

People v Li
2016 NY Slip Op 31194(U)
March 1, 2016
Criminal Court of the City of New York, New York County
Docket Number: 2015NY046526
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- |

XULAN LI, |

Defendant. |

-----X

DECISION AND ORDER

Docket Number 2015NY046526

LYLE E. FRANK, J.:

The defendant is charged with one count of Unlicensed General Vending (AC 20-453) and one count of Failure to Wear a General Vendor License (AC 20-461[b]).

By papers filed October 6, 2015, the defendant moved, in an omnibus motion, for: (1) dismissal of the accusatory instrument for facial insufficiency, (2) suppression of physical evidence, (3) a voluntariness hearing, (4) an order precluding statement or identification testimony, (5) a *Sandoval* hearing, and (6) reservation of rights. For the following reasons, defendant’s motion to dismiss for facial insufficiency is granted.

DISMISSAL FOR FACIAL INSUFFICIENCY

The defendant moves to dismiss the accusatory instrument for facial insufficiency 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 § 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 alleges that on June 16, 2015 at about 5:10 p.m. “across from 27 Union Square West”:

Police Officer Vincent Diforte observed the defendant display and offer for sale 20 pins. At the time of the above officer’s observations, the defendant was not displaying a license issued by the Department of Consumer Affairs and could not produce one when asked.

Police Officer Vincent Diforte observed the defendant standing for approximately ten minutes immediately behind a table and the above-described merchandise was offered for sale thereon.

Police Officer Vincent Diforte further states that he approached the defendant and asked the price of the merchandise and the defendant said (in substance) “\$1” and saw the defendant arranging the merchandise on the table that people could see it more clearly.

The misdemeanor complaint was turned into an information by the supporting deposition of Police Officer Diforte. The supporting deposition corroborates the factual allegations contained in the complaint, and states that Police Officer Diforte observed the defendant display and offer for sale twenty pins “opp 27 Union Sq West.”

The defendant asserts that the accusatory instrument should be dismissed because it fails to allege all of the elements of the offenses of Unlicensed General Vending and Failure to Wear a General Vendor License. Specifically, the defendant argues that the information fails to establish that she was acting in a “public space,” as is required for both charges. New York City Administrative Code § 20-453 prohibits people from acting as a “general vendor without having first obtained a license.” New York City Administrative Code § 20-461[b] requires “general vendors” to “conspicuously” wear vending licenses “at all times while he or she is operating as a general vendor.” A “general vendor” is someone who “hawks, peddles, sells, leases or offers to sell or lease, at retail, goods or services, including newspapers, periodicals, books, pamphlets or other similar written matter in a public space.” A.C. § 20-452[b] (emphasis added). A “public space” is defined as “[a]ll publicly owned property between the property lines on a street as such property lines are shown on the City Record including but not limited to a park, plaza, roadway, shoulder, tree space, sidewalk or parking space between such property lines,” including all “publicly owned or leased land, buildings, piers, wharfs, stadiums and terminals.” A.C. § 20-452[d]. Here, it is alleged that defendant stood behind a table for approximately ten minutes, where she offered twenty pins for sale. The misdemeanor complaint states that the defendant engaged in this alleged conduct “across from 27 Union Square West.” The supporting deposition states that the defendant engaged in the alleged conduct “opp 27 Union Sq West.” The court agrees with defendant’s contention that the complaint and supporting deposition, as currently

filed, fail to establish that the defendant was operating in a “public space” as required by the relevant statutes. In the context of a different statute, the Court of Appeals recently held that an instrument was facially insufficient absent factual allegations that precisely pleaded the public nature of the defendant’s location. *See People v Afilal*, 26 NY3d 1050, 1052 [2015]. The allegation that defendant was “across from” or “opp[osite] from” an address, without more, fails to satisfy this standard.

This is a case where the insufficiency could potentially be cured through the pleading of additional facts available to the People. Therefore, while the court is dismissing the information, it grants the People leave to refile a timely, facially sufficient information. *See People v Nuccio*, 78 NY2d 102 [1991]. The court accordingly directs that sealing be stayed for thirty days from the date of this decision.

Given the dismissal of the accusatory instrument, defendant’s remaining contentions are denied as moot.

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

Dated: March 1, 2016
 New York, New York

ENTER:

Lyle E. Frank, J.C.C.