People v Spina
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August 6, 2012
City Court of Canandaigua
Docket Number: CR12-0200
Judge: Stephen D. Aronson
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NEW YORK STATE
COUNTY OF ONTARIO
CITY OF CANANDAIGUA **CANANDAIGUA CITY COURT**

THE PEOPLE OF THE STATE OF NEW YORK,

Case No. CR12-0200

-vs-

DECISION AND ORDER ON DEFENDANT'S MOTIONS

THOMAS R. SPINA,

Defendant.

Presiding: Hon. Stephen D. Aronson

Appearances: People: Hon. R. Michael Tantillo, District Attorney,
Assistant District Attorney Kirk Hazen, Esq., of counsel
Defendant: Robert W. Zimmerman, Esq.

Defendant's Motion to Dismiss in the Interests of Justice

The defendant, Thomas R. Spina ("defendant"), has been charged with three counts of endangering the welfare of a child in violation of Penal Law § 260.10(1). The defendant, who was a teacher's aide at Canandaigua Academy until he lost his job when these charges were filed, is charged with engaging in inappropriate interactions with two 15-year-old female students. Specific allegations toward one or both girls include constant touching, rubbing hands, offering rides home, getting involved with their personal and romantic life, telling them that they are beautiful and cute, commenting on the length of their skirts, inquiring about their addresses, following them from class to class in school, spending money on one of the girls, and engaging in inappropriate text messaging.

The defendant filed a motion to dismiss all three charges in the interests of justice pursuant to Criminal Procedure Law § 170.40. A "dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution . . . would constitute or result in injustice." CPL § 170.40(1). In determining whether a compelling factor, consideration or circumstance exists, the court must consider ten factors. *Id.* In his written motion papers, the defendant addresses each of the ten factors required by CPL § 170.40(1)(a-j) as follows.

[a] Seriousness of the offense

Defendant's caring demeanor and gestures as a teacher's aide have been exaggerated and misinterpreted.

[b] Harm caused by the offense

No person or property was hurt. The police, disguised as a willing victim, lured the defendant into sending inappropriate texts.

[c] Evidence of guilt

Weak evidence of guilt and strong evidence of entrapment because the text exchange was initiated by the police posing as Ms. Herold.

[d] History, character, and condition of defendant

Defendant has no criminal history, is an upstanding citizen with a family, and is supported by two letters of endorsement attached to the pleadings.

[e] Misconduct by law enforcement

Lack of objective investigation has caused an innocent citizen to be fighting to get his reputation back. The police did not check class schedules, did not interview classroom teachers, did not try to confirm the accuracy of students' statements (e.g. the expenditure of $300 on a

student), and did not let the defendant know, before charging him, that some students were uncomfortable with his behavior.

[f] Purpose and effect of imposing sentence

The media frenzy that has already occurred is punishment enough. The defendant has lost his job and was barred from his son's senior year activities at the Academy. His family was subjected to search and seizure of their computers, and his wife and son had to do without a computer and a flash drive they needed to do school assignments (son) and classroom grading (wife).

[g] Impact on safety or welfare of the community

Dismissal would have no impact at all on the community.

[h] Impact of dismissal on public confidence in the system

Dismissal would demonstrate to the community that the law is not unyielding or unthinking. It would have a positive impact on their confidence in the criminal justice system.

[i] Attitude of complainant toward the motion to dismiss

An innocent person (presumably Ms. Herold) has been "lured by police to say specific key and incriminating words and then used those words to criminalize otherwise innocent behavior. . . ."

[j] Other relevant factors

A conviction would serve no useful purpose and would only hinder defendant's future ability to support his family. The court should consider defendant's clean record and the police inducement of the conduct complained of.

In opposition, the people address each of the ten factors required by CPL § 170.40(1) (a-j) as follows.

[a] Seriousness of the offense

The defendant's actions, collectively described as "grooming behavior," demonstrate his depravity, and the offenses are serious because the defendant used his position as a teacher's aide to gain access to children, one of the most vulnerable populations in our society.

[b] Harm caused by the offense

The harm caused by the defendant is the emotional abuse of the girls affected and also the erosion of the public's trust in school officials. The girls were so uncomfortable with and disgusted by the defendant's behavior toward them that they became reluctant to attend school. While at school they tried to avoid him when they could, but were often unable to do so. His behavior bordered on stalking.

[c] Evidence of guilt

There is proof beyond a reasonable doubt in the form of defendant's text messages and the many people who witnessed the defendant's grooming behavior.

[d] History, character, and condition of defendant

The defendant does not have a criminal record, but he has engaged in similar conduct in the past with other students. The two letters of support do not outweigh the testimony of the affected girls and other witnesses. One letter is from a long-time friend of the defendant and the other is from a distraught mother.

[e] Misconduct by law enforcement

There was no serious misconduct on the part of the police in regard to the exchange of cell phone texts, but there is no objection to having a hearing solely on this issue and solely as concerns the one relevant count of endangering the welfare of a child.

[f] Purpose and effect of imposing sentence

The minimum sentence will be a conditional discharge. At worst, the defendant is a sexual predator; at best, he is a person who lacks appropriate boundaries. Supervision and/or

counseling would clearly be helpful to him, and neither would be an unreasonable sentence. To this point, the defendant has been punished very little, if at all. He voluntarily left his position at the school, and he has been released from custody on his own recognizance.

[g] Impact on safety or welfare of the community; and
[h] Impact of dismissal on public confidence in the system

A dismissal would send a message to the affected students that their voices do not matter and that we do not believe them. A trial would give them the opportunity to be heard, but an outright dismissal would minimize the conduct of the defendant and would send a message to the community that such behavior is acceptable.

[i] Attitude of complainant toward the motion to dismiss

The victims want to see justice served and want the defendant to recognize that what he did to them was wrong, inappropriate, and illegal.

[j] Other relevant factors

There are no relevant factors favoring dismissal. On the other hand, there are relevant factors favoring a conviction. It would send a message to other adults that grooming behavior is not going to be tolerated and that children are going to be protected.

Under CPL § 170.45 and CPL § 210.45(3), the court must consider the written submissions of the movant and the other party "for the purpose of determining whether the motion is determinable without a hearing to resolve questions of fact." The hearing is commonly referred to as a *Clayton* hearing (see *People v. Clayton*, 41 AD2d 204 [2d Dept 1973]). Subdivision 4 of CPL § 210.45 provides that the court *must* grant the motion without a hearing if:

> (a) The moving papers allege a ground constituting legal basis for the motion pursuant to subdivision one of section 210.20; and (b) Such ground, if based upon the existence or occurrence of facts, is supported by sworn allegations of all facts essential to support the motion; and (c) The sworn allegations of fact essential to support the motion are either conceded by the people to be true or are conclusively substantiated by unquestionable documentary proof.

CPL § 210.45(5) provides that a court *may* deny the motion without conducting a hearing if

> (a) The moving papers do not allege any ground constituting legal basis for the motion pursuant to subdivision one of section 210.20; or (b) The motion is based upon the existence or occurrence of facts, and the moving papers do not contain sworn allegations supporting all the essential facts; or (c) An allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof.

Courts have addressed whether a *Clayton* hearing is required whenever a motion to dismiss in the interest of justice is filed. In *People v. Thomas*, 108 AD2d 884 (2d Dept 1985), the court held that there was no error in denying defendant's motion without having conducted a hearing. The court found that defendant's moving papers did not make a prima facie showing of a compelling factor, consideration or circumstance clearly demonstrating that his prosecution and conviction would be unjust. Therefore there was no legal basis for dismissal in the furtherance of justice. Our own fourth department found that the trial court did not abuse its discretion in denying a motion to dismiss in the interest of justice without a *Clayton* hearing in *People v. Shedrick,* 104 AD2d 263 (4th Dept 1984), *order aff'd*, 66 NY2d 1015 (1985). The motion was based upon police misconduct, namely, planting an informer in defendant's cell with some marijuana in order to facilitate gaining admissions from the defendant. The court held that the alleged misconduct, while reprehensible, was not sufficient to warrant dismissal, especially considering the serious nature of the crimes charged (murder, robbery, burglary, and conspiracy).

The Court of Appeals' affirmance noted that the evidence of the police scheme to plant an informant was collateral to the issues at trial, that it was properly excluded by the court, and that nothing resulting from it was sought to be introduced by the people. In *People v. Schlessel,* 104 AD2d 501 (2d Dept 1984), denial of the motion without a hearing was proper where the defendant failed to sustain his initial burden of making a prima facie showing of some compelling factor, consideration or circumstances that had rendered his conviction or prosecution on underlying charges of rape unjust.

The people dispute that there was serious misconduct by the police but have no objection to a hearing on the information involving entrapment issues (where a police officer posed as the victim on text message communications). At oral argument of this motion, the court inquired of the defendant what specific fact issues would need to be resolved at a *Clayton* hearing. The defendant's attorney indicated, in words or substance, that the only thing to be accomplished at a *Clayton* hearing would be to bring out facts about the defendant's initial contact with the complaining witness. However, regardless of the nature of the police contact and regardless of the defendant's initial contact with the complaining witness, this is not one of those rare and exceptional cases that cries out for dismissal in the interest of justice. The defense of entrapment would be a question to be decided by a trier of fact. These are not victimless crimes; the sworn statements of the complaining witnesses sufficiently describe their relationships with the defendant and show their concerns. The court's power to dismiss in the interest of justice should be exercised sparingly and only in the rare and unusual case that cries out for fundamental justice beyond the confines of conventional circumstances. *People v. Premier House, Inc.,* 174 Misc 2d 163 (NY City Crim Ct 1997). There is essentially no dispute about the facts; rather the defendant

disputes the characterization of his intentions. The defendant's motion ignores the two informations that are based on defendant's behavior at school (touching the students, asking personal questions, pulling them away from male students to talk to them himself, inviting them home, etc.). Moreover, the text messages themselves reveal that the defendant's conduct could readily be considered by a trier of fact to be inappropriate and constitute a crime. Given the nature of his position at a local high school and the young people he was dealing with, a dismissal would compromise confidence in the criminal justice system. A dismissal would be sending the wrong message and would appear to condone this behavior. Moreover, a *Clayton* hearing does not appear to be necessary.

Defendant's Motion for Probable Cause Hearing

In his motion papers the defendant contends that the police lacked sufficient evidence to detain and arrest defendant at his residence during the early-morning hours of March 4, 2012. The defendant alleges that a hearing should be held "to determine the propriety of the police actions toward the defendant in the first instance and whether suppression of tangible and intangible (statements of the accused) property is required." In this case, the police presumably acted upon the complaints of the complaining witnesses. The defendant does not specify "the propriety of the police actions toward the defendant in the first instance"; nor does the defendant specify "the police actions" complained about. In the face of the sworn statements of the complaining witnesses, the defendant must be more specific about the facts and constitutional infirmities that he complains about. In the absence of a clear factual description of the conduct complained about, the motion must be denied, without prejudice.

Defendant's Motion to Suppress Statements

A *Huntley* hearing has been set for August 22, 2012, at 8:30 AM.

Defendant's Motion to Suppress Evidence

On page 18 of his motion papers the defendant states:

> In light of the lack of an arrest warrant, valid search warrant or probable cause, a hearing should be held to determine the propriety of the police actions toward the Defendant in the first instance and whether suppression of tangible and intangible (statements of the accused) property is required.

It is not clear what the defendant is requesting. At oral argument the people were asked to disclose whether they intended to offer any evidence seized from a search warrant. If they decide to do so, leave is granted to the defendant to make any appropriate application regarding the search warrant.

This decision constitutes the order of the court.

Dated: Aug. 6, 2012
Canandaigua, New York

Stephen D. Aronson
City Court Judge