

People v Rivera

2016 NY Slip Op 31193(U)

May 23, 2016

Criminal Court of the City of New York, New York
County

Docket Number: 2015NY021343

Judge: Lyle E. Frank

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CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: BENCH TRIAL PART 1

-----X
THE PEOPLE OF THE STATE OF NEW YORK
-against-
JOSE RIVERA,
Defendant.
-----X

DECISION AND ORDER

Docket Number 2015NY021343

LYLE E. FRANK, J.:

The Defendant is charged with one count of Criminal Possession of Marijuana in the Fifth Degree (PL § 221.10[1]) and one count of Unlawful Possession of Marijuana (PL § 221.05).¹

By papers dated March 1, 2016, Defendant moves to dismiss the charge of criminal possession of marijuana in the fifth degree on facial insufficiency grounds. The People, through papers filed April 28, 2016, oppose this motion and assert that the information is sufficient with respect to this charge. For the following reasons, Defendant’s motion to dismiss the Penal Law § 221.10[1] charge for facial insufficiency is GRANTED.

The defendant moves to dismiss the charge of criminal possession of marijuana in the fifth degree for pursuant to Criminal Procedure Law (CPL) §§ 170.30[1][a] and 170.35. “A valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution.” *People v. Case*, 42 NY2d 98, 99 [1977]. An information is sufficient on its face when the three requirements enumerated in CPL § 100.40[1] are met. First, the information must substantially conform to the form and content requirements of CPL § 100.15. CPL §

¹¹ At arraignment, Defendant was additionally charged with unlawful consumption of alcohol in a public place (AC § 10-125[b]). This charge was dismissed on July 29, 2015.

100.40[1][a]. Second, the factual allegations and any supporting depositions must “provide reasonable cause to believe that the defendant committed the offense charged.” CPL § 100.40[1][b]. “Reasonable cause to believe that a person has committed an offense 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.” CPL § 70.10[2]. Finally, to satisfy the “prima facie case” requirement, the non-hearsay allegations, if true, must establish every element of the offense charged and the defendant’s commission of the offense. CPL § 100.40[1][c]. This requirement is not identical to the burden of proof beyond a reasonable doubt that the People would be required to prove at trial. *People v. Henderson*, 92 NY2d 677, 680 [1999]. A court reviewing a motion for facial insufficiency should not subject the allegations to an “overly restrictive or technical reading.” *People v. Casey*, 95 NY2d 354, 360 [2000]. However, conclusory statements that are not supported by evidentiary facts are legally insufficient. *People v. Dumas*, 68 NY2d 729, 731 [1986].

The factual portion of the instant accusatory instrument states, in relevant part, that on or about April 7, 2015 at 12:15 A.M. “in front of 503 West 144 Street” in Manhattan:

[The arresting officer] took a burning marijuana cigarette off the windshield wiper of the vehicle upon which the defendant was leaning at the above location. The defendant stated to [the arresting officer], in substance, that he knew the burning cigarette contained marijuana.

[The arresting officer] then took another marijuana cigarette, which was not burning or open to public view, from inside the defendant’s right sneaker.

[The arresting officer] know[s] that the substances [he] recovered contained marijuana based on [his] professional training as a police

officer in the identification of marijuana, [his] prior experience as a police officer making drug arrests, the odor emanating from the substances, [his] observation of the packaging, which is characteristic of marijuana, the defendant's statements that the substances are in fact marijuana, and a field test of the substances which confirmed that they are marijuana.

Based on these facts, Defendant was charged with violating Penal Law § 221.10[1], criminal possession of marijuana in the fifth degree. Defendant was arraigned in Criminal Court on April 7, 2015. At the arraignment, the People served field test results, and the complaint was deemed an information.

Penal Law § 221.10[1] provides that “[a] person is guilty of criminal possession of marihuana in the fifth degree when he knowingly and unlawfully possesses marihuana in a public place, [as defined in PL § 240.00], and such marihuana is burning or open to public view.” An individual “possesses” marijuana either when they are in actual possession of it, or when they have “constructive” possession of the marijuana by exercising “dominion and control” over it. *See* PL § 10.00[8]; *see also, People v. Russell*, 34 NY2d 261, 264-65 [1974].

Defendant does not dispute that the substance recovered from the windshield is marijuana, nor does he dispute that he was in a public place at the time of his arrest. Rather, Defendant argues that the information fails to adequately allege that he was in “possession” of the marijuana cigarette that was recovered from the windshield wiper of the car that he was leaning against at the time of his arrest. This court agrees.

Without more, simply being present in a public place where contraband has been discovered is not sufficient to establish possession. *People v. Pearson*, 75 NY2d 1001, 1002 [1990]. “In New York, the rule has long been that to support a charge that a defendant was in constructive possession of tangible property, the People must show that the defendant exercised

“dominion or control” over the property by a sufficient level of control over the area in which the contraband is found or over the person from whom the contraband is seized.” *People v. Manini*, 79 NY2d 561, 573 [1992]. Since Defendant was not found in actual possession of the marijuana recovered from the car’s windshield wiper, the People must set forth factual allegations to provide cause to believe that the Defendant exercised a sufficient level of control over the area where the contraband was found.

This court finds that the complaint lacks the factual allegations necessary to make this connection. The complaint does not describe the physical relationship between where Defendant was leaning in relation to where the marijuana was recovered. Nor does it indicate whether Defendant placed the marijuana on the car’s windshield wiper himself. The complaint also does not indicate whether Defendant owned the car from which the cigarette was recovered.

Defendant’s statement that he knew that the burning cigarette contained marijuana is also not adequate to establish constructive possession. Of course, there are many reasons that Defendant could have been aware that the burning cigarette contained marijuana. This statement alone does not provide cause to believe that the cigarette was under Defendant’s control.

Absent further details, the complaint does not create probable cause to believe that it is reasonably likely that Defendant possessed the marijuana recovered from the windshield of the car. The charge of Criminal Possession of Marijuana in the Fifth Degree (PL § 221.10[1]) is accordingly dismissed.

The foregoing constitutes the opinion, decision, and order of the court.

Dated: May 23, 2016
New York, New York

ENTER:



Lyle E. Frank, J.C.C.