

People of the State of N.Y. v Bavosa

2017 NY Slip Op 30236(U)

February 2, 2017

City Court of Peekskill, Westchester County

Docket Number: 16-0802

Judge: Reginald J. Johnson

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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
Docket No. 16-0802

MICHAEL BAVOSA,

Defendant.

-----X

Appearances:

Anthony A. Scarpino, Westchester County District Attorney by
ADA Anthony J. Molea
Kevin Kennedy, Esq. for Defendant

HON. REGINALD J. JOHNSON

The Defendant moves to dismiss the Assault in the Third Degree charge [Penal Law (PL) §120.00(01)] against him in the interest of justice [People v. Clayton, 41 A.D.2d 204, 342 N.Y.S.2d 106 (2d Dept. 1973)] [Clayton motion] pursuant to Criminal Procedure Law (CPL) §§170.30(1)(g) and 170.40. The People oppose the motion.

In deciding this motion, the Court considered the Notice of Motion, Affirmation of Kevin Kennedy, Esq., undated, and accompanying Memorandum of Law, Affirmation in Opposition of Anthony J. Molea, Assistant District Attorney, dated October 20, 2016, and accompanying Memorandum of Law.

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The motion is decided in accordance herewith.

Procedural History

On June 23, 2016, the Defendant was arrested, charged with Assault in the Third Degree (PL 120.00(01)), class A Misdemeanor, and arraigned with assigned counsel. The case was adjourned to June 30, 2016.

On June 30, 2016, the Defendant appeared and the case was adjourned to July 7, 2016.

On July 7, 2016, the Defendant appeared and the case was adjourned to July 28, 2016.

On July 28, 2016, the Defendant requested and was granted permission to file a Clayton motion. The Court set the following motion schedule: Defendant's motion to be filed on or before September 1, 2016; People to file its opposition papers on or before September 22, 2016; the Court to render a decision on or before October 6, 2016.

On September 22, 2016, the People requested an extension of time to file its opposition papers to October 27, 2016. The Court set a decision date by December 15, 2016.

On October 27, 2016, the People filed its opposition papers. The Defendant did not appear. This matter was adjourned by the Court to

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December 15, 2016 for a reply, if any.

On December 15, 2016, the Defendant indicated that he would not submit a reply; the matter was marked fully submitted at that time.

Factual History

The People allege that on June 23, 2016 at approximately 12:00 noon, the Defendant assaulted Francis X. Brunelle, Human Services Director for the City of Peekskill. Specifically, the People allege that Mr. Brunelle was addressing a group of senior during a senior luncheon at the Peekskill Senior Center located at 4 Nelson Ave, Peekskill in his capacity as Human Services Director. Mr. Brunelle asked the Defendant, who was sitting by himself at a table that had not been prepared for lunch service, to move to a table that had been set up for lunch. In response, the Defendant left the room only to return a few minutes later when he confronted Mr. Brunelle and said “I have a right to eat by myself” and “You’re a fucking asshole.” Mr. Brunelle asked the Defendant to leave the premises. The Defendant backed up and pulled his pants down. Mr. Brunelle again asked the Defendant to leave the premises to which the Defendant responded “call the cops on me.” The Defendant then charged Mr. Brunelle and struck him in the face three times

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with a closed fist. Mr. Brunelle wrestled the Defendant to the ground and restrained him until the police arrived. During the brief physical confrontation, the Defendant attempted to bite Mr. Brunelle and told him “I can spit too.”

The police arrived and arrested the Defendant for assault. The police documented the following injuries to Mr. Brunelle: swelling under his left eye, a chipped tooth, and pain in his left knee, which was exacerbated by the confrontation with the Defendant. In the days following the confrontation, Mr. Brunelle’s left eye blackened and he learned that he sustained torn cartilage in his left knee, which might have been preexisting to some extent but made worse after the confrontation (Molea Affirm In Opp. at pp. 1-2).

Contentions of the Parties

The Defendant oddly contends that although he “does not deny the occurrence of a physical altercation between himself and the complainant” he committed the assault “in his compromised physical state” and that he “struck the complainant only once and was immediately restrained by the complainant” (See, Affirm of Kennedy at ¶5). The Defendant also contends that the complainant did not suffer “substantial pain” because there is no evidence that his pain “lingered beyond twenty minutes” and because the

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complainant “did not receive or seek medical attention for his alleged injuries” (Kennedy Memo of Law at p. 2). Further, the Defendant argues that he suffers from the effects of Huntington’s Disease¹ and that even though he possesses a Master’s in Public Administration², the severity of the disease has rendered him unemployable and dependent on public assistance (Id. at p. 3).

Lastly, the Defendant argues that he has already been incarcerated for twenty days in this matter—a period greater than the maximum sentence for Harassment in the Second Degree (15 days maximum sentence for a conviction of this violation, PL 240.260)—and that the Behavioral Health Center of the Westchester County Medical Center determined that he does not present a threat to himself or others. In short, the Defendant concludes that a dismissal of the charges against him would not erode the public’s confidence in the criminal justice system (Id.).

¹ Huntington’s Disease is a hereditary disease that causes a progressive degeneration of nerve cells in the brain. The disease results in movement, thinking (cognitive) and psychiatric disorders. With regard to movement, a person’s voluntary and involuntary movements are affected. Specifically, a person may exhibit involuntary jerking, slow or abnormal eye movements, an impaired gait, posture and balance, among other symptoms. Cognitive disorders include, *inter alia*, difficulty organizing, prioritizing or focusing on tasks, lack of impulse control that can result in outbursts, acting without thinking and sexual promiscuity. Psychiatric disorders present with depression, social withdrawal, feelings of irritability, sadness or apathy, among other symptoms. See, <http://www.mayoclinic.org/diseases-conditions/huntingtons-disease/basics/symptoms/con-20030685>

² Mr. Kennedy asserts that his client claims he possesses a Master’s in Public Administration.

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The People argue, in sum and substance, that the Defendant has failed to demonstrate that the continued prosecution and/or subsequent conviction on the pending charge would constitute an injustice, “as there exists no compelling factor, consideration, or circumstance clearly demonstrating that conviction or prosecution of the defendant upon the instant charges would constitute or result in injustice” (citation omitted) (Molea Memo of Law, Point A).

In particular, the People argue that the Defendant has failed to “allege any facts whatsoever addressing the factors set forth in CPL 210.40³ that would amount to a rare and unusual situation that **demand**s dismissal of the charges” and that his motion should be summarily denied (citation omitted) (emphasis in the original) (Id.).

Lastly, the People cite and argue each factor under CPL §240.20, together with a copy of a DVD of the police response and interview of the

³ The People oppose the Defendant’s motion by arguing that he did not satisfy the factors enumerated under CPL§210.40. However, the Defendant moved to dismiss the charge against him under CPL §§170.30(1)(g) and 170.40, not CPL §210.40. In terms of a defendant’s statutory burden, there is a distinction without a difference whenever he moves to dismiss the charges under either section in the interest of justice. In its strictest application, CPL §210.40 applies to the dismissal of indictments only in the interest of justice, while CPL §§170.30(1)(g) and 170.40 only apply to a dismissal of an information, simplified traffic information, prosecutor’s information or misdemeanor complaint in the interest of justice. But the statutory factors under both sections are identical, except that factors (g) and (h) of §170.40 and CPL §210.40 are in inverse order.

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parties and photos of the complainant's injuries, and request that the Court deny the Defendant's motion to dismiss the charge against him in the interest of justice. (Id. at pp. 2-5 with Exhs. 1-4).

Legal Analysis and Discussion

Criminal Procedure Law (CPL) §170.30(1)(g) ("Motion to dismiss information, simplified information, prosecutor's information or misdemeanor complaint") states, in pertinent part,

1. After arraignment upon an information, a simplified information, a misdemeanor complaint, the local criminal court may, upon motion of the defendant, dismiss such instrument or any count thereof upon the ground that:
(g) Dismissal is required in furtherance of justice, within the meaning of section 170.40.

CPL §170.40(1)(a) through (j) ("Motion to dismiss information, simplified traffic information, prosecutor's information or misdemeanor complaint; in furtherance of justice") states,

1. An information, a simplified traffic information, a prosecutor's information or a misdemeanor complaint, or any count thereof, may be dismissed in the interest of

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justice, as provided in paragraph (g) of subdivision one of section 170.30 when, even though there may be no basis for dismissal as a matter of law upon any ground specified in paragraphs (a) through (f) of said subdivision one of section 170.30, such dismissal is required as a matter of judicial discretion by existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such accusatory instrument or count would constitute or result in injustice. In determining whether such compelling factor, consideration, or circumstance exists, the court must, to the extent applicable, examine and consider, individually and collectively, the following:

- (a) the seriousness and circumstances of the offense;
- (b) the extent of harm caused by the offense;
- (c) the evidence of guilt, whether admissible or inadmissible at trial;
- (d) the history, character and condition of the defendant;
- (e) any exceptionally serious misconduct of law enforcement

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- personnel in the investigation, arrest and prosecution of the defendant;
- (f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;
 - (g) the impact of a dismissal on the safety or welfare of the community;
 - (h) the impact of a dismissal upon the confidence of the public in the criminal justice system;
 - (i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion;
 - (j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose.

A motion to dismiss in the interest of justice is addressed to the sound discretion of the court. See, People v. Burke, 79 Misc.2d 46, 359 N.Y.S.2d 397 (Dist. Ct., Suffolk County 1974); People v. O'Grady, 175 Misc.2d 61, 667 N.Y.S.2d 895 (N.Y. City Crim. Ct. 1997). A defendant is not entitled to a dismissal in the interest of justice pursuant to CPL §170.40 where he fails to submit facts showing “some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the

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defendant...would constitute or result in injustice. See, People v. Zogone, 102 Misc.2d 265, 423 N.Y.S.2d 400 (Yonkers City Ct. 1979).

In deciding a Clayton motion to dismiss in the interest of justice, the court must examine and consider the merits of the defendant's motion in light of the factors enumerated in CPL §170.40, and balance the interests of the defendant, the complainant and the community. See, People v. Waston, 182 Misc.2d 644, 700 N.Y.S.2d 651 (N.Y. City Crim. Ct. 1999). However, the court is not required to engage in a point-by-point catechistic discussion of all ten statutory factors, instead the court need only consider the statutory factors individually and collectively in making a value judgment that is based upon striking a sensitive balance between the interests of the individual and those of the state. See, People v. Gragert, 1 Misc.3d 646, 765 N.Y.S.2d 471 (N.Y. City Crim. Ct. 2003); People v. Rickert, 58 N.Y.2d 122, 459 N.Y.S.2d 734, 446 N.E.2d 419 (1983) (Court held that a judge who grants a CPL §170.40 motion need only state the reason for the dismissal "written or orally delivered on the record" and is not required to state which of paragraphs (a) through (j) he relied on).

It has been held that before charges may be properly dismissed in the

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interest of justice, the attendant facts and circumstances must be of a nature that the denial of relief would be such an abuse of discretion as to shock the conscience of the court. See, People v. Stern, 83 Misc.2d 935, 372 N.Y.S.2d 932 (N.Y. City Crim. Ct. 1975); People v. Federman, 19 Misc.3d 478, 852 N.Y.S.2d 748 (N.Y. City Crim. Ct. 2008) (Court held that dismissal in the interest of justice should be exercised sparingly and only in those cases that cry out for fundamental justice beyond the confines of conventional considerations); See, People v. Gragert, *supra*.

A dismissal in the interest of justice is “neither an acquittal of the charges nor any determination of the merits. Rather, it leaves the question of guilt or innocence unanswered.” See, Ryan v. New York Telephone Company, 62 N.Y.2d 494, 504-505, 478 N.Y.S.2d 823, 467 N.E.2d 487 (1984).

In the case at bar, the Defendant conceded that he assaulted the complainant (See, Affirm of Kennedy at ¶5). From all accounts, the assault was unprovoked and flagrant. The Court should evaluate the People’s available evidence of the defendant’s guilt. See, People v. Prunty, 101 Misc.2d 163, 420 N.Y.S.2d 703 (N.Y. City Crim. Ct. 1979); CPL §170.40(1)(c). In so doing, the Court finds that the People have presented

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overwhelming evidence of the Defendant's guilt. Therefore, the Court is compelled to deny the Defendant's motion to dismiss the assault charge against him. The Defendant's claim⁴ of homelessness and Huntington's Disease together with its accompanying cognitive and physical degenerative symptoms is insufficient to warrant a dismissal of the charge against him at this stage of the proceedings. See, People v. Dodard, 178 Misc.2d 242, 680 N.Y.S.2d 393 (N.Y. City Crim. Ct. 1998).

To what extent, if any, the Defendant's alleged medical condition has impaired his ability to control his actions or his ability to appreciate the nature of his conduct, should be determined by a jury. It is for the trier of fact at trial to determine whether the Defendant "lacked substantial capacity to know or appreciate either ...[t]he nature and consequences of [his] conduct; or...[t]hat [his] conduct was wrong," (PL §40.15), and generally, whether his mental condition "negate[s] a specific intent necessary to establish guilt." People v. Segal, 54 N.Y.2d 58, 66 (1981).

Defendant further argues that since there is no evidence that complainant was in "substantial pain" for more than twenty minutes and

⁴ The Defendant has not presented one scintilla of medical proof regarding his medical condition to support his claim that he is, in fact, suffering from Huntington's Disease.

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since he did not seek medical attention for his alleged injuries, the proper charge against him is Harassment in the Second Degree, a violation (Kennedy Memo of Law at p. 2). According to the People, the complainant did seek medical attention at Putnam Valley Hospital (Molea Memo of Law at p. 3).⁵ Further, the People's evidence shows that the complainant suffered a black eye, a chipped tooth and possible torn cartilage in his left knee (Molea Affirm in Opp at pp 1-2; Exhs. 2-4).

The Defendant's arguments should be resolved at a trial since they tend to rebut and, if believed, may weaken the People's case. See, People v. Prunty, *supra*. That being the case, the Court declines to grant the Defendant's motion to dismiss in the interest of justice on this ground.

The Court is not required to address each statutory factor under CPL §170.40(1)(a) through (j) seriatim [See, People v. Pius, 157 Misc.2d 805, 598 N.Y.S.2d 693 (Dist. C. Suffolk Co. 1993)] but it can address the factors individually and collectively as the Court deems appropriate. People v. Gragert, *supra*. Having considered factors (a) through (j), the Court agrees with the People that the charge of Assault in the Third Degree is a serious

⁵ Even if the complainant had not sought medical treatment for his injuries sustained in the attack, this would not be dispositive of the presence or the lack thereof of a "physical injury." See, People v. Andrews, 236 A.D.2d 735, 654 N.Y.S.2d 838 (3d Dept. 1997).

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charge in that carries a potential sentence of one year in jail (PL §70.15).

The adverse impact of a dismissal upon the confidence of the public in the criminal justice system could be substantial given the fact that the assault took place on a public employee who was performing his official duties in a public venue during business hours while in the presence of senior citizens [CPL §170.40(1)(h)]. Further the adverse impact of a dismissal on the safety or welfare of the community could be substantial [CPL §170.40(1)(g)].

Given the fact that the assault was unprovoked and committed in a public venue in the presence of senior citizens-a vulnerable population, dismissing the assault charge would send the wrong message to the public regarding public safety.⁶ Since granting the Defendant's motion under the factual circumstances in this case would send the wrong message to the public, make the community less safe, and undermine the public's confidence in the criminal justice system, the motion is denied on these grounds. See, People v. S.H., 196 Misc.2d 754, 766 N.Y.S.2d 520 (Rye City Ct. 2003).

Based on a review of the factors set forth in CPL §170.40(1)(a)

⁶ The Court notes that the Defendant has not expressed remorse for his actions.

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through (j) and a review of the facts in this matter, the Court finds that the Defendant has failed to demonstrate the “existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such accusatory instrument... would constitute or result in injustice.” See, CPL §170.40(1).

Based on the foregoing, it is

ORDERED, that the Defendant’s Clayton motion to dismiss in the interest of justice pursuant to CPL §§170.30(1)(g) and 170.40 is denied;

ORDERED, that the parties are directed to appear in Court on February 23, 2017 at 9:30 a.m. for further proceedings in this matter.

This constitutes the Decision and Order of the Court.

Enter,

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

Dated: February 2, 2017

To: Kevin Kennedy, Esq.
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