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STATE OF NEW YORK : COUNTY OF TOMPKINS
CITY COURT : CITY OF ITHACA

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

DECISION

v.

Docket No. 2013-75929

NICOLE MIDDLETON,

Defendant.

Defendant Middleton moves for dismissal of the accusatory instruments charging Harassment in the Second Degree [PL §240.26(1)], Resisting Arrest [PL §205.30] and Obstructing Governmental Administration in the Second Degree [PL §195.05] upon the grounds that such are facially insufficient pursuant to CPL §100.40. The Court has reviewed Defense Counsel Veronica Frösén's affirmation dated July 10, 2013 and Assistant District Attorney's response dated, July 16, 2013.

For an information to be legally sufficient, it must contain non-hearsay allegations which establish, if true, every element of the offense charged and defendant's commission thereof (CPL §100.40). Subdivision 1 of CPL §100.40, expressly states that in order for an information to be legally sufficient:

> (b) The allegations of the factual part of the information,- together with those of any supporting depositions which may accompany it, provide reasonable cause to believe that the defendant committed the offense charged in the accusatory part of the information; and
>
> (c) Non-hearsay allegations of the factual part of the information and/or of any supporting depositions establish, if true, every element of the offense charged and the defendant`s commission thereof. (emphasis added)

In People v. Casey, the Court of Appeals explained, "[s]o long as the factual allegations of an

information give an accused notice sufficient to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, they should be given a fair and not overly restrictive or technical reading." 95 N.Y.2d 354, 360 (2000). In deciding a defense motion to dismiss an information for facial insufficiency, the Court must view the allegations set forth in the information(s) and the supporting depositions in the light most favorable to the People. *See* People v. Huhn, 34 Misc.3d 1217[A], 2012 WL 265916, at *3 (Dist. Ct. Nassau County, 2012).

The sworn to accusatory instrument charging Harassment in the Second Degree, alleges that Defendant Middleton "slapped [Officer Powers'] hand out of the way" while Powers was attempting to disperse a crowd. This harassment charge is legally sufficient. In People v. Badue, 22 Misc.3d 137[A], 2009 WL 531185, at *1-2 (App. Term. 9th and 10th Jud. Dists. 2009), a harassment charge rested on defendant Badue's alleged slapping of a police officer's hand. The Badue court held that "the question of whether defendant's alleged slapping of the police officer's hand was actually reflexive or spontaneous, rather than intentional, was an issue better left for trial." Id. Therefore, if believed by a trier of fact, the allegations charging Defendant Middleton with Harassment in the Second Degree are legally sufficient to support a conviction. It is worth noting that the Harassment accusatory is devoid of any allegation that Defendant Middleton made any statements directed at Officer Powers. However, the alleged slap by Defendant Middleton against the hand of Officer Powers could provide circumstantial evidence of Defendant's state of mind, from which a jury could infer her acts were intentional and with the intent to harass, annoy, or alarm the officer. Likewise, a jury could decide that the evidence of intent is lacking and could acquit. However, for the purposes of the instant motion, the minimum standard of legal sufficiency has been met, and

consequently Defendant's motion to dismiss the charge of Harassment in the Second Degree must be **denied**.

The defense argues that the Resisting Arrest charge is facially insufficient because the arrest was not legally authorized. Defendant argues that the pleadings are devoid of an allegation that Officer Powers possessed reasonable cause to believe that the Defendant committed an offense to warrant an arrest. Defendant implies that the arrest was not authorized because Officer Powers failed to specifically inform her that she was being placed under arrest. Penal Law §205.30 states that a person is guilty of resisting arrest when: "he intentionally prevents or attempts to prevent a police officer or peace officer from effecting an authorized arrest of himself or another person." In People v. Alejandro, the Court of Appeals held that:

> It is an essential element of the crime of resisting arrest that the arrest be authorized and, absent proof that the arresting officer had a warrant or probable cause to arrest defendant for commission of some offense, a conviction cannot stand. Thus, to comply with the statute, the factual part of the information for resisting arrest must contain [n]on-hearsay allegations [which would] establish, if true (CPL §100.40[1][c]) that the underlying arrest was authorized. 70 N.Y.2d 133, 135 (1987)

Additionally, CPL §140.10 *Arrest without a warrant; by police officer; when and where authorized*, provides:

> 1. Subject to the provisions of subdivision two, a police officer may arrest a person for:
>
> (a) Any offense when he or she has reasonable cause to believe that such person has committed such offense in his or her presence (emphasis added)

Thus, a police officer may arrest an individual if he has reasonable cause to believe that an offense has occurred within his presence. Certainly, the alleged Harassment in the Second Degree occurred within the presence of Officer Powers. In fact, Officer Powers is the alleged victim of the Harassment in the Second Degree. Charges are not to be read in isolation, and

all sworn supporting papers may be considered *together* when ruling upon a legal sufficiency motion. The Harassment in the Second Degree sworn Accusatory Instrument may be considered "together" (CPL §100.40) with the sworn Resisting Arrest information when determining Defendant's instant motion with respect to the Resisting Arrest charge. The Resisting Arrest information also states that Defendant Middleton did "swat at and strike" Officer Power's hand, which – apart from the Harassment in the Second Degree accusatory itself – sufficiently alleges that "reasonable cause" existed to arrest Middleton for the offense of Harassment in the Second Degree. Thus, the pleadings sufficiently allege that Officer Powers possessed reasonable cause to believe that an offense had been committed in his presence by Defendant Middleton for which Officer Powers was authorized to make an arrest.

Defendant also impliedly raises the argument that because it is not alleged that Defendant Middleton was specifically told or informed that she was being placed under arrest, the arrest was not authorized. It is true that the Resisting Arrest accusatory, and the other sworn documents, do not allege that Officer Powers informed Defendant Middleton that he was placing her under arrest. And, it is further worth noting that the CPL does require that an arresting police officer "must inform" [an individual of] "his authority and purpose and of the reason for such arrest unless he encounters physical resistance, flight or other factors rendering such procedure impractical." CPL §140.15(2), *cf.*, People v. Galvin, 253 A.D.2d 437 (2d Dep't. 1998) (where the defendant's knowledge of the impending arrest may be inferred from the surrounding facts and circumstances, an officer need not "specifically inform" the person that she is about to be arrested in order to establish an intent to resist arrest).

In People v. Clark, the defendant was found crawling among some desks in a school lab by the police. 241 A.D.2d 710 (3rd Dept. 1997). He then ignored the officers, who

identified themselves and demanded that the defendant surrender himself, by trying to leave the room and by resisting attempts by the officers to handcuff him. The court held that the defendant's verbal and physical refusal to submit to the authority of the arresting officers provided a legally sufficient basis from which a trier of fact could infer that the defendant knew he was being arrested and that he possessed the requisite intent for resisting such arrest. Thus, this Court cannot dismiss the Resisting Arrest charge based upon the failure to allege that Defendant Middleton was specifically informed that she was under arrest. The Defendant may certainly explore at trial, the issue of whether Officer Powers should have informed her that she was under arrest pursuant to CPL §140.15(2) and a jury instruction on the issue may be warranted, but this issue is one for the trier of fact to determine, not for the Court on a facial sufficiency motion. Reading the allegations in the light most favorable to the People, Defendant's Middleton's alleged "swat[ing]" and "strik[ing]" of Officer Powers' hand and her "pull[ing] away" from him while he attempted to place handcuffs on her sufficiently raise an issue of fact as to whether it was "impractical" for the officer to inform Defendant Middleton that she was under arrest. Further, viewing the allegations in the light most favorable to the People, having just swatted at Officer Powers, and Powers' attempt to place handcuffs on Defendant Middleton, her knowledge of the impending arrest could be inferred from the circumstances alleged. Defendant's motion to dismiss the Resisting Arrest charge must be **denied**.

Defendant Middleton, by accusatory instrument, sworn to by Officer Matthew Cowen, is also alleged to have committed the offense of Obstructing Governmental Administration in the Second Degree. In pertinent part, a person is guilty of Obstructing Governmental Administration in the Second Degree when he "intentionally ... prevents, or attempts to

prevent, a public servant from performing an official function by means of intimidation, physical force or interference, or by means of any independently unlawful act." PL §195.05. Officer Cowen alleges that he was investigating a complaint that Ms. Andrews refused to leave a local business, the Casablanca. Officer Cowen alleges that while he was at the Casablanca, Defendant Middleton "attempted to place her body between [Quiana] Andrews" and him, and that she attempted to prevent him from taking Andrews into custody. The defense moves to dismiss the accusatory instrument upon the ground that the People have failed to allege that the arrest of the third party (i.e., the "official function'), was an authorized arrest because the accusatory instrument does not allege that Ms. Andrews committed an offense in Officer Cowen's presence.

The issue then, in short, is must an Obstructing Governmental Administration in the Second Degree accusatory, if the "official function" is an arrest of a third party, allege that the arrest was authorized or lawful? The courts presently hold divergent views on this question. In People v. Cacsere, the court explained:

> [T]he words "authorized arrest" need not be used in the accusatory instrument. These words are not found in the statute and the accusatory instrument is sufficient so long as the factual allegations contained therein delineate what the obstruction and official function consist of (*Cf.*, Matter of Carlos G., 215 AD2d 165, 626 N.Y.S.2d 137). Therefore, whether or not the arrest, which constitutes the "official function" alleged to have been obstructed, was authorized need not be made part of the pleadings. Nonetheless, when an arrest forms the basis of the official function interfered with in a charge of obstructing governmental administration, the arrest must be authorized in order to convict a defendant of the charge. Therefore, a defendant may use an unauthorized arrest as a defense to the charge and it is the duty of the trier of fact to determine if the arrest was, in fact, authorized.185 Misc.2d 92, 93-94 (App. Term. 2d Dept. 2000) (emphasis added).

People v. Cacsere holds on the one hand that while the issue of whether the "official function" (the arrest) was authorized, is an essential element the People must prove, such element need

not be alleged in the accusatory. This Court does not find the reasoning of Cacsere persuasive. An essential element necessary for a conviction must also be alleged in the information in order to survive a motion to dismiss for facial insufficiency.

Neither the Court of Appeals, nor the Third Department has yet addressed this precise issue of whether an accusatory charging Obstructing Governmental Administration in the Second Degree is facially insufficient if the "official function" is an arrest of a third party, yet the lawful basis of said arrest is not specifically alleged. A recent New York City trial court chose not to follow Cacsere. In People v. Cox, in dismissing a charge of Obstructing Governmental Administration in the Second Degree premised upon the defendant interfering with the arrest of a third party, the trial court explained, "because the accusatory instrument fails to allege that the arrest of the third party with which defendant interfered was lawful, all charges here are insufficiently pleaded." 37 Misc.3d 1219[A] (NY City Crim. Ct. 2012). The Cox reasoning is sound. This Court adopts the rationale of Cox and holds that where a defendant is charged with Obstructing Governmental Administration in the Second Degree and the "official function" is an arrest of a third party, the People must specifically allege in the information that the third party's arrest was authorized or lawful. A mere conclusory allegation that the arrest was "authorized" or "lawful" will not suffice. The People must allege the specific "reasonable cause" that the officer possessed for such lawful arrest of the third party. This is not an onerous burden. The People need only mirror the same allegations that presumably are alleged against the third party in the information filed against the third party charging her with the offense for which she has been arrested.[1]

[1] Perhaps simply attaching the third-party defendant's accusatory instrument, which would be read "together" with the People's other depositions and informations, would suffice to cure this defect in the future. CPL§100.40.

Viewing the allegations in the light most favorable to the People, the Obstructing Governmental Administration in the Second Degree charge does not contain sufficient statements of sworn facts, which if true, satisfy the element that the arrest of the third party, Quiana Andrews, was authorized. Even under a liberal reading of Officer Cowen's accusatory, there is no allegation that any individual with any authority at the Casablanca requested that Andrews leave the premises. We do not know from whom Officer Cowen received the complaint about Andrews, nor is it even suggested that an owner or manager within the presence of Cowen stated that Andrews refused to leave the premises. Arguably, Cowen could have recited a present sense impression statement from the Casablanca manager/owner made within the officer's presence to Andrews directing her to leave, but the accusatory is silent on this fact. A person is guilty of Trespass when "he knowingly enters or remains unlawfully in or upon premises." PL §140.05. The People must plead that a lawful order excluding Andrews from the premises was issued, that the order was communicated to Andrews by a person with authority to make the order, and that Andrews defied that order. See, People v. Munroe, 18 Misc.3d 9 (App. Term 9th and 10th Jud. Dists. 2007). Because the people have failed to sufficiently allege that Andrews' arrest for Trespass was authorized, Defendant's motion to dismiss the Obstructing Governmental Administration in the Second Degree is **granted**.

This constitutes the Decision and Judgment of the Court entered upon notice to both parties. A notice of appeal, if applicable, must be filed within thirty (30) days of the date of this decision.

Dated: September 19, 2013

Scott A. Miller

SCOTT A. MILLER
Ithaca City Court Judge

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