

People v Chau

2016 NY Slip Op 31195(U)

April 4, 2016

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

Docket Number: 2015NY077893

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

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 November 7, 2015 at about 5:50 P.M. in front of 238 Canal Street, the arresting officer:

Observed the defendant standing at the above location, which is a sidewalk and a public space, for several minutes, while holding a flyer, upon which were photographs of numerous handbags. [The arresting officer] then observed five individuals approach the defendant and engage in conversation with him. [The officer] observed one of the individuals take the flyer from the defendant and examine the photographs of handbags pictured on the flyer.

[The arresting officer] further observed that, when [he] approached the defendant, he put the flyer inside his right front jacket pocket and start [sic] to walk away. [The officer] stopped the defendant and took the

flyer from his right front jacket pocket. Based on [the officer's] prior training and experience as a police officer, [he] know[s] that the behavior [he] observed is typical of the sale of handbags which are kept at another location and which are described and offered for sale to pedestrians on the street by means of a flyer containing illustrations.

At the time of [the officer's] observations, the defendant was not displaying a license issued by the Department of Consumer Affairs and could not produce one when asked.

Criminal Court Complaint, December 2, 2015 (emphasis added).

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 facts in the complaint fail to establish that the defendant possessed merchandise that he was offering for sale because the accusatory instrument “alleges only that the defendant was displaying photographs of merchandise that was for sale elsewhere, in order to reach an agreement with customers to make a sale at some other time and place[.]” Defendant further asserts that it is “perfectly plausible, both logically and as a matter of practical, everyday experience, that the defendant was the agent of a legitimate store owner or other type of vendor and was, in essence, ‘advertising’ his employer’s wares,” which does not fall within the proscriptions of Administrative Code § 20-453.

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 defined as someone who “hawk, 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 further 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[.]” A.C. § 20-452[d].

An individual does not need to make a sale in order to violate the Administrative Code’s ban on unlicensed general vending: the language of the statute prohibits even offering to sell goods or services without a proper license. Further, it is well-established that the elements of unlicensed general vending are satisfied when a person, without a license and in a public place, displays merchandise for sale and engages in conversations about that merchandise with people who pass by, even if no sale is made. *See, e.g., People v. Dieye*, 2016 NY Slip Op 50287(U) [App Term, 1st Dept, March 14, 2016] (affirming conviction for unlicensed general vending and finding that the accusatory instrument sufficiently set forth the basis for the charges through allegations that the defendant displayed and offered four tee-shirts for sale, showed the merchandise to multiple people, and engaged in conversation with people who approached the defendant); *People v. Diatara*, 36 Misc 3d 158(A) [App Term, 1st Dept 2012] (“The elements of unlicensed general vending [. . .] were established by the credited police testimony that defendant, without the requisite license, was observed standing immediately behind a suitcase ultimately found to contain a number of handbags; that he spoke with and showed the contents of the suitcase to two female passersby; and that he fled in response to the police approach.”).

Defendant asserts that the accusatory instrument should be dismissed because it fails to establish that he was offering merchandise for sale, and that his conduct is more akin to distributing advertising pamphlets. The difference, however, between defendant’s conduct and the conduct of someone handing out advertising pamphlets is that defendant utilized a single

flyer, which he repeatedly showed to and discussed with passersby. At least one person took the flyer, examined it, and returned it to defendant. The use of a single flyer that defendant showed to multiple people and retained for future use is substantially similar to the display of sample merchandise that has consistently been found to constitute unlicensed general vending. The court fails to see a distinction for the purpose of the Administrative Code's ban on unlicensed general vending between displaying sample bags for sale through the use of a flyer and displaying sample bags for sale by using physical samples.

The court accordingly finds that the non-hearsay allegations in the accusatory instrument, if true, sufficiently support the elements of unlicensed general vending. Accordingly, the defendant's motion to dismiss for facial insufficiency is denied.

MOTION TO SUPPRESS PHYSICAL EVIDENCE

The branch of the defendant's motion that is to suppress physical evidence allegedly recovered from the defendant (CPL § 710.20[1]) is granted to the extent that a *Mapp/Dunaway* hearing is ordered to be held before trial. CPL § 710.60(4). The motion to suppress such physical evidence is otherwise held in abeyance pending this hearing and is referred to the hearing judge for determination.

MOTION TO PRECLUDE STATEMENT AND IDENTIFICATION EVIDENCE

The branch of the defendant's motion that is to preclude evidence of unnoticed statements or identification procedures (CPL § 710.30[3]) is denied, with leave granted for the defendant to renew this branch of the motion upon learning that the People intend to introduce any such evidence at the defendant's trial.

MOTION FOR A SANDOVAL HEARING

The branch of the defendant's motion that is to preclude the People from introducing, for the purpose of impeaching the defendant's credibility at trial, evidence of the defendant's prior uncharged criminal, vicious or immoral acts is granted to the extent that it is referred to the trial judge for determination.

MOTION TO COMPEL DISCOVERY AND A BILL OF PARTICULARS

The branch of the defendant's motion seeking a Bill of Particulars and Discovery is regarded as a Request for a Bill of Particulars pursuant to CPL § 200.95 and a Demand for Discovery pursuant to CPL § 240.20. The motion is granted to the extent that the People are to serve a response and a Voluntary Disclosure Form within two weeks of this order if they have not already done so. The People are reminded of their continuing obligations under *Brady v Maryland*, 373 US 83 [1963].

RESERVATION OF RIGHTS

The branch of the defendant's motion seeking the right to make further motions is granted to the extent provided for by CPL 255.20 (3).

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

Dated: April 4, 2016
 New York, New York

ENTER:

Lyle E. Frank, J.C.C.