People v Thompson
2015 NY Slip Op 31792(U)
September 22, 2015
City Court of Peekskill, Westchester County
Docket Number: 2015-0506
Judge: Reginald J. Johnson

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CITY COURT: CITY OF PEEKSKILL
COUNTY OF WESTCHESTER: STATE OF NEW YORK
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PEOPLE OF THE STATE OF NEW YORK,

-against-

DECISION & ORDER
Docket No. 2015-0506

KEVIN THOMPSON,
Defendant.
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HON. REGINALD J. JOHNSON

The Defendant moves to dismiss the pending Driving While Intoxicated (DWI) charges (Vehicle and Traffic Law [V&T] §§1192.2 and 1192.3) pursuant to Criminal Procedure Law (CPL) §170.40 and People v. Clayton, 41 A.D.2d 204 (2d Dept. 1973). The People oppose the motion.

For the reasons the follow, the motion is denied.

Factual and Procedural History

The facts are largely undisputed and, in fact, conceded by the Defendant except regarding a portion of the Supporting Depostion/DWI Bill of Particulars that stated that the Defendant "operated…[a] motor vehicle…in a Westerly direction on N Water St…in the City of Peekskill…" (See Def's Exh. "A"; Hersh Affirm. ¶2).

On April 26, 2015 at approximately 10:00 pm, the Defendant drove his father's gray 1995 Dodge to the Sunset House bar located at 137 North

Water Street, Peekskill, New York. While in the bar, the Defendant consumed "several drinks including a few beers and a few shots of rum." (See, Affid. of Thompson, ¶¶ 3-6).[1] At approximately 2:30 a.m., the Defendant's friend Sean McCabe told the Defendant that he would take him home because he realized he "had been drinking." Id. at ¶7 After the Defendant exited the bar and proceeded to his car, he realized that he "was not in good condition to drive," so he started up the car in order to put down the window in order to smoke and charge his cell phone. Id. at ¶7.[2]

Approximately 10 minutes later, State Troopers Kasin and Mederos, who were on patrol in the City of Peekskill, approached the Defendant's vehicle in order to conduct a welfare check. Defendant produced his license and registration upon their request. Thereafter, Trooper Mederos asked the Defendant if he needed any assistance, to which the Defendant replied that he had come from the Sun Set House where he had consumed seven beers. (See Molea Affirm. at pp. 1-2.). Trooper Kasin asked the Defendant to exit the vehicle after which he could smell alcohol emanating from the Defendant. Trooper Kasin then asked the Defendant to perform several

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[1] According to the People's 710.30 notice, the Defendant is alleged to have stated that he consumed seven (7) alcohol drinks consisting of a combination of beer and rum.
[2] The Support Deposition/DWI Bill of Particulars allege that the Defendant was seated in the driver's seat with the keys in the ignition and the engine running at the time of investigation. See, Def's Exh. "A".

standardized field sobriety tests- to wit, the horizontal gaze nystagmus, the walk and turn test and the one leg stand test, which he failed. Id. at p. 3; Def's Exh. "A". Thereafter, the Defendant was arrested and transported to the police station where he was administered a chemical breath test that yielded a 0.17% B.A.C. (Blood Alcohol Content) result. Id.

The Defendant was arraigned on May 11, 2015 and on June 15, 2015 the Defendant advised the Court that he wished to make a Clayton motion. Thereafter, the Court set a motion schedule.

Legal Analysis and Discussion

In People v Clayton, supra, the Second Department held that the lower Court could not, sua sponte, dismiss the indictment against the defendant pursuant to CPL §§210.40 and 210.45, but must give the People and the defendant an opportunity to present evidence they think should be considered by the Court before it decides whether to dismiss the indictment based upon some compelling factor, consideration, or circumstance that clearly demonstrates that the conviction or prosecution of the defendant on the pending charges would result in injustice. The same enumerated factors set forth in CPL §210.40 are identical to the factors set forth in CPL §170.40. Although the enumerated factors set forth in both sections are

identical, it is important to note that CPL §170.40 specifically addresses motions to dismiss a Simplified Traffic Information, among other accusatory instruments (excluding an indictment),[3] while CPL §210.40 specifically addresses motions to dismiss an indictment.

The purpose of a CPL §170.40 motion to dismiss in the interests of justice is not to be considered an opportunity for the court to judge the merits of the case before trial, but the exercise of a power that should be utilized sparingly and only in the rare and unusual case that cries out for fundamental justice beyond the confines of conventional considerations. People v. Curcio, 22 Misc.3d 907 (Crim. Ct., Kings County, 2008); People v. Federman, 19 Misc.3d 478 (Crim. Ct., New York County, 2008). It has been held that where a defendant has a bona fide defense or other evidence to weaken the People's case, the case should be resolved at trial and not by way of a motion to dismiss in the interest of justice, which is reserved for compelling circumstances requiring the prosecution of a case to be

[3] CPL §170.40 pertains to a motion to dismiss only the following accusatory instruments: Simplified Traffic Information, Prosecutor's Information, Information or Misdemeanor Complaints in furtherance of justice. A Clayton motion really refers to a motion to dismiss an indictment but since a motion under CPL§170.40 is akin to dismissing an indictment since the statutory criteria that the Court must consider to dismiss either an indictment pursuant to CPL 210.40 or any of the accusatory instruments enumerated in CPL §170.40 is identical, the bench and bar have denominated a motion to dismiss in the interest of justice under either section a Clayton motion.

terminated. People v. Prunty, 101 Misc.2d 163 (Crim. Ct., Queens County, 1979).

While a motion to dismiss in the interest of justice is addressed to the sound discretion of the Court, that discretion in neither absolute nor uncontrolled. People v. Wingard, 33 N.Y.2d 192 (1973); People v. Gragert, 1 Misc.3d 646 (Crim. Ct., New York County, Part A., 2003).

Further, the burden of proof on a dismissal motion in the interest of justice rests with the Defendant to show by a preponderance of the credible evidence that a compelling reason exists to justify dismissal in the interest of justice, and if the Defendant fails to meet his burden the Court could summarily deny the motion. People v. LaFont, 43 Misc.3d 384 (Crim. Ct., New York County, 2014).

In addition, a motion to dismiss in the interest of justice is not an appropriate mechanism for a defendant to assert his innocence. People v. Hold, 22 Misc.3d 297 (Crim. Ct., Kings County, 2008).

In deciding a motion to dismiss in the interest of justice, CPL §170.40 requires that the Court consider individually and collectively ten (10) factors set forth in the statute in making a value judgement in balancing the interests of the defendant and those of the state. Id.; People v.Watson, 182 Misc.2d

644 (Crim. Ct., Bronx County, 1999); People v. Doe, 158 Misc.2d 863(Crim. Ct., New York County, 1993). There is no requirement that the Court conduct a step-by-step discussion of all ten (10) statutory factors, but rather the Court is only required to consider the factors individually and collectively in determining the motion to dismiss in the interest of justice. People v. Federman, supra; People v Gragert, supra.; People v. Givenni, 27 Misc.3d 1135 (Crim. Ct., New York County, 2010).

In cases where the Court grants a motion to dismiss in the interest of justice, said dismissal is neither an acquittal of the charges nor a determination on the merits; therefore, the guilt or innocence of the defendant remains undecided. Ryan v. New York Telephone Co., 62 N.Y.2d 494 (1984).

In New York State, V&T Law §§1192.2 and 1192.3 prohibits all operators of motor vehicles in this state from operating a motor vehicle with a B.A.C. of 0.08% or more or from operating a motor vehicle in an intoxicated condition.

In the case at bar, the dispositive issue to be decided is whether the Defendant "operated" his motor vehicle in an intoxicated condition in violation of V&T Law §§1192.2 and 1192.3. As stated by the Defendant,

the "sole question is whether or not the observations of the Defendant at the wheel with the keys in the ignition and motor running are, by themselves, sufficient to conclude that the Defendant was operating the vehicle." Hersh Affirm. at ¶7. Specifically, the Defendant argues that the People must prove that he "started the car **with the intention of placing the vehicle in motion.**" Id. at ¶10 (emphasis in the original).

In People v. Prescott, 95 N.Y.2d 655 (2001), the Court of Appeals definitively answered the question of what constitutes "operation" of a motor vehicle under V&T 1192. The Prescott Court stated that a driver "operates" a motor vehicle within the meaning of V&T 1192 when 'he intentionally does any act or makes use of any mechanical or electrical agency which alone or in sequence will set in motion the motive power of the vehicle.' Id. at 662 (citations omitted).The Prescott Court further stated that "criminal liability under section 1192 can attach to conduct 'dangerously close' to driving, as long as that conduct occurs upon locations covered by the statute." Id. (citations omitted).

In the case at bar, the People argue that the Defendant has not set forth "any compelling reasons for the Court to dismiss the charges in the furtherance of justice" and that therefore the Court should summarily deny

the motion. Molea, Memo of Law, Point A. The People further cite each statutory criteria set forth in CPL §170.40 and argue that the Defendant's motion should be denied for the reasons set forth in its Memo of Law.

As stated above, the Defendant argues that the People cannot prove that the Defendant intended to "operate" the vehicle he was in, and that since the People cannot prove its case a dismissal in the interest of justice is warranted.

The Court does not share the Defendant's interpretation of the definition of "operation" under V&T Law §1192. As stated by the Prescott Court, *supra*, where an individual 'intentionally does any act or makes use of any mechanical or electrical agency which alone or in sequence will set in motion the motive power of the vehicle,' he has "operated" the vehicle within the meaning of V&T Law §1192. 95 N.Y.2d at 662 (citations omitted). The Defendant's admissions are fatal to his motion, inasmuch as he admits that even though he "was not in good condition to drive" he went to his car and "started up the ignition". Thompson Affid. at ¶¶7-8. Since the Defendant admitted that he started the ignition of his car while he was in an intoxicated condition, it appears that he may have "operated" a motor vehicle in violation of V&T Law §1192. See, People v. Strauss, 260 A.D.

880 (2d Dept. 1940)(Court held that "operation" and intoxication must be simultaneous or this is no offense). There is no requirement under V&T 1192 that the Defendant "engage the vehicle in gear." Hersh Affirm. at ¶15.

Defendant argues, however, that he never intended to move his vehicle and that he only started the car in order to put down the window so that he could smoke and charge his phone. Thompson Affid. at ¶10-11. The People argue that the Defendant does not address whether he concedes that he had his seatbelt on and headlights on at the time he was approached by the troopers. In addition, the People argue that the Defendant did not put down his window until the troopers approached his vehicle. Molea, Affirm. at p. 3.

The credibility of the Defendant and the troopers in this case is a matter to be weighed by the trier of facts, and therefore this Court is precluded from granting a dismissal in the interest of justice. People v. Curio, *supra,* 22 Misc.3d 907.

The Court has considered individually and collectively the ten (10) factors enumerated in CPL §170.40 and hereby determines that there have been no compelling facts or circumstances presented to warrant a dismissal in the interest of justice. Further, a dismissal of the DWI charges in this case

under these facts would have a potentially adverse impact on the public's confidence in the criminal justice system. Most importantly, given the admissions of the Defendant, at least with respect to his intoxication at the time of his arrest and his intentional act of starting his vehicle, coupled with a BAC reading of 0.17%, it appears that the Defendant's claim of innocence is problematic.

The Defendant's citation of People v. O'Connor, 159 Misc.2d 1072 (Dist. Ct. Nassau County First Dist. 1994) is wholly inapposite to the facts in this matter because there is no claim in this case that the Defendant started his car because he was having engine trouble, as was the case in O'Connor. Further, O'Connor was decided after a bench trial. Here, the Defendant is seeking to dismiss the charges before reaching trial. In O'Connor, the Court had to resolve credibility issues at trial. It is not clear to the Court why the Defendant cites O'Connor since that case was decided after a bench trial when the Defendant in this case is arguing for a dismissal before trial. The Defendant cites language from the O'Connor case but that language contains references to credibility and inferences that are terms only used and determined in reference to a trial, not a motion to dismiss. Hersh Affirm. at ¶12. Lastly, the O'Connor case did not involve a motion to dismiss the

charges in the interest of justice.

The Defendant's citation to People v DeSantis, Appellate Term 9th &10th Jud. Dists, N.Y.L.J. 5/21/90 p. 32, col 4, is equally inapposite to the case at bar, in that the lower Court took testimony in that case at a trial. Here, the Defendant proposes not to have a trial but to seek to dismiss the charges in the interest of justice. In DeSantis, a trial was conducted where the Court was able to make credibility assessments and to weigh testimony. In the case at bar, the Defendant is seeking to dismiss the charges in the interest of justice before the Court could make credibility assessments and weigh testimony.

Lastly, Defendant's cites People v. Dymond, 158 Misc.2d 677 (County Court, Greene County, 1993). In Dymond, the Court held that the Defendant was entitled to a grand jury instruction that he did not operate the motor vehicle while intoxicated unless he had an intention to move it. To the extent that Dymond is inconsistent with People v Prescott, *supra*, this Court respectfully declines to follow it.

Based on the foregoing, it is

ORDERED, that the Defendant's motion to dismiss this action in the interests of justice pursuant to CPL §170.40 is denied;

Docket No. 2015-0506

ORDERED, that the parties are directed to appear in Court on October 13, 2015 at 9:30 a.m. for further proceedings in this matter.

This constitutes the Decision and Order of the Court.

Enter,

Honorable Reginald J. Johnson
City Court Judge
Peekskill, New York

DATED: September 22, 2015

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