

**People v Pierre**

2011 NY Slip Op 31274(U)

May 13, 2011

Sup Ct, Kings County

Docket Number: 6884-2007

Judge: Michael A. Gary

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM PART 12

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THE PEOPLE OF THE STATE OF NEW YORK :

-against- :

DECISION AND ORDER  
CLAYTON MOTION

GAMACY PIERRE :

IND. NO. 6884-2007

Defendant :

-----X

MICHAEL A. GARY, J.

The defendant has filed with the court a written motion, dated April 12, 2011, pursuant to CPL § 210.40, to dismiss the charge against him in the interest of justice. The People have responded to the motion, in papers dated April 21, 2011.

After a non-jury trial, on May 14, 2010 , the defendant was found guilty of the charge of Endangering the welfare of a child (Penal Law § 260.10, a class A misdemeanor).

Sentencing on the conviction was delayed until the present, pending Mr. Pierre's initiation of proceedings in Family Court, including the finalization of an order of filiation, acknowledging his paternity of the child born to the complainant, Whisny Louis, who was under 17 years of age at the time of the offense. In light of his efforts to demonstrate his responsibility towards his child, this court promised the defendant that if he successfully completed the program, the court would entertain a *Clayton* motion.

The Clayton Motion

The criteria governing dismissals in the furtherance of justice are delineated in CPL § 210.40, as well as in *People v. Clayton*, 41 AD2d 703, (2d Dept., 1973). The statute and case law provide that a defendant must demonstrate by a preponderance of the evidence that some compelling factor or circumstance exists such that conviction or prosecution of the defendant would constitute an injustice. In deciding this motion, the court must consider the

statutory criteria and balance the interests of the individual and the state. *People v. Clayton, supra*, at 208.

The procedure to be applied upon consideration of a *Clayton* application initially involves a showing by the defendant in his moving papers, of a compelling factor or factors warranting dismissal. Such a compelling factor is present whenever the "denial of the motion would be such an abuse of discretion so as to shock the conscience." *People v. Stern*, 83 Misc. 2d 935.

After a review of the defendant's motion and exhibits, the court papers, the People's response, and the pre-sentence report prepared by the Department of Probation, and the applicable law, the court decides as follows.

#### The Seriousness of the Offense

Endangering the welfare of a child is a serious offense.

#### The Extent of Harm Caused by the Offense

The police became aware of this case after the victim's father went to the police station soon after the birth of the defendant's baby . Though the complainant initially named her then boyfriend as the father, and had him arrested, a DNA test proved that he was not. When pressed, the complainant admitted to having had sexual intercourse with the defendant. Mr. Pierre immediately surrendered to the police once it was known that they were looking for him.

Though the charge against the defendant is serious, both the complainant and the defendant maintain that it was not apparent to him that the complainant was under the statutory age of consent. Once it was determined that the defendant was indeed the father of

Ms. Louis's baby, Mr. Pierre has faithfully participated in the baby's rearing, has acknowledged his responsibility toward the child by initiating a Family court proceeding to establish his paternity, and has abided by the court's order of protection, while developing a relationship with his child.

#### Evidence of Guilt

The defendant was found guilty after a bench trial of a class A misdemeanor. Curiously, the People point out that the evidence relied upon at trial to prove their case- the stipulated to minutes of the Grand Jury testimony of the complainant, and the affidavit, as submitted by the complainant/mother of the baby, substantiates that the only sexual intercourse between Ms. Louis and Mr. Pierre took place on New Year's Eve, 2006. Yet the birth of the baby in question, occurred almost 13 months later (February, 2007)! Had this court been alerted to this at trial, the complainant's credibility would surely have been called into question, perhaps resulting in a different outcome. The court notes that the complainant too had named someone else as responsible for fathering the child. Finally, the court notes, that the defendant has likewise admitted his guilt to the Department of Probation.

#### History and Character of the Defendant

The defendant has, by way of a pre-sentence investigation report, and his motion offered a personal history of his life. He was 28 years old at the time of this, his first arrest. He has been successfully employed as a messenger and a truck driver, having earned his CDL, which has now been transferred to Pennsylvania. He successfully received a GED in 1998 and assists in the financial support of his widowed mother and siblings. Though he was born in Haiti, he has been a permanent residence in the USA since the age of 11.

The court notes that Mr. Pierre has generally cooperated with the court's direction to commence and actively participate in all Family Court proceedings regarding his child Laury Louis. Attached to the motion is the Orders of Filiation. According to the defense papers, the defendant has been voluntarily maintaining financial support as well as participating in visitation with the child. The defendant's mother babysits her granddaughter for Ms. Louis, who has primary custody of the child.

In the 3½ years since this incident occurred, defendant has not sustained any new arrests.

Any Exceptionally Serious Misconduct of Law Enforcement Personnel

None noted.

The Purpose and Effect of Imposing Sentence on the Defendant

A sentence from a penological perspective is supposed to punish and deter criminal conduct. In this case, the only aspect of the defendant's behavior that made it criminal was the complainant's age.

Impact of a Dismissal on the Safety and Welfare of the Community/

Confidence in the Justice System/Victims' Attitude

The defendant has requested that the court be mindful of the defendant's immigration situation, in that as a permanent resident, he potentially faces deportation back to Haiti, depriving the baby of her father. Mr. Pierre continues to dutifully and responsibly attend to the needs of his child, a goal that society should encourage.

Whisny Louis, the mother of Laury, has in her affidavit in support of the defendant's motion to dismiss (Exhibit A) acknowledges that she regrets her own behavior and seeks to

have Mr. Pierre remain as part of her and her child's life.

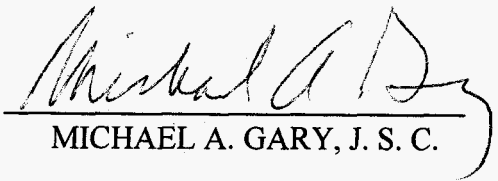
Other Relevant Factors

Mr. Pierre's efforts in tending to his paternal responsibility have demonstrated to this court that an appropriate exercise of its discretion to dismiss in the interest of justice is warranted.

Accordingly, the court hereby grants the defendant's motion, vacates the conviction and dismisses the charge in the interest of justice.

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York  
May 13, 2011

  
MICHAEL A. GARY, J. S. C.

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**ENTERED**  
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NANCY T. SUNSHINE  
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