

**People v Tuzzolino**

2009 NY Slip Op 31680(U)

July 28, 2009

Supreme Court, New York County

Docket Number: 46361

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

Martin A. Tuzzolino,  
Defendant.

DOCKET NO. 46361

Christopher D. Hameline, Esq., Asst. District Attorney of Oneida County,  
for the People

David L. Arthur, Esq., Assistant Public Defender of Oneida County,  
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 May 28, 2009 and which was duly submitted to the court for decision on June 4, 2009 for an order seeking dismissal of the accusatory instruments herein charging Endangering the Welfare of a Child in violation of §260.10 of the Penal Law, and Disorderly Conduct in violation of §240.20(7) of the Penal 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:

The factual allegations in the accusatory instrument charging Endangering the Welfare of

a Child reads as follows:

That on the aforesaid date and time at the Rome Walmart located at 5815 Rome Taberg Road in the City of Rome, County of Oneida the defendant did commit the offense of Endangering the welfare of a Child. The defendant did create a physically offensive condition by an act which served no legitimate purpose, the defendant did in a public place approach a nine year old child named Jazmyn Humphrey and he appeared to reach with his hand and grab or touch the child for no legitimate purpose. The defendant is not acquainted with the child and said act caused annoyance, alarm and public inconvenience. The defendant's physical behaviors and mannerisms directed to the victim are likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old.

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." Since the complainant police officer only alleges a conclusory statement as to what the defendant allegedly did, the information would be jurisdictionally defective. *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. 2<sup>nd</sup> 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). The procedural defect in the factual allegations herein would be the question as to whether the activity listed in the factual statement would be likely to cause harm to the child. As noted in *People v. Casey, supra*, a defect as in the case at bar would be a jurisdictional non-waivable defect, as opposed to the issue as to whether the supporting deposition contains the proper non-hearsay testimony to support the charge. A defect in the supporting deposition, on the other hand, would not have been jurisdictional. *People v. Casey, supra*.

"A person is guilty of endangering the welfare of a child when:

1. He knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old." §260.10 Penal Law

Actual harm to the child need not result for liability under the statute to attach, it being sufficient that the defendant act in a manner which is likely to result in harm to the child, knowing of the likelihood of such harm coming to the child (see, *People v. Simmons*, 92 N.Y. 2<sup>nd</sup> 829; *People v. Bergerson*, 17 N.Y.2d 398, 403, 271 N.Y.S.2d 236, 218 N.E.2d 288 [distinguishing between subdivisions (1) and (2) of predecessor statute to Penal Law § 260.10]).

Thus, it requires that the defendant act "knowingly" (see, Penal Law § 15.05 [2]) and in a manner which is "likely" to be injurious to the welfare of the child. It is insufficient for the People to prove merely that the defendant "should have known" that his conduct was likely to be injurious to the welfare of the child, since the degree of culpability required by the statute is actual knowledge (*People v. Chase*, 186 Misc. 2<sup>nd</sup> 487 ( App. Term 2<sup>nd</sup> Dept., 2000 ), leave denied at 95 N.Y. 2<sup>nd</sup> 962 ( 12/14/00 ); *People v. Simmons*, 221 A.D.2d 994, 635 N.Y.S.2d 373, lv. denied 88 N.Y.2d 885, 645 N.Y.S.2d 460, 668 N.E.2d 431). With respect to the term, "likely," the Appellate Term 2<sup>nd</sup> Dept. noted in *Chase* that conduct which clearly raises a risk of injury to a minor does not necessarily make such injury "likely."

The Court in *Chase*, in invalidating a conviction of Endangering the Welfare merely because of an Operating While Impaired with Alcohol conviction, noted that the evidence in a given case might evince conduct so egregious as to establish the requisite knowledge and a true

likelihood of injury which is not "speculative" (cf., *People v. Simmons*, 92 N.Y.2d 829, 831, 677 N.Y.S.2d 58, 699 N.E.2d 417).

The important point to note in this case is that both the *Chase* case and the *Simmons* case, with contradictory results, were both decided upon the evidence and not upon the accusatory instruments.

It would appear that in the facts at bar the defendant would not have knowledge that the mere fact that he reached his hand toward the child would thereby endanger the child's welfare.

Moreover, the accusatory does not show the basis for the probable cause to believe that the defendant committed to the offense since it states that it is based upon unsubstantiated hearsay, i.e., "my investigation into this matter as a Police Officer". 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*, 29 A.D. 3<sup>rd</sup> 24 (4<sup>th</sup> Dept.) ; leave to appeal denied at 6 N.Y. 3<sup>rd</sup> 715 (May 11, 2006); *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).

The accusatory instrument charging Disorderly Conduct in violation of §240.20(7) of the Penal Law herein which is labeled as an information states as to the factual allegation regarding incidents occurring at the same time and date as above as follows:

That on the aforesaid date and time at the Rome Walmart located at 5815 Rome Taberg Road in the City of Rome, County of Oneida the defendant did commit the offense of disorderly conduct. The defendant did create a physically offensive condition by an act which served no legitimate purpose, the defendant did in a public place approach a nine year old child named Jazmyn Humphrey and he appeared to reach with his hand and grab or touch the child for no legitimate purpose. The defendant is not acquainted with the child and said act caused annoyance, alarm and public inconvenience

The language in the factual segment of the accusatory instrument contains mere conclusory statements and essentially restates the allegations from the Endangering Welfare charge. Since the complainant police officer again alleges unsubstantiated hearsay as to his source of information, and does not allege what segment of the public was inconvenienced, the information would be jurisdictionally defective. *People v. Alejandro*, supra.

To constitute the offense of disorderly conduct in violation of 1. section 240.20 (7) of the Penal Law there must be evidence beyond a reasonable doubt that this defendant committed acts in violation of the statute.

In addition, the proscribed conduct must be accompanied by the stated culpable mental state of intent to cause public inconvenience, annoyance or alarm or recklessly creating a risk thereof. (*People v. Griswald*, 170 Misc. 2<sup>nd</sup> 38, 40; *See*, Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law § 240.20, at 219-220; *People v Deignan*,

116 Misc 2d 955.)

The Court of Appeals has emphasized that “the disruptive behavior proscribed by our disorderly conduct statute be of public rather than individual dimension”. (People v Munafu, 50 NY2d 326, 331.) Furthermore, the behavior must occur in a public rather than a private place. (People v Dalton, 121 NYS2d 915.) Annoying language and presumably annoying conduct must, to constitute disorderly conduct, amount to a nuisance. (People v. Griswald, supra at p. 40; People v Sharpe, 207 Misc 39.)

However, a nuisance may be public or private, i.e., a private nuisance is one which violates only private rights and produces damages to but one or a few persons (81 NY Jur 2d, Nuisances, § 6), and a public nuisance is “conduct or omission which offend[s], interfere[s] with, or cause[s] damage to the public in the exercise of rights common to all in a manner such as to offend public morals, interfere with use by the public of a public place, or endanger or injure the property, health, safety, or comfort of a considerable number of persons.” (81 NY Jur 2d, Nuisances, § 5.)

It is important to note that only a public nuisance may be made the basis of a criminal prosecution (*see*, Penal Law § 240.45) and only the public, through the proper officer, may sue to enjoin or abate a public nuisance, whereas only a private individual may sue to abate a private nuisance. (81 NY Jur 2d, Nuisances, § 4.)

An information is facially insufficient when those injured constitute a distinct and finite group as this does not satisfy the statutory requirement that conduct endanger the public-at-large. (*People v Kotler*, 141 Misc 2d 675.) Therefore, in light of the specific intent required for criminal nuisance, a court should not impose criminal liability when a particular case involves what is essentially a private complaint. (*People v Markovitz*, 102 Misc 2d 575.)

The disorderly conduct statute was promulgated to address public acts affecting the public in general, not private acts which in essence constitute a private nuisance. Therefore, in order to sustain a conviction, the offensive conduct must be public in nature and must cause inconvenience, annoyance or alarm to a substantial segment of the public or be of such nature and character that it would appear beyond a reasonable doubt that the conduct created a risk that a breach of the peace was imminent. (*People v Chesnick*, 302 NY 58; *People v. Griswald*, *supra* at p. 41; *People v Szepansky*, 25 Misc 2d 239.) Perhaps more importantly, it must be established beyond a reasonable doubt that the accused intended to breach the peace. (*People v Hill*, 60 Misc 2d 277.)

Therefore, the statute of disorderly conduct may not be molded to fit the facts, and to warrant conviction, the facts must fit the disorderly conduct statute under which the defendant has been charged. (*People v. Griswald*, *supra*; *People v Hill*, *supra*.)

Moreover, the accusatory does not mention any members of the public who were disturbed by the defendant's behavior other than the child, himself, which obviously makes the

offense private in nature rather than public.

Accordingly, the defendant's motion to dismiss the charges of Endangering the Welfare of a Child and of Disorderly Conduct for the papers being defective upon their face would be in all respects granted.

The defendant's motion to reserve the right to submit any further motions necessitated by the relief obtained from this motion would be granted pursuant to the provisions of section 255.20 (3) of the Criminal Procedure Law, but in all other respects will be denied.

The defendant's motion is granted as above stated if the charges are re-filed, but the accusatory instruments would be dismissed.

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

ENTER:

DANIEL C. WILSON

ROME CITY COURT JUDGE

DATED: July 28, 2009