

**People v White**

2018 NY Slip Op 33537(U)

February 26, 2018

Supreme Court, Westchester County

Docket Number: 17-0461

Judge: Susan M. Capeci

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
THE PEOPLE OF THE STATE OF NEW YORK,

-against-

FILED  
AND ENTERED  
ON 2-26 2018  
WESTCHESTER  
COUNTY CLERK

DECISION & ORDER

BRIAN WHITE,

Defendant.

-----X

Docket # 17-0461

FILED

FEB 26 2018



CAPECI, J.,

TIMOTHY C. IDONI  
COUNTY CLERK

The defendant, having entered a plea of guilty to the charges of criminal possession of a weapon in the third degree and menacing in the second degree on September 14, 2017, in satisfaction of Superior Court Information ("SCI") #17-0461, and having been placed on a one year term of interim probation on that date, now moves to dismiss the violation of his interim probation. The People oppose the motion.

The defendant in this case entered a plea of guilty to the charges of criminal possession of a weapon in the third degree and menacing in the second degree on September 14, 2017, in satisfaction of SCI #17-0461. On that date, as part of his negotiated plea, the defendant was placed on a one year term of interim probation, and was advised by the Court that the matter would be adjourned for one year. He was further advised that if he successfully completed interim probation, the Court would dismiss the felony charge, and sentence him to two additional years of probation on the misdemeanor charge. However, if he was unsuccessful on interim probation, the Court would dismiss the misdemeanor charge, and sentence him, as a predicate felon, to a state prison term of two to four years. The defendant entered into this conditional plea based upon the above noted terms and conditions.

Thereafter, the Court received an Interim Probation Compliance Report dated October 20, 2017, from the Department of Probation, indicating that the defendant had been re-arrested on October 18, 2017, and charged in Beacon City Court with failure to register as a sex offender, an E felony. The defendant was adjudicated a level 2 sex offender in 2009, and has since been required to register his social media accounts. The written compliance report further alleged that in his meetings with Probation officers, the defendant had a combative attitude, denied responsibility in the instant offenses, and expressed no remorse for his victims. The Department of Probation recommended that he be removed from interim probation and sentenced to a period of incarceration.

The defendant later entered a plea of guilty to the charge of failure to register and verify as a sex offender (Corr. Law §168(F)(4) and §168-T) on November 28, 2017, before the Dutchess County Court (Forman, J.), having agreed to be prosecuted by SCI on that charge. As part of his plea allocution, the defendant admitted that during the time period from July 26, 2017 through September 28, 2017, he was using internet identifiers BigThingEnterprisesUSA@gmail.com and BigThings Enterprises.com, both of which he had failed to register as he was required to do under the Corrections Law.

The defendant now seeks to dismiss the violation of interim probation, arguing that: 1) he cannot be found to have violated interim probation based upon an offense committed before interim probation began; 2) that he was never served with a written declaration of delinquency; and 3) that he did not receive written conditions of interim probation. For the reasons that follow, the Court finds no merit to the defendant's motion to dismiss the violation of interim probation.

Turning first to the defendant's claim that he is charged with having violated interim probation based upon an offense committed before interim probation began, in support of this allegation he refers solely to the felony complaint, which charged him with failure to register as a sex offender committed on July 26, 2017, a date prior to the entry of his plea in this case and to his being placed on interim probation, which occurred on September 14, 2017.

However, the defendant overlooks that he actually entered his plea to the SCI<sup>1</sup>, which specified that the charge against him, failure to register as a sex offender, was based upon a continuing course of conduct which occurred between July 26, 2017 and September 28, 2017. The plea minutes of November 28, 2017, with respect to the charge of failure to register as a sex offender make clear that the defendant entered into his plea having been fully aware that the charge against him was based on his continuing course of conduct extending through September 28, 2017, a date beyond the date of the entry of his plea before this Court. Thus, the defendant admitted to criminal conduct that occurred after the date he entered his plea before this Court and was placed on interim probation, on September 14, 2017<sup>2</sup>.

The Dutchess County Court further noted during defendant's plea allocution that he had a pending violation of interim probation before this Court. Accordingly, the

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<sup>1</sup> There is no authority for entering a plea to a felony complaint (see art CPL 180) (People v Montanye, 95 AD2d 959, 960 (3d Dept 1983)).

<sup>2</sup> Moreover, the People take the position that failure to register as a sex offender is a continuing crime. While no New York case has specifically considered whether the failure to register under SORA constitutes a continuing offense, there are numerous state courts and federal circuits which have held that failure to register as a sex offender is a continuing offense (see People v Minott, 41 Misc3d 1002 (Crim. Ct, NY Co. 2013)).

defendant's claim that he is being violated on interim probation based upon conduct which occurred before he was placed on interim probation is meritless, since the plea he entered in Dutchess County encompassed conduct that occurred after he was placed on interim probation.

The defendant's further allegation that he cannot be held to have violated interim probation because he did not receive written conditions of interim probation and did not receive a declaration of delinquency must also fail. First, as the People note, the defendant was twice verbally advised by his probation officer as to the conditions of his interim probation and expressed his understanding of those conditions. Even in the absence of a written condition, the defendant's commission of a felony offense while on probation is sufficient to result in a revocation of probation, without the need for him to have been notified of that condition (see CPL 410.10 (2); People v Britton, 158 AD2d 932 (4<sup>th</sup> Dept 1990); People v Hill, 148 AD3d 1469 (3d Dept 2017)). Here, the defendant was arrested and entered a plea of guilty to an additional offense after entering into interim probation.

Lastly, the Court notes that a term of interim probation prior to sentence is not the same as a sentence of probation, and the statutory scheme which requires the filing of a declaration of delinquency under CPL 410.30 does not apply to interim probation (see, e.g., People v Muniz, 2003 WL22038569 (Sup. Ct, NY Co. 2003) [noting that a court's determination of a violation of interim probation is not evaluated pursuant to CPL 410.70 as is a sentence of probation]). The defendant received the written Interim Probation Compliance Report from the Department of Probation, which detailed the basis for his claimed violation of interim probation.

For all the foregoing reasons, the defendant's motion to dismiss the violation of interim probation is denied.

This constitutes the Decision and Order of this Court.

Dated: February 26, 2018  
White Plains, New York



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HON. SUSAN M. CAPECI  
A.J.S.C.

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