

People v Thomas

2019 NY Slip Op 31274(U)

May 6, 2019

City Court of Peekskill, Westchester County

Docket Number: CR-4395-18

Judge: Reginald J. Johnson

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CR-4023-18

CITY COURT: CITY OF PEEKSKILL
COUNTY OF WESTCHESTER: STATE OF NEW YORK

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PEOPLE OF THE STATE OF NEW YORK,

-against-

DECISION &
ORDER
Dockets. CR-4395-18
CR-4023-18

CORY L. THOMAS,
Defendant.

-----X

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HON. REGINALD J. JOHNSON

I.

In this consolidated criminal action¹, the defendant was arrested and charged with Assault in the Third Degree (PL §120.00[1]) [A Misdemeanor] (CR-4023-18) after he allegedly struck the victim in the face and head, and ribcage several times with a closed fist causing her a bloody lip on November 7, 2018 at approximately 4:00 p.m. On November 8, 2018, the

¹ Criminal Dockets CR-4395-18 and CR-4023-18 are consolidated for purposes of this Decision and Order.

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defendant was assigned counsel, arraigned, pled not guilty, and issued a temporary order of protection with a “fully stay away” provision barring the defendant from the protected party’s home, school, place of business or employment, or any contact with the protected party through mail, telephone, internet, fax, email, voice-mail, or other electronic or any other means, except for any contact, communication or access permitted by subsequent order issued by a family or supreme court in a custody, visitation, child abuse or neglect proceeding. On February 21, 2019, this Court modified the temporary order of protection and permitted the defendant to have non-criminal contact with the protected party.

On November 30, 2018 at approximately 10:04 p.m. (approximately 23 days after the temporary full stay away order of protection was issued), the defendant allegedly violated the temporary order of protection when a police officer discovered him inside the protected party’s apartment at 807 Main Street, Apt. 5K, Peekskill, New York. On December 7, 2018, the defendant was charged with Criminal Contempt in the Second Degree (PL § 215.50 [A Misdemeanor] (CR-4359-18), arraigned with counsel from his assault case, pled not guilty, and issued a temporary order of protection with a “fully stay away” provision barring the defendant from the protected

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party's home, school, place of business or employment, or any contact with the protected party through mail, telephone, internet, fax, email, voice-mail, or other electronic or any other means, except for any contact, communication or access permitted by subsequent order issued by a family or supreme court in a custody, visitation, child abuse or neglect proceeding.

On January 31, 2019, the parties appeared in Court and the People offered the defendant an "as charged" plea offer on each docket with a concurrent 6- month jail term on each docket together permanent orders of protection. The defendant rejected the offers. On February 14, 2019, the defendant filed an omnibus motion seeking dismissal of the cases pursuant to CPL §§ 170.30(1)(a), 170.35(1)(a), 170.35(1)(a), 100.15, and 100.40; or in the alternative, discovery pursuant to CPL §§240.40, 240.43, and 240.45; preclusion of trial evidence pursuant to *People v. Sandoval*, 34 NY.2d 371 (1974) and *People v. Ventimiglia*, 52 N.Y.2d 350 (1981); and a reservation of rights.

On February 21, 2019, this Court modified the temporary orders of protection on both dockets by removing the "stay away" provision on each thereby permitting the defendant to have non-criminal contact with the protected party.

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March 14, 2019, the Court set the following motion schedule: opposition papers on or before April 4, 2019; reply papers, if any, due on or before April 11, 2019. On April 5, 2019, opposition papers were filed, and on April 10, 2019, reply papers were filed. The Court marked the motion fully submitted on April 10, 2019.

II.

The defendant argues that the accusatory instrument charging him with Criminal Contempt in the Second Degree is facially insufficient because,

[t]he accusatory instrument does not provide sufficient non-hearsay allegations of fact to establish the required element of INTENT to disobey the court order. No supporting deposition of Ms. Diaz has been filed in this case. The direct observation complaint of Officer Henderson does not allege facts to support the intent requirement needed to establish the charge against Mr. Thomas.

(Signorelli [Contempt] Affirm at ¶7) (capitalization in the original)

The defendant also argues that since the protected party allegedly moved out of the premises on or about November 7, 2018² prior to his

² A written letter attached to Mr. Signorelli's reply papers purports to be from the protected party's mother wherein she stated that the protected party no longer resided at the subject premises from November 7,

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arrival,

...it is clear that [he] did not violate the order to stay away from the residence of Ms. Diaz. She moved out of apartment 5K. When Thomas was advised by the police that he could not stay in the apartment until Diaz officially changed her address, he left. He never approached Ms. Diaz on the street or at any other location. This was simply a case of Thomas acting on the understanding that Ms. Diaz had moved out of the apartment and that it was no longer her residence. He had not intent to violate the court order by approaching Diaz at her residence.

(Id. at ¶12) (parenthesis added)

Defendant argues that to support a charge of Criminal Contempt in the Second Degree, there must be proof of conduct that justifies a reasonable belief that he intended to defy the Court's authority or evade its mandate, which he believes is lacking in this case and therefore warrants a dismissal for facial insufficiency (Id. at ¶¶13 and 17).

The People argue that the information charging the defendant with Criminal Contempt in the Second Degree is facially sufficient because it properly alleges that,

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defendant did intentionally violate a stay away order of protection issued on [November 8, 2018] by Judge Reginald Johnson out of the Peekskill City Court...when he entered and remained in [807 Main Street, Apt. 5K, City of Peekskill, County of Westchester, State of New York], not allowing [the victim] to reside in said residence.

(John [Contempt] Memo of Law at p. 5) (parenthesis in the original)

Further, the People argue that the defendant acts intentionally with respect to conduct described by a statute defining an offense; that the fact that defendant's conduct would otherwise be legal but for the order of protection does not immunize him from prosecution for Criminal Contempt in the Second Degree; and that the whereabouts of the protected party at the time that the defendant was inside the subject premises—i.e., whether the protected party moved out the premises, is irrelevant to whether the defendant violated the order of protection (Id.).

The defendant next argues that the information charging him with Assault in the Third Degree should be dismissed for facially insufficiency because,

[t]he accusatory instrument, in combination with the supporting

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deposition, does not provide sufficient non-hearsay allegations of fact to establish the required element of PHYSICAL INJURY. In her supporting deposition, Ms. Diaz stated that ‘I noticed my lip was swollen and bleeding, I have pain on the right side of my ribs, head and lip....

(Signorelli [Assault] Affirm at ¶7) (capitalization in the original)

Defendant further argues that the information is facially insufficient because,

Ms. Diaz refused medical aid. She did not go to the hospital or a doctor to treat an injury or pain. She did not describe SUBSTANTIAL PAIN as required by the statute, and a swollen and bleeding lip does not meet the standard of IMPAIRMENT OF PHYSICAL CONDITION that the Court have required.

(Id. at ¶8) (capitalization in the original)

The People argue that the information is facially sufficient because it alleges the defendant ‘intentionally [struck] [the victim] several times in the face and ribcage with a closed fist causing pain to [the victim’s] right side ribcage, head and a swollen bloody lip.’ The People also argue that the victim’s supporting deposition states, *inter alia*, that defendant ‘hit [her] on

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the right side of [her] head with a closed fist’ with such force that she ‘[fell] into the sink.’” The People further argue that the victim stated that as result of the defendant’s conduct ‘[h]er lip was swollen and bleeding,’ and that she experienced ‘pain on the right side of [her] ribs, head and lip from [defendant] hitting [her].” Lastly, the People argue whether the victim sustained a physical injury is for the trier of fact to determine (John [Assault] Memo of Law at p. 4) (parenthesis in the original).

III.

A defendant may move to dismiss an accusatory instrument pursuant to CPL §170.30(1)(a), 170.35(1)(a), 170.35(1)(a), 100.15, and 100.40. CPL §170.30(1)(a) provides that after an arraignment upon an information, a defendant may move to dismiss said information upon the ground that it is defective within the meaning of §170.35(1)(a). CPL §170.35(1)(a) states that an information is defective pursuant to CPL §170.30(1)(a) when “it is not sufficient on its face pursuant to the requirements of section 100.40....” CPL §100.40 provides that “an information...is sufficient on its face when” it substantially complies with the requirements of CPL §100.15; when the factual allegations contained therein, together with any supporting deposition, provides reasonable cause to believe that the defendant

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committed the charged offense; and when the information contains non-hearsay allegations that establish, if true, every element of the charged offense and the defendant's commission thereof (see, *People v. Hall*, 48 N.Y.2d 927 (1979)).

The Court of Appeals has held that it is a fundamental and non-waivable jurisdictional prerequisite that an information state the crime with which the defendant is charged; the particular facts constituting that crime; every element of the crime charged; and allege the defendant's commission of said crime (see, *People v. Hall*, 48 N.Y.2d 927 [1979]). However, it is now well settled that an information need not contain the most precise words or phrases which most clearly express the thought, but only needs to allege the crime and set forth the specifics so that a defendant can prepare for trial and so that he will not be tried again for the same offense (see, *People v. Hall*, 4 Misc.3d 60 [App. Term 9th & 10th Jud. Dists. 2004]).

An accusatory instrument will be dismissed as facially insufficient if it fails to allege non-hearsay facts of an evidentiary nature that support or tend to support every element of the offense charged and the defendant's commission of same. However, an accusatory instrument is facially sufficient when it establishes a 'prima facie' case; it need not establish

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defendant's guilt beyond a reasonable doubt (see, *People v. Ensley*, 183 Misc.2d 141 [Crim. Ct. N.Y. Co. 1999]). As long as the factual allegations of an information give an accused sufficient notice to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, Courts should give the allegations a fair and not overly restrictive or technical reading (see, *People v. Konieczny*, 2 N.Y.3d 569 [2004] (citing *People v. Casey*, 95 N.Y.2d 354 [2000]); *People v. Hatton*, 26 N.Y.3d 364 [2015]).

A defendant is guilty of Assault in the Third Degree (PL §120.00(1)) when “with the intent to cause physical injury to another person, he causes such injury to such person or to a third person.” In the case at bar, the Court finds that the information sufficiently makes out a prima facie case for Assault in the Third Degree, wherein it contains allegations that the victim sustained a swollen and bloody lip, and pain on the right side of her ribs, head and lip after the defendant struck her. The Court of Appeals in *People v. Henderson*, 92 N.Y.2d 677 (1998) held that contusions and swelling that caused the victim substantial pain satisfied the “physical injury” requirement for Assault in the Third Degree and rendered the information facially sufficient. The Court of Appeals noted that the prima facie requirement is

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not the same as the burden of proof required to obtain and sustain a conviction (Id. at 680).

The present case is distinguishable from *In re Philip A.*, 48 N.Y.2d 198 (1980), a case in which the Court of Appeals addressed the definition of “substantial” pain within the meaning of PL §10.00(9)³. The Court noted that ‘petty slaps, shoves, kicks and the like delivered out of hostility, meanness and similar motives’ are insufficient to establish “substantial pain” as a matter of law (Id. at 200). In the present case, the victim stated in her supporting deposition that the defendant struck her with a closed fist on the right side of her head so hard that she fell into the sink, and then he punched her in the face and then in the ribs and the back of her head, causing her lip to swell and bleed; she felt pain on the her right side of her ribs, pain in her head and pain in her lip. In this Court’s view, a jury could very well determine that the defendant’s actions were not ‘petty slaps, shoves, kicks and the like delivered out of hostility, meanness and similar motives’ (see, *People v. Everson*, 24 Misc.3d 1229(A) [Crim Ct. N.Y. Co. 2009] [Court held that victim’s complaint of redness, swelling and substantial pain after being struck in the abdomen is sufficient for pleading purposes to establish a

³ PL §10.00(9) defines “physical injury” as impairment of physical condition or substantial pain.

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“physical injury” to support a charge of assault in the third degree]; *People v. Henderson*, 92 N.Y.2d at 680 [Court of Appeals held that victim’s allegation that he suffered contusions and swelling in his legs after being kicked during an attempted robbery satisfied the “physical injury” requirement to establish a prima facie case for assault in the third degree]; *People v. Arroyo*, 279 A.D.2d 386 [1st Dept. 2001], *rev’d on other grounds*, 98 N.Y.2d 101 [Court held that “physical injury” requirement satisfied through testimony of victim that he suffered substantial pain when defendant pulled on his thick gold neck chain until it broke, and the pain and red marks lasted for several weeks after the incident]; *People v. Claxito*, 29 Misc.3d 798 [Crim Co N.Y. Co. 2010] [Court held that punching a victim more than once can establish a “physical injury” to support a prima facie case of assault in the third degree).

The *Henderson* Court emphasized that a prima facie case is not the same as the burden of proof beyond a reasonable doubt required at trial (see, *People v. Gordon*, 88 N.Y.2d 92 [1996]; *People v. Swamp*, 84 N.Y.2d 725 [1995]). In other words, the People must prove beyond a reasonable doubt at trial that the victim sustained a “physical injury” within the meaning of PL §10.00(9) (see, *People v. Claxito*, 29 Misc.3d at 803). However, whether a

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victim sustained a “physical injury” within the meaning of PL §10.00(9) is generally a question of fact for the trier of fact (see, *In re Philip A.*, 48 N.Y.2d at 200) [Court stated that “question whether the ‘substantial pain’ necessary to establish assault in the third degree has been proved is generally a question of fact for the trier of fact...”]. Further, whether the victim sought medical treatment at a hospital is not dispositive on the issue of whether she suffered a “physical injury” (see, *People v. Gerecke*, 34 A.D.3d 1260 [4th Dept. [2006], *app denied*, 7 N.Y.3d 925).

The Court finds that the allegations in the information charging the defendant with Assault in the Third Degree are sufficient, at the pleading stage, to provide reasonable cause to believe that the defendant’s alleged conduct resulted in physical injury to the victim as defined in PL §10.00(9). Therefore, defendant’s motion to dismiss the information charging him with Assault in the Third Degree is denied.

IV.

The defendant argues that the information charging him with Criminal Contempt in the Second Degree should be dismissed, because “the accusatory instrument does not provide sufficient non-hearsay allegations of fact to establish the required element of INTENT to disobey the court order”

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(Signorelli [Contempt] Affirm at ¶7) (capitalization in the original). The essential elements of Criminal Contempt in the Second Degree are that a lawful order of the court was in effect and was clearly expressed, that the defendant had knowledge of its provisions, and that the defendant intentionally disobeyed it (see, *Matter of McCormick v. Axelrod*, 59 N.Y.2d 574 [1983]). The defendant does not dispute that an order of protection with a stay away provision was in effect at the time he entered and remained at the subject premises from which he was barred (Signorelli [Contempt] Affirm at ¶9). The defendant only argues that it was not his intent to violate the order of protection because the protected party allegedly moved out of the premises prior to his arrival, and since there was no intent to violate the order of protection, the intent requirement necessary for the establishment of a prima facie case for Criminal Contempt in the Second Degree is lacking rendering the information facially insufficient (*Id* at ¶¶8-12).

The defendant misapprehends the intent requirement for Criminal Contempt in the Second Degree. Assuming *arguendo* that the protected party moved out of the subject premises prior to defendant's arrival, if he entered the subject premises while an order of protection barring him from the premises was extant, a trier of fact could still find that he intentionally

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violated the order of protection simply by being present at the subject premises (see, *People v. Inserra*, 4 N.Y.3d 30 [2004]). The defendant argues that *Inserra* is inapplicable to the facts in this case because the defendant in that case went to the protected party's actual home although she was not present. In the present case, defendant argues that he went to the subject premises after the protected party allegedly moved out, and therefore, on the facts, *Inserra* is distinguishable (Signorelli [Contempt] Reply Affirm at ¶7).

The defendant's intent argument is without merit for, at least, two reasons. First, the prohibitions in an order of protection are modifiable only by the court (see CPL §530.12[6]). In fact, written in bold print on the order of protection in this case it states: "This order of protection can only be modified or terminated by the court." To sanction the defendant's presence in the protected party's present or former home in the absence of a modification of the order of protection which barred him from the home, would in effect delegate to him the power to modify the terms of an order of protection in violation of CPL §530.12[6]. Second, a defendant's criminal intent can be inferred from his conduct and the surrounding circumstances (see, *People v. Bracey*, 41 N.Y.2d 296 [1977]; *People v. Roman*, 13 A.D.3d 1115, 1116 [4th Dept. 2004]; CPL §15.05 ["[a] person acts intentionally with

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respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.”). In the case at bar, a trier of fact could find that the defendant’s presence at the subject premises was a manifestation of “his conscious objective” to defy the authority of this Court or its mandate (see, *People v. Ndiaye*, 9 Misc.3d 1118(A) [Just. Ct. Town of Hyde Park Dutchess Co. 2005]; *LePage v. LePage*, 208 A.D. 596, 598 [Court stated “if the defendant understands the terms of an order, he is in no position to claim that he was ignorant of what was required of him” [citation of omitted]]).

The Court finds that the allegations in the information charging the defendant with Criminal Contempt in the Second Degree are sufficient, at the pleading stage, to provide reasonable cause to believe that the defendant’s alleged conduct violated PL §215.50[3]. Therefore, defendant’s motion to dismiss the information charging him with Criminal Contempt in the Second Degree is denied.

V.

a. Motion for Discovery and Inspection

Defendant’s motion pursuant to CPL §240.40 for various items of discovery is granted on consent. The People consent to discovery in

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accordance with CPL §240.20.

b. Demand for Brady Material

Defendant's motion for Brady material is granted. People are reminded of their Brady obligations under CPL §240.20(h). To the extent that the People have any Brady material in their possession that has not been turned over to defendant, they are hereby directed to do so forthwith.

c. Motion for Sandoval and Ventimiglia Hearings

Defendant's motion for Sandoval and Ventimiglia hearings are granted on consent of the People. If the People intend to introduce evidence of the defendant's prior bad acts or convictions on cross examination if the defendant elects to testify, or their direct case, the People will give timely notice to the defendant so that hearing(s) can be scheduled.

d. Reservation of Rights

Defendant's application to make additional pre-trial motions pursuant to CPL §255.20(2) and (3) is denied as premature subject to renewal.

Defendant's request to amend or supplement his motion is denied as premature subject to renewal.

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Based on the foregoing, it is

ORDERED, that the Defendant's application to dismiss the information charging him with Assault in the Third Degree is denied;

ORDERED, that the Defendant's application to dismiss the information charging him with Criminal Contempt in the Second Degree is denied;

ORDERED, that Defendant's motion for discovery is granted on consent and as set forth herein;

ORDERED, that Defendant's motion for pre-trial hearings is granted on consent and as set forth herein;

ORDERED, that Defendant's application for reservation of rights is denied as set forth herein; and

ORDERED, that the parties are directed to appear in Court on June 3, 2019 at 9:30 a.m. for a pre-trial conference.

This constitutes the Decision and Order of the Court.

Enter,

Honorable Reginald J. Johnson
City Court Judge
Peekskill, New York

DATED: May 6, 2019