

**People v Weaver**

2019 NY Slip Op 34097(U)

July 8, 2019

Supreme Court, Westchester County

Docket Number: 18-0460

Judge: Susan M. Cacace


Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

**FILED and ENTERED**  
  
**WESTCHESTER  
COUNTY CLERK**

-against-  
**FILED**   
JUL 10 2019

**DECISION AND ORDER**

TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

Indictment No. 18-0460

SHAWN WEAVER,

Defendant.

-----X  
CACACE, J.

Upon consideration of the People's prospective application seeking the adjudication of the defendant as a second felony offender upon the imposition of sentence under the instant indictment pursuant to Criminal Procedure Law (CPL) § 400.21, the Court has reviewed the following papers: memorandum of law of counsel for the defendant, Ada D. Medina, Esq., and the affirmation and memorandum of law of Assistant District Attorney Anne H. Stark.

**RELIEF REQUESTED**

By oral motion, as supported by a memorandum of law, the defense seeks to controvert and otherwise challenge the constitutionality of the defendant's previous conviction on June 25, 2012 of Criminal Possession of a Controlled Substance in the Fifth Degree pursuant to Penal Law § 220.06(1) in the Westchester County Court under superior court information (SCI) 12-0167, alleging that same was jurisdictionally defective due to the improper inclusion of offenses therein.

## FACTUAL BACKGROUND

Under SCI No. 12-0167, the defendant was charged with a single count of Criminal Possession of a Controlled Substance in the Fifth Degree pursuant to Penal Law § 220.06(1), and a single count of Resisting Arrest pursuant to Penal Law § 205.30(1), which were drawn from a felony complaint previously filed in the Yonkers City Court whereby the defendant was charged the felony offenses of Criminal Possession of a Controlled Substance in the Third Degree pursuant to Penal Law § 220.16(1), and a single count of Assault in the Second Degree pursuant to Penal Law § 120.05(3). On June 25, 2012, the defendant entered a guilty plea in the Westchester County Court to the above-referenced crime of Criminal Possession of a Controlled Substance in the Fifth Degree (hereinafter, the alleged predicate conviction), in full satisfaction of the remaining count of Resisting Arrest which was also charged under SCI No. 12-0167, and was subsequently sentenced thereunder in the Westchester County Court on December 3, 2012 to serve a definite term of incarceration of one year.

Subsequently, upon the return of a unanimous jury verdict before this Court on March 6, 2019, the defendant was convicted under the instant indictment of a single count of Assault in the First Degree in violation of Penal Law § 120.10(1), a single count of Robbery in the First Degree in violation of Penal Law § 160.15(3), and a single count of Criminal Possession of a Weapon in the Third Degree in violation of Penal Law § 265.02(1). Following the rendition of the jury's verdict on this date, the People filed a Second Felony Offender Conviction Statement with this Court, and served same upon the defendant, alleging that the defendant's alleged predicate conviction served as a basis for the imposition of sentence as a second felony offender pursuant

to CPL § 400.21. In advance of the imposition of sentence under the instant indictment, the defense filed a pre-sentence memorandum of law (unsigned and undated) which challenges the defendant's prospective adjudication as a second felony offender in connection with his sentencing upon the counts of conviction under the instant indictment, upon argument that the defendant's alleged predicate conviction was unconstitutionally obtained, and therefore, the alleged predicate conviction may not serve as the basis for the imposition of sentence upon the defendant as a second felony offender pursuant to CPL § 400.21.

### CONCLUSIONS OF LAW

As it is uncontested by the parties that the defendant entered a guilty plea on June 25, 2012 in the Westchester County Court to the crime of Criminal Possession of a Controlled Substance in the Fifth Degree pursuant to Penal Law § 220.06(1) in full satisfaction of SCI No. 12-0167, which had been drawn from a previously filed felony complaint under which the defendant was charged with a single count of Criminal Possession of a Controlled Substance in the Third Degree pursuant to Penal Law § 220.16(1), and a single count of Assault in the Second Degree pursuant to Penal Law § 120.05(3), the Court's focus must be directed solely upon the defendant's challenge that SCI No. 12-0167 was jurisdictionally defective due to the improper inclusion therein of offenses which were not lesser included offenses of the crimes originally charged in the felony complaint from which that SCI was drawn.

Turning first to consider the defendant's argument that the crime of Criminal Possession of a Controlled Substance in the Fifth Degree pursuant to Penal Law § 220.06(1) is not a lesser

included offense of the crime of Criminal Possession of a Controlled Substance in the Third Degree pursuant to Penal Law § 220.16(1), the Court finds that Criminal Possession of a Controlled Substance in the Fifth Degree pursuant to Penal Law § 220.06(1) is a lesser included offense of Criminal Possession of a Controlled Substance in the Third Degree pursuant to Penal Law § 220.16(1), as the Court concludes that it is theoretically impossible to commit the crime of Criminal Possession of a Controlled Substance in the Third Degree pursuant to Penal Law § 220.16(1) without concomitantly committing the crime of Criminal Possession of a Controlled Substance in the Fifth Degree pursuant to Penal Law § 220.06(1) (*see People v Glover*, 57 NY2d 61, 64; *see also People v Robinson*, 45 NY2d 448, 453; *In re Davers McQ.*, 309 AD2d 752, 753; *People v Bowe*, 73 AD2d 971). Accordingly, as the crime of Criminal Possession of a Controlled Substance in the Fifth Degree pursuant to Penal Law § 220.06(1) is a lesser included offense of Criminal Possession of a Controlled Substance in the Third Degree pursuant to Penal Law § 220.16(1), SCI No. 12-0167 was not jurisdictionally defective due to the inclusion therein of the count of Criminal Possession of a Controlled Substance in the Fifth Degree pursuant to Penal Law § 220.06(1).

Furthermore, insofar as the defendant argues that the crime of Resisting Arrest pursuant to Penal Law § 205.30 is not a lesser included offense of the crime of Assault in the Second Degree pursuant to Penal Law § 120.05(3), the Court finds that although the Resisting Arrest charge contained within SCI No. 12-0167 is not a lesser included offense of the Assault in the Second Degree charge contained in the felony complaint from which it was drawn, the Resisting Arrest charge was properly included in SCI No. 12-0167 under the authority of CPL 195.20 because it was properly joinable therein with the crime of Criminal Possession of a Controlled

Substance in the Fifth Degree pursuant to CPL 200.20(2)(a) since both of these offenses were based upon the same criminal transaction as defined by CPL 40.10(2) (*see People v Philip*, 205 AD2d 714, 714; *see also People v Lee*, 275 AD2d 995, 996). Accordingly, as the crime of Resisting Arrest was properly included within SCI No. 12-0167 as a joinable offense with the crime of Criminal Possession of a Controlled Substance in the Fifth Degree pursuant to Penal Law § 220.06(1) charged therein, this Court finds that SCI No. 12-0167 is not jurisdictionally defective due to its inclusion of the crime of Resisting Arrest.

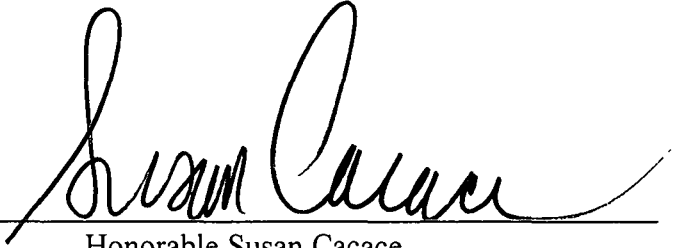
Furthermore, to the extent that the defendant also seeks to challenge his adjudication as a second felony offender upon the argument that the felony complaint from which the charges contained in SCI No. 12-0167 were drawn was facially defective, the Court finds this argument unavailing, as the replacement - that is the superseding - of the underlying felony complaint by SCI No. 12-0167 rendered any defects in the underlying felony complaint inconsequential to the validity of SCI No. 12-0167 (*see People v Webb*, 111 AD3d 968; *see also People v Jackson*, 286 AD2d 912).

Based upon the foregoing, the defendant's several jurisdictional challenges to SCI No 12-0167 are hereby summarily denied; and therefore, the People's previously filed Second Felony Offender Conviction Statement relating the defendant's previous conviction of Criminal Possession of a Controlled Substance in the Fifth Degree pursuant to Penal Law § 220.06(1) on June 25, 2012 in the Westchester County Court under SCI 12-0167 may be relied upon by the People to establish that the defendant is a second felony offender within the meaning of CPL 400.21 for the purpose of determining his applicable sentencing range pursuant to Penal Law §§ 70.06(2), (3) and (4), or 70.06(2) and (6) upon the imposition of his sentence under the instant

indictment.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York  
July 8, 2019



---

Honorable Susan Cacace  
Acting Justice of the Supreme Court

TO:

Honorable Anthony A. Scarpino  
Westchester County District Attorney  
County Courthouse  
111 Dr. Martin Luther King, Jr. Blvd.  
White Plains, New York 10601  
Attn: A.D.A. Anne H. Stark

Office of Clare Degnan, Esq.  
The Legal Aid Society  
of Westchester County  
Attorneys for Defendant  
150 Grand Street, Suite 100  
White Plains, New York 10601  
Attn: Ada Medina, Esq.