People v Lamont
2017 NY Slip Op 30156(U)
January 17, 2017
City Court of Rye, Westchester County
Docket Number: 16-5364
Judge: Joseph L. Latwin
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CITY COURT : CITY OF RYE
WESTCHESTER COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

STEPHEN LAMONT,

Defendant.

DECISION & ORDER
Nos. 16-5364
16-5787
17-090

APPEARANCES:
The People by *Anthony A. Scarpino, District Attorney (Michelle Calvi, Assistant District Attorney)*
Defendant by *Michael Tiesi*, Esq.

The question here is whether and to what extent defendant is entitled to representation without charge. Defendant was arrested for Theft of Services on November 25, 2016. On December 21, 2016, defendant was arrested for Petit Larceny and Criminal Possession of Stolen Property 7th. On January 5, 2017, defendant was charged with Aggravated Harassment 2d.

On December 6, 2016, defendant was brought before the Court and, after being advised of his rights, requested the assignment of counsel. Defendant completed the Court's financial disclosure form that is required to be completed by all who seek assigned counsel. In reviewing the form, the Court became aware of issues as to whether or not defendant was eligible for assigned counsel.

The financial disclosure form indicated that the defendant was Chairman and CEO of a corporation but received no salary. The Court inquired as to why this was the case. Defendant responded that it was a technology company and no salary was taken to attract investors. The Court, being aware of such arrangements, asked if, as was customary, the defendant took an equity interest

in lieu of a salary. The defendant said he owned a 15% interest in the corporation and the corporation was worth over $100,000,000. The Court also learned that defendant here is a plaintiff in several tort cases pending in Supreme Court, Westchester County, and in at least four civil rights cases pending in the Federal District Court for the Southern District of New York. The defendant also claims to be the holder of 9 U.S. patent applications. Defendant clearly claims to own assets, but it is equally clear those assets may not be readily convertible to cash.

This is not a case where defendant will be denied the assistance of counsel. Instead, it is a question of who will pay that counsel and when. Exercising an abundance of caution, the Court sought to assign the cases pursuant to County Law Article 18-B to an attorney on the 18-B panel. On the next return date, the Court Clerk handed the accusatory instruments to an attorney on the panel. Upon reading the name of the defendant on the accusatory instrument, that attorney refused the assignment claiming his firm had a dispute with defendant. Thereupon, the Court assigned another attorney, who interviewed the defendant as to his eligibility for assignment and stood in as a friend of the Court for purposes of arraignment.

The law has provided for free legal representation of the poor in criminal cases . . . well before *Powell v. Alabama*, 287 US 45, 53 SCt 55 [1932] and *Gideon v. Wainwright*, 372 US 335, 83 SCt 792 [1963]. *People v. Settles*, 46 NY2d 154, 412 NYS2d 874 [1978]. However, while those rights are fundamental, they are conditioned upon a finding of an inability to pay private counsel. In 1881, the State Legislature adopted Criminal Procedure Law § 308, requiring courts to appoint counsel *pro bono publico* for indigent defendants. In 1961, the Legislature added a provision to County Law § 224(10), that authorized local governments to appropriate their own funds to contract with private agencies to provide counsel for indigent defendants. The most notable use of this authority caused the creation of the Legal Aid Society in New York City.

By statutory scheme, enacted in 1965 as Article 18-B of the County Law, New York enlarged legal representation of indigent persons accused of crime. Criminal Procedure Law § 722 provides that "[e]ach county and the governing body of the city in which a county is wholly contained shall

place in operation throughout the county a plan for providing counsel to persons charged with a crime . . .who are financially unable to obtain counsel." There is no statutory definition of what constitutes being "financially unable to obtain counsel" nor any instructive case law as to its meaning. *People v. Wheat*, 80 Misc2d 844, 365 NYS2d 363 [Suffolk County Court 1975]. While the statute does not use the term "indigent", that phrase has been conflated with the statutory language "financially unable to obtain counsel."[1] *See generally, Determination of indigency of accused entitling him to appointment of counsel,* 51 ALR 3rd 1108.

As part of the statutory plan for representation of persons accused of a crime, County Law Article 18-B § 722-d provides a fulcrum for this balancing of defendant's rights and the public treasury. County Law 722-b says "Whenever it appears that the defendant is financially able to obtain counsel or to make partial payment for the representation or other services, counsel may report this fact to the court and the court may terminate the assignment of counsel or authorize payment, as the interests of justice may dictate, to the public defender, private legal aid bureau or society, private attorney, or otherwise."

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[1] "How does financially unable to obtain counsel differ from indigent, if at all? The Court having read *People v. Simmons*, 31 N.Y.2d 997, 341 N.Y.S.2d 451, 293 N.E.2d 826; *People v. Salman*, 31 N.Y.2d 841, 340 N.Y.S.2d 161, 292 N.E.2d 303; *Legal Aid Society of Nassau County v. Samenga*, 39 A.D.2d 912, 333 N.Y.S.2d 729; *Stream v. Beisheim*, 34 A.D.2d 329, 311 N.Y.S.2d 542; *People v. Perry*, 27 A.D.2d 154, 278 N.Y.S.2d 323; *People ex rel. Amendola v. Jackson*, [74 Misc2d 797, 346 NYS2d 353], finds no distinction as to the terms in issue in any of those cases. More often than not, the terms are used interchangeably. A defendant's concession, that she is not indigent, precludes a determination that she is financially unable to obtain counsel." *People v. Wheat, supra at 848.*

It cannot have been the purpose of County Law § 722 to provide appointed counsel to the stereotypical couch potato who eats bon bons while watching soap operas on a large flat screen television while chatting on their cell phone and who lives off of the distribution of a trust fund. On the other end of the spectrum, some circumstances are prima facie proof of financial inability to pay, such as being qualified to receive public assistance, Medicaid, SSI, or other income and asset based government assistance programs. Absent such qualification, the Court needs to examine the defendant's complete financial picture, including income, expenses, assets, liabilities and obligations. Impoverishment is not the criteria. *Hardy v. U.S.*, 375 US 277 [1964]. Where defendant's income after expenses of the necessities of life is insufficient to fully pay for retained counsel,

By its language, it is clear that the statute invests the court with important case management responsibilities. While remaining sensitive to the imperatives of *Gideon v. Wainright*, 372 US 335 [1963], to appoint competent counsel for indigent defendants in criminal cases, the court is authorized to terminate assignment of counsel or to direct payment of counsel or other fees in whole or in part where a defendant is or becomes financially able to retain counsel or to make some payment. See *People v. Mion*, 31 Misc3d 1204(A), 930 N.Y.S.2d 176 [Rye City Court 2011] (discussing terminating assigned counsel when sufficient income to afford an attorney is made known to the Court). Likewise, the Legislature, adopted the "unable to retain counsel" standard to assure representation at public expense to those in real need, but not extend that precious right to litigants who, by choice, intentionally limit their income to avail themselves of publicly financed legal services. The Legislative command seems compellingly appropriate: the public, through tax dollars, should not be financing legal costs for someone capable of paying private counsel. *Carney v. Carney*, 38 NYS3d 765 [Sup Ct, Monroe County 2016].

In *People v. King*, 41 Misc3d 1237, 983 NYS2d 205 [Bethlehem Town Court 2013], the Justice Court, citing *People v. Mion*, found the amount of liquid assets reported by Mr. King sustained an ability to pay for counsel. His expenses were not such as to undermine this ability. In addition, the nature of the charges against Mr. King did not appear to be particularly complex, and the cost of private representation to defend Mr. King on these charges would not significantly dissipate Mr. King's assets. Given the "relatively scant public resources currently devoted to the public defense services" and the need to assure that such resources are "expended appropriately" further yields the conclusion that an individual with the amount of liquid assets owned by Mr. King does have the ability to retain private counsel.

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defendant should be eligible for appointed counsel, but defendant's excess funds should be paid towards reimbursement of the cost of appointed counsel. U.S. v. Hennessey, 575 F Supp 119 [NDNY 1983], aff'd, 751 F2d 372 [2nd Cir. 1984]. A defendant should not be in the position of seeking assigned counsel while choosing for which non-necessities to pay or whether to keep his assets.

The report of the New York State Office of Indigent Legal Services, entitled Criteria and Procedures for Determining Assigned Counsel Eligibility at 31 [April 4, 2016] states "Non-liquid assets shall not be considered [in determining eligibility] unless such assets have demonstrable monetary value and are readily convertible to cash impairing applicant's ability to provide for the reasonable living expenses of themselves and their dependents." The reason is because such non-liquid assets typically cannot be converted to cash quickly enough to retain private counsel, thus the applicant lacks the present ability to retain counsel. This view is shortsighted and counterproductive to protecting the public fisc. It ignores some basic principles of money and property.

Many items are illiquid but valuable in the future. If a defendant owns a note payable in 60 days, or a lottery ticket for a future drawing or has a cause of action, or an expected inheritance, the asset may be illiquid and not be available to pay for private counsel –- however, those assets may have great value. [Anyone who doubts those illiquid assets may have value is free to transfer or assign those assets to me.] It is not that they lack value, they simply lack *immediate* value. The solution is not to simply fling open the doors of the treasury and pay for assigned counsel for expectant millionaires. Rather, it is to exercise the same financial prudence the State exercises when it dispenses other public benefits. For example, when the State advances funds to cover a Medicaid recipient's necessary medical costs, it assures the medical services are currently provided but asserts a lien against the property or estate of the Medicaid recipient. The needed services are currently provided and paid for, but the State can recoup the moneys it advances, if and when, they become available to the Medicaid recipient. This type of financing has been made famous by the Popeye character J. Wellington Wimpy who started saying "I'll gladly pay you Tuesday for a hamburger today" as far back as 1931. The solution is simple – have the defendant with illiquid assets assign an amount equal to the counsel fees paid to the assigned counsel so that if and when the assets become liquid, the State can recoup its expenditures. Thus, the defendant gets is counsel immediately, and the State will not be paying for counsel for defendants who can afford to pay for a private attorney, but just not now. There may also be other effective solutions for this illiquidity problem.

Where the facts of financial ability are brought to the court's attention, the court may not ignore the information. County Law § 722-d, appears to be a grossly underutilized weapon in the battle of balancing a defendant's right to counsel and the exploding financial burden to the State of providing free representation to those who are not fully able to afford private counsel. *People v. Alessi*, 154 Misc2d 322, 584 NYS2d 275 [Sup Ct Kings County 1992]. A Court has the statutory authority to order that defendant's representation by legal aid society be terminated, unless a defendant who is not indigent, assents to an arrangement providing for her to make partial payments for the representation. *People v. Wheat*, 81 Misc2d 934, 367 NYS2d 161 [Suffolk County Court 1975].

Depending on the facts before it, the court may exercise its discretion, in the interests of justice, to terminate the assignment of counsel or may elect to direct payment. If it can terminate the assignment once it starts, what sense does it make not to protect the public fisc *ab initio*?

Here, the defendant provided information that he owns illiquid equity claimed to be worth $15 million dollars. He may also be in line to collect substantial sums from his numerous lawsuits. Based upon this information, the Court found a reasonable basis to inquire whether or not the defendant is financially able to make full or partial payment for his legal representation, instead of shifting that burden to the taxpayers. This procedure falls within the design of the legislature in enacting § 722-d of Article 18-B of the County Law. *People v. Bell*, 119 Misc2d 274, 463 NYS2d 989 [Sup Ct Queens County 1983].

The trial court, in the exercise of its discretion, is vested with the authority to terminate the assignment of counsel if a defendant becomes financially able in whole or in part to retain counsel, the court should first conduct a proper allocution to determine not only the defendant's income but also to discern any financial obligations the defendant might have and other relevant economic information. *People v. Lincoln*, 158 AD2d 545, 551 NYS2d 314 [2nd Dep't, 1990]. This Court has done so by asking for defendant's financial information. That information shows the following: Defendant owns a 15% interest in Arumai Technologies Inc. and has several actions pending in State and Federal Court in New York. It appears that the defendant, at this

time, is financially unable to retain counsel to complete these matter due to the illiquidity and timing of these assets, but may have more than sufficient funds in the future. If these assets turn out to be of little or no value, the defendant has lost little or nothing.

Accordingly, IT IS ORDERED that the defendant be provided with assignment of counsel in these cases upon his execution and delivery of an assignment of his right, title, and interest in said corporation and lawsuits to Westchester County to the extent that Westchester County expends funds on his behalf to pay for his assigned counsel and further that defendant execute and deliver such documents as are necessary, including but not limited to UCC-1s, to secure a security interest in said assets, and it is

FURTHER ORDERED that defendant deliver said assignments and security documents forthwith to the Westchester County Attorney and provide the receipt for said documents by the Westchester County Attorney to the Court.

January 17, 2017

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JOSEPH L. LATWIN
Rye City Court Judge