

**People v Mann**

2023 NY Slip Op 30391(U)

February 3, 2023

City Court of Peekskill, Westchester County

Docket Number: CR-319-20

Judge: Reginald J. Johnson

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This opinion is uncorrected and not selected for official publication.

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  
CR-319-20

KRISTIE M. MANN,  
Defendant.

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REGINALD J. JOHNSON, J.

The defendant moves, by her attorney Gerard Savage, Esq., pursuant to Criminal Procedure Law (CPL) §170.30 to dismiss the simplified information charging the defendant with using a cell phone while operating a motor vehicle in violation of Vehicle and Traffic Law (VTL) §1225-(c)(2)(a). The People opposed the motion.

For the reasons that follow, the motion is denied.

Background

I. Factual Background

On January 30, 2020, at approximately 10:01 a.m., Peekskill P.O. G. Jackman alleges that he was parked on the northeast corner of Washington Street and Requa Street facing westbound traffic when observed the defendant traveling southbound

on Washington Street holding a cell phone in her right hand up to her face. He stopped the defendant and issued her a simplified information for operating a motor vehicle while using a cell phone at or about the intersection of Washington and Requa Streets in the City of Peekskill. The Uniform Traffic Ticket/Simplified Traffic ticket (traffic ticket) [C256BGSJ3H] and supporting deposition of P.O. G. Jackman were provided to counsel prior to or at the last in-court appearance on January 11, 2023.

## II. Procedural Background

The defendant was issued the traffic ticket on January 30, 2020. On February 7, 2020, the defendant pled not guilty. On August 10, 2022, the defendant was scheduled for a pre-trial conference. At the pre-trial conference, the defendant requested a trial, which was scheduled for October 12, 2022. The October 12 trial date was adjourned by the Court to January 11, 2023, for trial. At the January 11 appearance, defendant submitted a copy of the motion to dismiss to the Court (which was previously filed with the Court on January 10). The Court set the following motion schedule: motion filed January 10, 2023; opposition by January 18, 2023; and reply, if any, by February 8, 2023. On January 24, 2023, the People filed its

opposition to the motion. The defendant filed her reply on January 31, 2023.<sup>1</sup> On January 31<sup>st</sup>, the Court marked the motion fully submitted.

### III. Discussion

The defendant moves to dismiss the traffic ticket pursuant to CPL §170.30(1)(a), which states

1. After arraignment upon a ...simplified information... the local criminal court may, upon motion of the defendant, dismiss such instrument or any county thereof upon the ground that:

(a) It is defective, within the meaning of section 170.35.

CPL §100.25 states, in pertinent part, that “[a] defendant charged by a simplified information is, upon a timely request, entitled as a matter of right to have filed with the court and served upon him...a supporting deposition of the complainant police officer or public servant, containing allegations of fact, based either upon personal knowledge or upon information and belief, providing reasonable cause to believe that the defendant committed the offense or offenses charged.”

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<sup>1</sup> The reply was filed without an affidavit/affirmation of service.

On a motion to dismiss, the Court must view the evidence in the light most favorable to the People (see *People v. Contes*, 60 N.Y.2d 620, 621 [1983]). Further, a simplified traffic information is sufficient on its face when it substantially conforms to the form prescribed by the Commissioner of Motor Vehicle (see CPL §100.25(1); CPL §100.40(2); *People v. Ferro*, 22 Misc.3d 7 [App Term, 2d Dept, 9<sup>th</sup> & 10<sup>th</sup> Jud Dists 2008]).

Here, the traffic ticket charges the defendant with operating a motor vehicle while using a cell phone in violation of VTL §1225(c)(2)(a) (the statute). That section states,

2. (a) Except as otherwise provided in this section, no person shall operate a motor vehicle upon a public highway while using a mobile telephone to engage in a call while such vehicle is in motion; provided, however, that no person shall operate a commercial motor vehicle while using a mobile telephone to engage in a call on a public highway including while temporarily stationary because of traffic, a traffic control device, or other momentary delays. Provided further, however, that a person shall not be deemed to be operating a commercial motor vehicle while using a mobile telephone to engage in a call on a public highway when such vehicle is stopped at the side of, or off, a public

highway in a location where such vehicle is not otherwise prohibited from stopping by law, rule, regulation or any lawful order or direction of a police officer.

(c) “Using” shall mean (i) holding a mobile telephone to, or in the immediate proximity of, the user’s ear....

(g) “Immediate proximity” shall mean that distance as permits the operator of a mobile telephone to hear telecommunications transmitted over such mobile telephone, but shall not require physical contact with the operator’s ear.

In his supporting deposition, P.O. Jackman stated that he was “parked on N/E C/O Washington Street & Requa St facing W/B. Motorist traveling S/B on Washington St holding cell phone in right hand up to face.” The defendant argues that the officer’s statement that he allegedly observed the defendant “holding cell phone in right hand up to face” is facially insufficient because the officer did not allege that the defendant’s “cell phone was positioned by the defendant’s right or left ear,[and that] the police officer does not state that he observed the defendant moving her lips or was otherwise animated to infer she was having a conversation on the cell phone” (Reply at ¶7).

The People argue that the definition of “using” a cell phone does not require that there be an allegation that the officer observed the defendant holding a cell phone near her ear, but rather in the “immediate proximity” of her ear which includes the face, as the statute defines “immediate proximity” as “that distance as permits the operator of a mobile telephone to hear communications transmitted over such mobile telephone, but shall not require physical contact with such operator’s ear” (People Opp. at ¶6).

The Court does not share the defendant’s interpretation of the statute. The officer’s allegation that he observed the defendant holding her cell phone up to her face is sufficient to infer, at least on this motion, that the phone was of sufficient distance to permit “the operator of the mobile telephone to hear telecommunications transmitted over such mobile telephone,” because an allegation that the defendant was holding a cell phone in close proximity to her face creates a rebuttable presumption that she was engaged in a call in violation of the statute [see *People v. Sweeney (Michael)*, 66 Misc.3d 12, 14 (App Term 2d Dept 2019) citing, *People v. Ferguson*, 56 Misc. 3d 140(A) [App Term, 2d Dept, 9<sup>th</sup> & 10<sup>th</sup> Jud Dists 2017]; *People v. Phillips*, 50 Misc.3d 134(A) [App Term, 2d Dept, 9<sup>th</sup> & 10<sup>th</sup> Jud Dists 2016)]; 1225-c(2)(b)]. Viewing the factual allegations in the light most favorable to the People, the Court finds that the defendant’s arguments do not sufficiently rebut

the presumption that she was engaged in a call. To the contrary, the traffic ticket and supporting deposition taken together, which need only provide reasonable cause to believe that the defendant committed the charged offense (see *People v. Rose*, 8 Misc. 3d, 184 [Dist. Ct. Nassau Co. 2005]; *People v. Quarles*, 168 Misc. 2d 638 [Rochester City Ct. 1996]; *People v. Rose*, 8 Misc. 3d 184 [Dist. Ct. Nassau Co. 2005]), do, in fact, make that preliminary showing.

Lastly, the defendant's citation of *People v. Delprete*, 62 Misc.3d 128(A) (App Term 2d Dept 2018) is misplaced. In the *Delprete* case, the officer only alleged "OPER MV WHILE USING PORTABLE ELEC DEV" without stating any supporting facts. *Id.* at \*4. Here, P.O. Jackman stated facts supporting his allegations when he stated that he was in "RMP #256 PARKED ON N/E C/O WASHINGTON ST & REQUA ST FACING W/B. MOTORIST TRAVELING S/B ON WASHINGTON ST HOLDING CELL PHONE IN RIGHT HAND UP TO FACE" (Supp. Dep. at 8). Further, the defendant in *Delprete* was charged with a violation of VTL §1225-d, operating a motor vehicle while using a portable electronic device, which includes a hand-held mobile telephone (see VTL §1225-d[2][a]). Here, the defendant is charged with VTL§1225-c(2)(a), operating a motor vehicle while using a cell phone, not a portable electronic device. Further, the definition of "using" device/mobile phone is different between VTL §1225-D and §1225-c(2)(a). VTL

§1225-d[2][b] defines “using” the device/mobile phone as “holding [it] while viewing, taking or transmitting images, playing games, or for the purpose of present or future communication; performing a command or request to access a world wide web page, composing, sending, reading, viewing, accessing, browsing, transmitting, saving or retrieving email, text messages, instant messages, or other electronic data.” VTL §1225-c defines “using” as holding the cell phone to or within the “immediate proximity” of the ear, and that “immediate proximity” means holding the cell phone at such a distance that would permit the user to hear the telecommunications.

In addition, the statutory presumptions between the sections are different. VTL §1225-d (4) provides that “[a]” person who holds a portable electronic device in a conspicuous manner while operating a motor vehicle is presumed to be using such device. The presumption established by this subdivision is rebuttable by evidence showing that the operator was not using the device within the meaning of this section.” However, VTL §1225-c[2][b] provides that an operator of a motor vehicle who holds a mobile telephone within the immediate proximity of his or her ear; that is, at a sufficient distance for the user to hear the telecommunications, is presumed to be engaging in a call. While the statutory presumption is rebuttable, this Court has already found that the defendant has failed to rebut that presumption. Hence, the issue of whether the defendant was holding a mobile device within the

immediate proximity of her ear is inherently a triable issue of fact to be resolved at trial.

Accordingly, the Defendant's motion is denied.

Based on the aforesaid,

It is Ordered that the defendant's motion pursuant to VTL §170.30 is denied.

This constitutes the Decision and Order of the Court.

Enter,

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

Dated: February 3, 2023

In deciding this motion, the Court reviewed the uniform traffic ticket, supporting deposition, Motion to Dismiss, Affirmation in Opposition, and Defense Reply.

Cc: Gerard C. Savage, Esq.  
Timothy W. Kramer, Corporation Counsel