change or rescind a facsimile telephone number by serving a notice on the other parties; or

6. by dispatching the paper to the attorney by overnight delivery service at the address designated by the attorney for that purpose or, if none is designated, at the attorney's last known address. Service by overnight delivery service shall be complete upon deposit of the paper enclosed in a properly addressed wrapper into the custody of the overnight delivery service for overnight delivery, prior to the latest time designated by the overnight delivery service for overnight delivery. Where a period of time prescribed by law is measured from the service of a paper and service is by overnight delivery, one business day shall be added to the prescribed period. "Overnight delivery service" means any delivery service which regularly accepts items for overnight delivery to any address in the state; or

7. [Eff. until July 1, 2003, pursuant to L.1999, c. 367, § 10.] by transmitting the paper to the attorney by electronic means where and in the manner authorized by the chief administrator of the courts by rule upon the

party's written consent. The subject matter heading for each paper sent by electronic means must indicate that the matter being transmitted electronically is related to a court proceeding.

"Mailing" is defined as follows in §2103(f) of the Civil Practice Laws and Rules:

"Mailing" means the deposit of a paper enclosed in a first class postpaid wrapper, addressed to the address designated by a person for that purpose or, if none is designated, at that person's last known address, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the state;

However, in the facts at bar, no proof has been submitted that the defendant was ever served.

Accordingly, the motion would be in all respects granted, and the accusatory instruments charging the traffic infractions and the traffic misdemeanor of Reckless Driving would be dismissed.

The defendant's remaining motions would be denied with leave to re-apply it the charges are re-filed by the People.

The defendant's motion is granted as above stated, but in all other respects will be denied.

This will constitute the Decision and the Order of the Court.

ENTER:

DANIEL C. WILSON
ROME CITY COURT JUDGE

DATED: December 26, 2008