

<b>People v L.L.</b>
2019 NY Slip Op 32330(U)
July 19, 2019
Supreme Court, Queens County
Docket Number: FYC-700**-19-001
Judge: Lenora Gerald
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS: CRIMINAL TERM, PART QAP

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THE PEOPLE OF THE STATE OF NEW YORK,

against

By: GERALD, J.  
Dated: July 19, 2019

Case No: FYC-700\*\*-19-001

L.L. (Adolescent Offender)

Defendant.

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Sixteen-year old defendant, L.L., is charged in a felony complaint with two counts of robbery in the first degree (Penal Law §160.15 [3] & [4]), one count of attempted robbery in the first degree (Penal Law §110/160.15[1]), three counts of robbery in the second degree (Penal Law §160.10 [1], [2A] and [2B]), one count of robbery in the third degree (Penal Law §160.05), two counts of assault in the second degree (Penal Law §120.05[2] and [6]), one count of grand larceny in the fourth degree (Penal Law §155.30[5]), one count of assault in the third degree (Penal Law 120.00[1]), one count of petit larceny (Penal Law §155.25), and one count of harassment in the second degree (Penal Law §240.26[1]), in connection with an alleged incident that occurred on April 21, 2019 (Case No. FYC-70089-19-001).

Defendant was arraigned before an Accessible Magistrate on May 2, 2019 and the matter was adjourned to the Queens Adolescent Part (QAP) on May 3, 2019. On May 3, 2019, the case was adjourned to May 8, 2019 for the six-day review pursuant to CPL §722.23[2][a]. On May 8, 2019, this Court determined that the People did not establish, by a preponderance of the evidence, any of the three factors set forth in CPL §722.23[2][c]. Thus, the present case is subject to removal to Family Court. After this court's ruling, the People requested a motion schedule seeking to file a motion to prevent removal of the case pursuant to CPL §722.23. A motion schedule was set and

this matter was adjourned to June 28, 2019 for a determination on the People's motion to prevent removal to Family Court. The People's motion was due on June 3, 2019 and defendant's reply was due on June 24, 2019. On June 4, 2019, the People's motion was improperly filed since it failed to provide proper notice and service to the defendant. On June 26, 2019, the court received the People's corrected motion listing the correct address for defense counsel and providing proper notice. On June 27, 2019, the matter was adjourned to July 19, 2019 to allow defense counsel time to reply to the People's motion and for decision.

New York's Raise the Age legislation took effect on October 1, 2018. This legislation sought to raise the age of criminal responsibility and to advance the goal of rehabilitation for youth. Raise the Age Legislation created a new category of defendant, "adolescent offenders" (currently, sixteen (16) year olds. Seventeen (17) year olds will be added as of October 1, 2019). CPL §1.20[44]. It also created a superior court Youth Part with exclusive jurisdiction over adolescent offenders and juvenile offenders for initial arraignment and subsequent proceedings. Upon arraignment in the Youth Part, the Court shall review the accusatory instrument and other relevant factors to determine if one or more of the following are present: "(i) the defendant caused significant physical injury to a person other than a participant in the offense; or (ii) the defendant displayed a firearm, shotgun, rifle or deadly weapon as defined in the penal law in furtherance of such offense; or (iii) the defendant unlawfully engaged in sexual intercourse, oral sexual conduct, anal sexual conduct or sexual contact as defined in section 130.00 of the penal law." CPL §722.23[2][b] & [c]. If none of the above-mentioned factors are present, the case is eligible for removal to Family Court. To prevent removal, a motion must be made by the People demonstrating "extraordinary circumstances." "The court shall deny the motion to prevent removal

of the action in youth part unless the court makes a determination upon such motion by the district attorney that extraordinary circumstances exist that should prevent the transfer of the action to family court.” CPL § 722.23[1][d]. The statute does not define “extraordinary circumstances.”

Although, undefined the legislative transcript makes clear that “denials of transfer to family court should be extremely rare.... Transfer to family court should be denied only when highly usual and heinous facts are proven and there is strong proof that the young person is not amenable or would not benefit in any way from the heightened services in the family court....[In sum], [o]utside of the most serious felony conduct, all cases will be presumptively transferred. The judge must look at all the circumstances...all the circumstances of a young person, and aggravating factors may be proven, but the ...court must also consider individual mitigating circumstances as well.” (*People v. J.P.*, FYC-70038-18, Supreme Court Bronx County, J. Boyle citing Transcript, New York State Assembly session, April 8, 2017, pgs. 39-40; Defense Affirmation, paragraphs 2-3).

### **INSTANT MOTION**

The People move to prevent removal of the instant matter to Family Court on “extraordinary circumstances” grounds. The People’s “extraordinary circumstances” argument is multifaceted. First, the People argue that removal is improper because the defendant displayed what appeared to be a deadly weapon, to wit: a firearm, which he used to strike the complainant on the head. The People maintain that defendant pointed the deadly weapon, a gun, at the complainant and used it to subdue the complainant during the robbery. Although, the People acknowledge that evidence is needed to determine whether the defendant was displaying a BB gun or a firearm, they maintain that defendant’s use of what appeared to be a firearm to physically

subdue, batter, and impede the complainant during the robbery, coupled with defendant's statement, "BOOM, BOOM", support a finding of extraordinary circumstances.<sup>1</sup>

Second, the People argue that the matter should not be removed since the defendant caused significant physical injury to the complainant. The People contend that review of the DA's file establishes that the complainant sustained injuries to his head requiring three (3) staples, a chipped bottom tooth, two bruised eyes, and a swollen face, as well as abrasions and lacerations to his knee and scalp.

Third, the People maintain that the defendant's actions were premediated. Specifically, the People argue that the defendant and the other individuals involved in the attack followed and targeted the complainant. It is the People's position that the defendant and the group followed the complainant out of the park after the co-defendant initiated a physical fight with the complainant. Finally, the People maintain that removal to family court should be denied because the defendant is currently charged with several violent felony offenses.

In sum, the People contend that defendant's alleged display of what appeared to be a deadly weapon or firearm, the alleged significant physical injury, the premediated attack, and the charged violent felonies are of the kind of extraordinary circumstances that warrant granting the People's motion to prevent removal to Family Court.

Defendant argues that the People did not establish extraordinary circumstances by a preponderance of the evidence.

### **FINDINGS OF FACT**

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<sup>1</sup> Although, the People argue that defendant possessed a "deadly weapon" and/or a "firearm" a weapon was not recovered in this matter, so the People's contention is speculative and conclusory.

Defendant, L.L., an adolescent offender, has no prior convictions or arrests. As stated, he is charged in the instant matter with two counts of robbery in the first degree (Penal Law §160.15 [3] & [4]), one count of attempted robbery in the first degree (Penal Law §110/160.15[1]), three counts of robbery in the second degree (Penal Law §160.10[1], [2A] and [2B]), one count of robbery in the third degree (Penal Law §160.05), one count of assault in second degree (Penal Law §120.05[2]), two counts of assault in the second degree (Penal Law §120.05[2] and [6]), one count of grand larceny in the fourth degree (Penal Law §155.30[5]), one count of assault in the third degree (Penal Law 120.00[1]), one count of petit larceny (Penal Law §155.25), and one count of harassment in the second degree (Penal Law §240.26[1]), in connection with an alleged incident that occurred on April 21, 2019 (Case No. FYC-700\*\*-19-001).

The complaint alleges, in sum, that on or about April 21, 2019, between 4:52 pm and 5:00 pm, in front of 188-44 Ilion Avenue, County of Queens, the deponent, Police Officer Alicia Commisso, was informed by complainant, Mikhario Bennet, that:

The defendant, L.L., apprehended other (Name Redacted), and six (6) unapprehended others started following him.

Deponent further states that she is informed by the complainant that one of the unapprehended others hit his hand and was trying to take the phone out of his hand.

Deponent further states that she is informed by the complainant that when the unapprehended other hit his hand and tried to take his phone, apprehended other (Name Redacted) stated, in sum and substance, hit him, don't let him talk to you like that.

Deponent further states that she is informed by the complainant that the defendant hit him in the back of the head with what appeared to be a black firearm, causing a laceration, swelling and substantial pain to the back of his head.

Deponent further states that she is informed by the complainant that the unapprehended others repeatedly punched him in the face and the back of his head.

Deponent further states that she is informed by the complainant that one of the unapprehended others took his cellphone from his hand.

Deponent further states that she is informed by the complainant that he is the legal custodian of the above-mentioned cellphone and that the defendant, the apprehended other, and the unapprehended others did not have permission or authority to take, remove, use or otherwise exercise authority or control over said cellphone.

Deponent further states that she is informed by the complainant that the defendant held what appeared to be a firearm to his chest and stated in sum and substance, Boom.

Deponent further states that she is informed by the complainant that the defendant, apprehended other (Name Redacted), and the unapprehended others left together.

Deponent further states that she is informed by the complainant that he was removed to a local area hospital for treatment of the above mentioned injuries as a result of the defendant's, the apprehended other's (*sic*) and the unapprehended other's actions. Deponent is further informed by the complainant that he received treatment at said local area hospital and that he received staples to his head.

Deponent further states that she has reviewed video surveillance of the above mentioned date, time and place of occurrence, and observed the defendant, apprehended other (Name Redacted), and six unapprehended other (*sic*) walking behind the complainant, as they walk out of view of the camera, then a few moments later, the defendant, apprehended other Grant, and the unapprehended others all run in the same direction.

Deponent further states that the defendant viewed said video surveillance and identified himself in the video.

Deponent further states that the defendant admitted, in sum and substance, that one of the unapprehended others gave him a black BB gun and that he hit the complainant with said BB gun, and that another unapprehended other picked up the complainant's cell phone and then ran away with everyone else.

### **CONCLUSIONS OF LAW**

Herein, the defendant is alleged to have committed several offenses involving robbery, grand larceny, and assault. Because the defendant is charged with a violent felony offense this

court held a 6-day review and determined that the matter was removable. (See, CPL §722.23[2]) Although, this court did not find that a gun or deadly weapon was displayed, the People argue that the alleged use and display is an extraordinary circumstance. This court disagrees.

When considering the issue of “display” in the context of “extraordinary circumstances” we are not called to determine legal sufficiency, but rather actual circumstances that rise to a level warranting the prevention of removal of a youthful offender. Prior to the enactment of the “Raise the Age” legislation, when addressing the issue of “what appears to be a firearm or deadly weapon” as applied to juvenile offenders, courts have held the People to a high standard. (See, *People v Robert C.*, 46 Misc. 3d 382 [Sup Ct, Queens County 2014][Court ordered removal of felony matter to Family Court where the juvenile offender displayed what appeared to be a black firearm, but in fact was a BB gun]; see generally: *People v Matthews*, 159 AD3d 1111 [3<sup>rd</sup> Dept 2018][Robbery in the 1<sup>st</sup> degree not established because BB gun was plastic and did not work, hence could not potentially cause harm or death.])

Although, a display of a BB gun under certain circumstances may warrant a finding of “extraordinary circumstances” to support a removal denial. (see, *People v. A.T.*, 2019 WL 722871 [Sup. Ct. Erie County, 1/24/2019][Where the BB gun displayed was recovered, the Court denied removal to family court finding the People met their burden pursuant to CPL §722.23, and holding that a BB gun is a deadly weapon]; *People v L.M.*, 62 Misc. 3d 1227[A] [Sup. Ct., Nassau County 2019][Court held the People satisfied their burden establishing a display, where the A.O. possessed a loaded pistol and fired 5 shots warranting the removal denial]; see converse, *People v M.M.*, 63, Misc 3d 772, [Sup. Ct., Nassau County 2019][Court held the People failed to establish a “display” burden seeking to disqualify the matters for removal during 6 day Review, where AO was alleged

to have pointed or gestured that A.O. possessed a gun and made verbal threats.]; *see also*, *People v D.G.*, 2019 NY Slip 50947U, 04/4/2019 [2019 Sup. Ct., Kings County][After a 6-day review, held that for the People to meet their burden, pursuant to CPL 722.23[2][c], they were required to set forth evidence showing that what was actually displayed, was in fact a firearm or deadly weapon. *Id* at \*4)], the facts and evidences herein do not support such a finding.

While the statute does not define “extraordinary circumstances,” this Court looks for facts that are highly unusual or irregular. Upon a review of the motion and court file, I find no circumstances present which meet this definition. Although, the Felony Complaint appears to support every element of the crimes charged and is sufficient on its face, the factual allegations of the defendant’s alleged behavior do not set forth any highly unusual or heinous facts such that removal of this action should be prevented.

Specifically, the complaint alleges that defendant participated in the incident that resulted in injuries to the complainant, but it does not allege facts to support that the defendant was the principal actor. The defendant was not the person that initiated the alleged assault and subsequent robbery. While the complaint does allege that the defendant displayed what appeared to be a firearm or deadly weapon that made direct physical contact with the complainant, it fails to allege facts, pursuant to CPL §722.23[2][c][ii], supporting that the defendant actually displayed a firearm or deadly weapon, as defined under the penal law. Unlike, the Penal Law inclusive language allowing prosecution for Robbery in the first degree for “*what appears to be a firearm...or deadly weapon*”, the legislature under CPL §722.23[2][c][ii] use unequivocal language requiring an actual “display of a firearm or deadly weapon” to avoid removal. (*See, People v D.G.; and People v M.M., supra*). Herein, the complaint and supporting affidavit do not allege that any weapon or

stolen property was recovered from defendant, as such an analysis of the alleged weapon's ability to cause death is an impossibility. Moreover, the People's statement notice stating that the defendant admitted to possessing a BB gun, in conjunction with the allegation that defendant displayed "what appeared to be a firearm" and said "BOOM, BOOM" fail to establish, as required by CPL§ 722.23(2)(c), an actual display of a firearm or deadly weapon. (*See, People v. M.M., supra*). Finally, the complaint and proof provided fail to support that defendant was the sole cause of the complainant's physical injuries nor did the People establish by a preponderance of the evidence a significant physical injury was sustained by the complainant. In sum, the allegations solely establish that defendant was an accessorial actor or secondary participant in the alleged incident.

This court finds that defendant's alleged participation does not constitute an extraordinary circumstance such that removal is inappropriate. The behavior alleged here demonstrates the kind of poor judgment and impetuous conduct that militates in favor of removal to the family court in order to redirect defendant's errant path. Moreover, since this is defendant's first contact with the criminal justice system, this Court does not believe that defendant presents as a danger to public safety such that removal should be denied. Rather, this matter can be effectively adjudicated in the family court where either rehabilitation and/or detention can be imposed.

Accordingly, this matter shall be removed to Family Court.

The People's motion is denied.

This constitutes the decision, opinion, and order of this Court.

  
LENORA GERALD, A.J.S.C.