

**People v Korah**

2011 NY Slip Op 30486(U)

March 3, 2011

City Court of Rome

Docket Number: 49765

Judge: Daniel C. Wilson

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State of New York  
County of Oneida

Rome City Court

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People of the State of New York

vs.

MEMORANDUM DECISION

Matthew P. Korah,  
Defendant.

DOCKET NO. 49765

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

Frank Mellace, II, 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 December 10, 2010 and which was duly submitted to the court for decision on December 17, 2010 for an order seeking discovery and inspection of certain listed items, and for relief pursuant to *People vs. Sandoval*, 34 NY 2d 371 (1974) and *People v. Ventimiglia*, 52 N.Y. 2<sup>nd</sup> 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 disclosure of exculpatory material pursuant to federal and state case law, and for an order seeking dismissal of the accusatory instruments herein charging Harassment in the 2<sup>nd</sup> degree in violation of §240.26(1) of the Penal Law and Forcible Touching in violation of §130.52(2) of the Penal Law for being defective upon their face pursuant to §170.35(1)(a) of the Criminal Procedure Law, 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 defendant's motion for relief pursuant to *People vs. Sandoval*, supra, and *People v. Ventimiglia*, supra, will be granted insofar as the People will be directed to serve upon the defendant and file with the court a list of all prior criminal convictions and/or bad acts of the defendant which they intend to use for cross examination purposes or upon their direct case at a trial of this action. Such list shall be served and filed by a date to be fixed by the court within three days of trial. At such time, the court will determine which, if any, of said list may be used for such purposes at the trial of this action. Pending said in camera ruling, said motion would be in all other respects denied.

The defendant's motion for police reports and arrest reports as listed in part III of defendant's moving papers and for prior statements of witnesses as listed in part V of defendant's moving papers would be granted as to any exculpatory material, but any other pre-trial discovery would be denied. The People will be reminded to comply with the procedure outlined in the Criminal Procedure Law for disclosure of such materials at the time of trial.

The defendant's motion for a list of persons interviewed by law enforcement personnel as listed in part IV of defendant's moving papers would be granted as to any exculpatory material, but in all other respects will be denied. Part VI of defendant's moving papers requesting a list of witnesses would be in all respects granted.

Parts VII and VIII of defendant's moving papers requesting disclosure of exculpatory material will be in all respects granted.

The accusatory instrument herein as to the charge of Harassment in the 2<sup>nd</sup> degree in violation of §240.26(1) of the Penal Law which is labeled as an information states as to the factual allegation regarding incidents occurring on or about the 11<sup>th</sup> day of November, 2010 at 10:00 A.M. as follows:

“On the above stated date and time, the aforementioned defendant did intentionally grab the victim, Francesca T. Jimenez by the right arm and restrained her in a bear hug. The defendant also touched the buttocks of the victim four times and kissed her on the right cheek. The defendant's actions did cause the victim to become alarmed and fear for her safety. The incident took place while at the Windgate Hotel, room 203, located at 90 Dart Circle, in the City of Rome, County of Oneida, State of New York.”

The defendant contends that the accusatory instrument herein is defective upon its face in that it does not allege a culpable mental state of specific intent.

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.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.”

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).

One case in the Appellate Term of the Second Department held that, even where there was no applicable statutory presumption, an accusatory instrument need not allege intent in the factual part but need only do so in the accusatory part. (See, *People v Leiner*, NYLJ, Oct. 15, 1997, at 34, col 5 [App Term, 2d & 11th Jud Dists], lv denied 91 NY2d 894 [1994].) In *Leiner*, the court concluded that it was not necessary to repeat an allegation of intent in the factual part because intent "is an operation of the mind and cannot be the subject of a nonhearsay evidentiary allegation ... it is necessary only that there be alleged evidentiary facts from which intent may be inferred." (Supra, at 34, col 5.)

In the case at bar the culpable mental states could be easily inferred from the evidence as being the proper specific intent.

The Court of Appeals has noted that Penal Law § 240.26(1) defines harassment in the second degree as occurring when a party with "intent to harass, annoy or alarm another person \* \* \* strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same." *People v. Bartkow*, 96 N.Y. 2<sup>nd</sup> 770, 772 (2001).

The crux of section 240.26(1) is the element of physical contact: actual, attempted or threatened. Although not rising to the level of an assault causing physical injury (Penal Law § 10.00[9]), petty forms of offensive touching, such as striking, shoving and kicking, are prohibited when committed with the intent to annoy, harass or alarm the victim. Under the rule of construction requiring courts "to limit general language of a statute by specific phrases which

have preceded" it (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 239[b] ), the general language "physical contact" is properly confined to the preceding "strikes, shoves, kicks" and the like contemplated by the statute. *People v. Bartkow*, supra.

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 as upon the face of the information 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.

In the case at bar the accusatory as to the charge of Harassment in the 2<sup>nd</sup> degree satisfies both the *Alejandro* and the *Casey* requirements.

The same provisions as to the factual allegation of culpable mental state would apply to the charge of Forcible Touching.

Accordingly, the defendant's motion to dismiss for the papers being defective upon their face would be in all respects denied.

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, 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: March 3, 2011