People v Thomas
2019 NY Slip Op 34098(U)
June 12, 2019
Supreme Court, Westchester County
Docket Number: 18-0522
Judge: Barry E. Warhit

SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER
(Upon Motion to Dismiss
Counts Seven and Eight)

Indictment No.: 18-0522

RICHARD THOMAS,

Defendant.

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WARHIT, J.

Defendant RICHARD THOMAS is charged under the within indictment with grand larceny in the third degree, grand larceny in the fourth degree, offering a false instrument for filing in the first degree (two counts) and offering a false instrument for filing in the second degree (2 counts). Defendant moves to dismiss both charges of offering a false instrument for filing in the second degree. The New York State Office of the Attorney General ("OAG") opposes Defendant's motion in its entirety.

In connection with this application, this Court read and considered:
Notice of Motion by Mayor Richard Thomas to Dismiss Counts 7 & 8; Notice of Motion to Dismiss Counts 7 & 8 and Annexed Exhibits A through C, Affirmation of Assistant Attorney General Brian Weinberg in Opposition to Defendant's Motion to Dismiss and People's Memorandum of Law in Opposition to Defendant's Motion to Dismiss Counts 7 & 8; and *Affirmation of Douglas A. Martino, Esq. In Reply to Notice of Motion to Dismiss Counts 7 & 8*

Relevant Procedural History

Defendant is an elected official. He was sworn in as the Mayor of Mount Vernon on January 4, 2016. On April 27, 2016 the New York State Comptroller ("Comptroller") sent a referral to the OAG requesting it investigate and, if appropriate, proffer charges

relating to alleged improper procurement and payment of funds belonging to the City of Mount Vernon ("City"). In connection with this investigation the OAG received bank and financial records alleged to reveal, *inter alia*, that Defendant used campaign funds to satisfy personal debts and credit card expenses and included false statements or information in required campaign related filings. These alleged malfeasances resulted in the within indictment on which Defendant was arraigned on May 25, 2018.

By counseled motion[1] filed on May 30, 2018 Defendant moved to dismiss the indictment upon the contentions that OAG is without authority to conduct the within prosecution and that, in any event, OAG violated Defendant's right to Due Process by failing to provide him with a reasonable opportunity to testify before the grand jury. By Decision and Order, dated August 31, 2018, this Court denied this motion (*People v. Thomas*, Westchester County Court Indictment No. 18-0522 (Warhit, J.), August 31, 2018).

In its subsequently filed omnibus motion, the defense renewed its claim that the OAG was acting in excess of its authority and also moved to dismiss specific couts of the indictment.[2] By Decision and Order, dated October 30, 2018, this Court denied these aspects of Defendant's omnibus motion (*People v. Thomas*, Westchester County Court Indictment No. 18-0522 (Warhit, J.), October 30, 2018) .

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[1]This motion was filed by Defendant's previously retained counsel Randall W. Jackson, Esq. then of Boises Schiller Flexner LLP.

[2]This motion was filed by Defendant's previously retained counsel Randall W. Jackson, Esq. then of Boises Schiller Flexner LLP.

Defendant now moves, by motion dated April 5, 2019, to dismiss counts seven and eight which charge Defendant with offering a false instrument for filing in the second degree. Defendant contends these charges require dismissal on grounds that the OAG "selectively charged [him] with campaign violations" and because these counts present "a legal impossibility [and] do not exist as a matter of law" (Defendant's Notice of Motion, ¶ 4). In addition, Defendant asserts he is entitled to dismissal of counts seven and eight on grounds that, on March 14, 2019, the City's Inspector General issued a report which he concluded the Mount Vernon Board of Ethics ("Board of Ethics") is improperly constituted and is without "legitimate power or authority to do or demand anything of anyone . . . and that every act and action taken . . . is of no legal force and effect, and that all decisions or determinations made by such [Board] are *void ab initio"* (*Id.* at Exhibit B). In a memorandum issued March 20, 2019 the City's Corporation Counsel concurred stating:"an unlawfully constituted Board can have no authority [and] therefore lacks the power to draft and distribute Financial Disclosure Forms . . . or demand that City Officers and employees complete same" (*Id.* at ¶ 5 and C).

The OAG submits the within motion should be denied on procedural grounds as it is untimely. Alternatively, the People assert denial of the within motion for dismissal is warranted as Defendant has not met his burden to establish "selective prosecution" and has not demonstrated that his commission of the crimes of Offering a False Instrument for Filing in the second degree, as charged under counts seven and eight, constitutes a legal impossibility.

Conclusions of Law

Pursuant to New York State Criminal Procedure Law ("Criminal Procedure Law" or "CPL") pre-trial motions must be served or filed within forty-five (45) days of arraignment or "within such additional time as the court may fix upon application of the defendant" (CPL § 255.20[1]). Whenever practicable, pre-trial motions and supporting affidavits, affirmations, exhibits and memoranda of law are to be contained within a single set of motion papers (CPL § 255.20 [2]). This Court did not expand the time for motion practice or authorize the filing of consecutive motions. Nevertheless, where despite due diligence a particular application cannot be brought within the specified time-period, applicable statute allows for late filing (CPL § 255.20[3]). Consequently, the portions of the instant motion that are a direct outgrowth of the Inspector General's report, issued on May 14, 2019, and the Corporation Counsel's memorandum, issued on May 20, 2019, are permissible as a matter of law (CPL § 255.20[3]).

While the court is permitted to summarily deny any motion which is not timely filed, this Court elects to exercise its discretion and to consider those aspects of this motion which are otherwise untimely in the furtherance of justice (*Id.; and see*, CPL § 255.20[3]; *and see*, *People v. Dean*, 74 NY2d 643, 644 [1989]; *see also*, *People v. Field*, 161 AD2d 660, 661 [2d Dept. 1989]). Accordingly, the merits of the motion are now addressed.

Defendant alleges counts seven and eight "should have been processed administratively" and that he is the target of "selective prosecution" (Defendant's Notice

of Motion, ¶ 2). Nevertheless, "in order to be entitled to an evidentiary hearing on a claim of selective prosecution, the burden is on petitioner to demonstrate a reasonable probability of success in proving not only that the law was not applied to others similarly situated but also that the selective application of the law was deliberately based upon an impermissible standard such as race, religion or some other arbitrary classification" (*Agnello v. Corbisiero*, 177 AD2d 445, 445 [1st Dept. 1991]; *and see*, *People v. Esposito*, 225 AD2d 928, 929 [3d Dept. 1996]). Defendant herein has not made such a showing. He has not set forth any facts to support his bold claim or offered any evidence upon which this Court can or should conclude the OAG has declined to prosecute others in like situations or that the within prosecution is driven by race, religion or any other arbitrary classification (*see, Id.*) As such, Defendant's claim of "selective prosecution" is appropriately summarily denied (*Id.*).

Additionally, Defendant contends counts seven and eight require dismissal upon grounds of impossibility. In support of this argument the defense contends Defendant could not have committed the crimes of offering a false instrument for filing in the second degree as charged on May 31, 2016 and May 31, 2017 since the filings were not due until May 31, 2017 and May 31, 2018. In this regard Defendant is mistaken. Relevant documentary evidence presented to the grand jury provides sufficient proof that Defendant filed his 2016 financial disclosure form on May 31, 2016 and filed his 2017 financial disclosure form on May 31, 2017 (Transcript of the Grand jury Proceedings, Exhibits 24 and 25B). As such, Defendant's motion to dismiss on this

basis is denied.

Finally, Defendant seeks an Order dismissing counts seven and eight based upon a report the City's Inspector General issued on May 14, 2019 during the pendency of this indictment. Therein, the City's Inspector General concluded that the City's Board of Ethics is illegally constituted since the provision of the Mount Vernon City Code ("Code") which directs Board membership is in conflict with the participation requirements of New York State General Municipal Law ("General Municipal Law"). The General Municipal Law requires one member of a city's Board of Ethics to be an officer or employee of the municipality whereas the Code forbids any member of the Board from having such a designation (*see*, General Municipal Law § 808(3); *cf.,* Code, Chapter 24, Article 1 § 24-7(A)). The Inspector General concluded the illegal composition of the Board of Ethics renders that body without "legitimate power or authority to do or demand anything of anyone" (Defendant's Notice of Motion, ¶¶ 8-15 and Exhibit B). In a memorandum issued on May 20, 2019, the City's Corporation Counsel declared the Board of Ethics "lacks the power to draft and distribute Financial Disclosure Forms ("FDF") or demand that City Officers and employees complete same" (Defendant's Notice of Motion, ¶¶ 8-15 and Exhibits C).

The OAG contends the Board of Ethics is properly configured as, under New York's Municipal Home Rule Law ("Home Rule Law"), cities may, but are not required, to establish a local Board of Ethics and are empowered to adopt local laws relating to their "property, affairs or government" so long as the enacted legislation is not

inconsistent with the constitution or any general law (Municipal Law §§ 808(3) and 10(1)(1); NY Const. Art IX, § 2(c)(I). Further, the State Constitution defines a "general law" as one that "in terms and in effect *applies alike to . . . all cities*, all towns or all villages" (NY Const. Art. IX, § 3(d), par. 1) (emphasis added). Accordingly, since Municipal Law § 808(3) permits rather than requires cities to create a Board of Ethics it is not a general law (*see*, *Johnson v. Etkin*, 279 NY 1 [1938](holding that optional laws are not general laws). Upon the foregoing it may well be that the Inspector General is erroneous in his conclusion that "each and every act and action taken by an illegal board is of no legal force and effect, and that . . . [a]ny evidence an illegal Board provided to another governmental agency would be tainted as the fruit of a poisonous tree" (Defendant's Notice of Motion, Exhibit B). And, while the Inspector General is most certainly correct that "it will be up to the courts to deal with the consequences" of the conflict between Municipal Law § 808(3) and City Charter § 24-7A, the within criminal proceeding is not the appropriate forum to challenge the Inspector General's determination as affected by an error of law or as arbitrary or capricious (*cf*, Civil Practice Law and Rules § 7803(3)). Regardless, such a determination is not required to resolve the present motion.

Counts seven alleges that on May 31, 2016 Defendant filed a written instrument containing false statements or information with the Mount Vernon City Court and count 8 alleges he did so again on May 31, 2017. Of import, the indictment does not accuse Defendant of filing a false statement or false information with the Board of Ethics.

Consequently it is significant that, regardless of whether the General Municipal Law and the section 24-7(A) are in conflict regarding the permissible composition of the Board of Ethics, Defendant, as the mayor, is obligated to file a financial disclosure statement under General Municipal Law § 811 and under the Code, Chapter 24, Article II, section 24-11 entitled "Officials, officers and employees required to file" (Code, Chapter 24, Article II, § 24 -11(a)[1]). General Municipal Law § 811(1)[3](d) requires annual filing with "either the temporary state commission on local government ethics or with the board of ethics" (General Municipal Law § 811(1)[3](d)). Significantly, Chapter 24 of the Code contains a severability clause which plainly directs that if any clause, paragraph, section or part of Chapter 24 is deemed invalid, the remainder of the section shall not be invalidated (Code, Chapter 24. Article 1, § 24-8(A)). Consequently, Code Chapter 24, Article II § 24-11 is not affected by the Inspector General's report or the Corporation Counsel's memorandum. As such, Defendant has not established a basis to dismiss counts seven and eight.

Finally, to the extent the defense appears to seek suppression of the FDFs on grounds that they constitute "fruit of the poisonous tree", this Court finds this argument to lack merit. Defendant is neither entitled to suppression or to a *Mapp* hearing. Defendant has not set forth sworn allegations of fact in support of this application nor has he established that he has standing in documents he filed or caused to be filed with the Mount Vernon City Court (*see*, *People v. Mendoza*, 82 NY2d 415, 422 [1993]; *and see*, *People v. Carter*, 86 NY2d 721 [1995]).

For each of the above discussed reasons, Defendant's motion seeking the dismissal of counts seven and eight is denied in its entirety.

The foregoing constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York
June 12, 2019

Honorable Barry E. Warhit
Supreme Court Justice

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