

People v Brown-Ashley

2009 NY Slip Op 32899(U)

December 11, 2009

City Court of Rome, Oneida County

Docket Number: 47384

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

Anita J. Brown-Ashley,
Defendant.

DOCKET NO. 47384

No appearance by 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 November 18, 2009 and which was duly submitted to the court for decision on December 9, 2009, for an order seeking dismissal of the accusatory instrument herein charging Petty Larceny in violation of §155.25 of the Penal Law pursuant to §170.30 and §170.35 of the Criminal Procedure Law for being defective upon its face. The People have not opposed said motion by any answering affidavit or affirmation filed with the court nor by oral argument, and after due deliberation, the court determines the defendant's motion as follows:

The accusatory instrument herein alleging Petty Larceny, which is labeled as an "information/complaint", states as to the factual allegation regarding an incident occurring on or about the 30th day of August, 2009 at about 11:49 A.M.. as follows:

On the aforementioned date and time, the defendant, Anita J. Brown-Ashley did steal property from Walmart located at 5815 Rome-Taberg Road. The defendant did remove a mixer valued at \$198.96, from a shelf in the store and proceeded to the Customer Service Desk. The defendant received a gift card in the amount of \$216.37 from the Customer Service Associate upon

returning the merchandise which she had not purchased. The defendant's actions were observed on video surveillance. All this occurring in the City of Rome, County of Oneida, State of New York

The accusatory instrument states that it is based upon attached supporting deposition of Steven Fernandez. The supporting deposition attached to the accusatory refers to hearsay statements that some unidentified woman related to the deponent and does not mention the defendant other than to mention an unidentified "female" as being involved in the transaction.

An 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, 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.

The statutory charge filed against the defendant reads as follows:

§ 155.25 Petty Larceny

A person is guilty of petty larceny when he steals property.

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.2d 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."

A legally sufficient misdemeanor complaint must contain facts of an evidentiary character supporting or tending to support the charges. The facts must provide reasonable cause to believe that the defendant committed the offense charged. The factual allegations may be based upon personal

knowledge of the complainant or upon information and belief. In addition, a legally sufficient information must contain nonhearsay allegations establishing, if true, every element of the offense charged and the defendant's commission thereof. An information which fails to satisfy these requirements is jurisdictionally defective (see, CPL 100.40 [1], [4]; 100.15 [3];

People v Alejandro, supra; *People v Dumas*, 68 NY2d 729). 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. The People are not required to present at any stage before trial actual evidence demonstrating a prima facie case.

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, *aff'd* 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). As noted in *People v. Casey*, supra, a defect 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.

The disputed issue is whether the accusatory demonstrates the requisite reasonable cause to believe that a person has committed an offense, within the meaning of CPL 70.10(2). Such reasonable cause “exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it. Except as otherwise provided in [the CPL], such apparently reliable evidence may include or consist of hearsay”(*id.*).

[1] [2] [3] The “reasonable cause” standard defined in 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]). The Appellate Division 4th Department noted in *Fitzpatrick v. Rosenthal*, 29 A.D. 3rd 24; leave to appeal denied at 6 N.Y. 3rd 715 (May 11, 2006) that reasonable cause is the equivalent of probable cause (*see* *People v. Maldonado*, 86 N.Y.2d 631, 635, 635 N.Y.S.2d 155, 658 N.E.2d 1028; *People v. Wharton*, 60 A.D.2d 291, 293, 400 N.Y.S.2d 840, *affd.* 46 N.Y.2d 924, 415 N.Y.S.2d 204, 388 N.E.2d 341, *cert. denied* 444 U.S. 880, 100 S.Ct. 169, 62 L.Ed.2d 110), 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 U.S. 103, 111, 95 S.Ct. 854, 43 L.Ed.2d 54, quoting

Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142). 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).

The supporting deposition does not allege that the defendant did anything of a culpable nature or otherwise.

Accordingly, the defendant's motions to dismiss the accusatory instrument for being defective upon its face would be in all respects granted.

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

ENTER:

DANIEL C. WILSON

ROME CITY COURT JUDGE

DATED: December 11, 2009