People v Paula
2016 NY Slip Op 32464(U)
December 19, 2016
Supreme Court, Nassau County
Docket Number: 282N-16
Judge: Terence P. Murphy
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT - STATE OF NEW YORK
NASSAU COUNTY- CRIMINAL TERM

Trial/IAS: Part 47
Ind. No.: 282N-16
Motion No.: C-004
Motion Date: 10/13/16

Present: Hon. Terence P. Murphy, AJSC

---X

THE PEOPLE OF THE STATE OF NEW YORK

- against -

DAURY PAULA,

Defendant.

---X

Hon. Madeline Singas
District Attorney
Nassau County, Mineola, NY
By: ADA DJ Rosenbaum

Hon. Carnell Foskey
Nassau County Attorney
One West Street
Mineola, NY 11501
By: Dominick DiMaggio, Esq.

Linda Lebovitz, Esq.
Counsel for Defendant
40 Main Street
Hempstead, NY 11550

The following named papers numbered 1 to 5 have been considered by the Court on this motion submitted on October 13, 2016

papers numbered

Notice of Motion and Annexed Affirmation and exhibits	1-2
People's Affirmation in Opposition	3
County Attorney's Affirmation in Opposition	4
Defendant's Reply Affirmation	5

Defendant, a Level 1 sex offender, presently serving a sentence of six (6) years probation, moves this Court for an order permitting him to continue living at his current residence despite its proximity within 1,000 feet of an operational daycare facility. The People and the County Attorney's Office (on behalf of the Probation Department) oppose the motion on the ground that the Defendant's residence is in violation of the residential restrictions set forth as mandatory conditions of probation for certain sex offenders pursuant to Penal Law §65.10(4-a) and imposed by the Court as part of the Defendant's probationary sentence. The motion is DENIED.

Penal Law §65.10(4-a) provides in pertinent part,

> "when imposing a sentence of probation or conditional discharge upon a person convicted of an offense defined in article one hundred thirty. . . the court shall require, as a mandatory condition of such sentence, that such sentenced offender shall refrain from knowingly entering into or upon any school ground, as that term is defined in subdivision fourteen of section 220.00 of this chapter, ***or*** any other facility or institution primarily used for the care or treatment of person under the age of eighteen while one or more of such persons under the age of eighteen are present, ..." (Bold and italics added)

Penal Law §220.00(14) states,

> " '[s]chool grounds" means (a) in or on or within any building, structure, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior high, vocational, or high school, or (b) any area accessible to the public located within one thousand feet of the real property boundary line comprising any such school or any parked automobile or other parked vehicle located within one thousand feet of the real property boundary line comprising any such school. For the purposes of this section an "area accessible to the public" shall mean sidewalks, streets, parking lots, parks, playgrounds, stores and restaurants

"Courts have interpreted section 220.00(14) as creating a residency restriction prohibiting certain classes of sex offenders from living within 1,000 feet of a school (internal citations omitted). The practical effect is that any sex offender who is subject to the school grounds mandatory condition is unable to reside within 1,000 feet of a school or facility as defined in Penal Law § 220.00(14)(b)." (*People v. Diack*, 24 NY3d 674, 682 [2015]).

The question for the Court to answer is whether the 1,000 foot residency restriction set forth and referenced in the above statutes and interpreted by the *Diack* Court applies to the subject day care center.

The Court notes that the parties agree that the center in question comports with the definition of "any other facility or institution primarily used for the care of treatment of persons under the age of eighteen." The parties further agree that should the Defendant be required to

live outside a 1,000 foot radius of the subject daycare facility, he would have to remove himself from his present residence as its location of his residence is within 1,000 feet of the property line of the day care facility.

Defendant claims that the residency restriction in Penal Law §65.10(4-a) only applies to schools and not the subject day care center. It is argued that it is permissible for the Defendant to reside within 1,000 feet of the center. The Defendant urges this Court to interpret the statutory language to not apply the 1,000 foot residency restriction for the day care facility because the section contains the "disjunctive connector" word "or" within the statute thereby offering an alternative choice between school grounds (which includes the perimeter restriction) and a day care facility (which does not include any restrictive language).

The People and the County Attorney each argue similarly that access restrictions related to a day care facility do include a 1,000 foot perimeter. The essence of their argument is that, when interpreting the restrictive language of PL §65.10(4-a), entry upon the "grounds" of the subject day care facility is prohibited and not just entry into the building itself.

The Court recognizes that in enacting the legislation, it was the general overall intent of legislature to provide for sex offender residency restrictions, specifically pertaining to the protection of children. "Beginning with enactment of the Sex Offender Registration Act (SORA), the legislature has passed and the Governor has signed a series of laws regulating registered sex offenders, including the Sexual Assault Reform Act (SARA) in 2000, the Sex Offender Management and Treatment Act (SOMTA) in 2007, and chapter 568 of the Laws of 2008 (chapter 568)." *Diack* at 679. It is, however, also clear that there is ambiguity in the statutory language. Indeed, the New York State Senate Coalition issued a report, *Keeping Our Children Safe from Sex Offenders*, (Feb. 2015) (hereinafter "Report"), wherein it's stated, "[t]he loophole allowing convicted sex offenders to live near some kindergarten and Pre-K programs arises from the interaction of several separate existing laws . . . ." The report goes on to state that ". . .there

is some ambiguity as to which schools and which children are covered by these statutes." The Report further asserts "the law's clear and avowed intent to afford protection to all children . . . [and] [o]ne of the primary reasons that these restrictions are in place is to limit a sex offender's interaction with children. * * * [T]he intent of SORA and these residency requirements was to protect all children and victims of sexual predators, not just those attending programs tied to a grade school . . . ." (Report, pp.4-5). The Report characterizes the legislature's failure to explicitly include kindergartens and Pre-K programs in the legal descriptions of schools as a loophole. The Court differs from the Report's characterization of the statutory language viewing it more as an ambiguity subject to judicial interpretation rather than a loophole in the statutory language. What is ambiguous is whether the restriction from entering into or upon a facility as that term is placed and used in the statute is included in the 1,000 foot residency restriction zone.

"In construing a statute which is ambiguous the construction to be adopted is the one which will not cause objectionable results" (McKinney's Cons. Laws of N.Y., Book 1, Statutes §141). "A basic consideration in the interpretation of a statute is the general spirit and purpose underlying its enactment, and that construction is to be preferred which furthers the object, spirit and purpose of the statute." (*Id* at § 96). "Statutory words must be read in their context, and words, phrases, and sentences of a statutory section should be interpreted with reference to the scheme of the entire section." (*Id*, Comment at §97, citation omitted). The words and phrases used in a statute should be given the meaning intended by the lawmakers." (*Id* at §230). "Dictionary definitions may be useful as guide posts in determining the sense with which a word was used in a statute, but they are not controlling." (*Id* at §234). The legislature's "[i]ntent [is] determined from language used; natural and obvious meaning." (*Id* at §94).

Contrary to the defense argument, the Court finds that the statutory language is interpreted to include the proscription that the Defendant may not reside within 1,000 feet of the day care facility. The language is explicit in that the "offender shall refrain from knowingly entering into or upon" either school grounds or a facility such as the subject day care center. The

"disjunctive connector" "or" as referenced by the defense simply applies to join or link the alternative places subject to the restriction from "entering into or upon". This conclusion, though, does not end the Court's inquiry as to the interpretation of the statutory language and the legislative intent. The Court, in construing the statute can glean the legislature's intent from the language used, giving it its natural and obvious meaning.

In making its finding, the Court is drawn to the clause "entering into or upon" set out in PL §65.10(4-a). The word "into" has it general meaning to indicate the offender is prohibited from entering "to the inside or interior of" any school grounds or any other facility http://www.thefreedictionary.com/into (Accessed 12/15/16). The word "upon" is defined by the online "Free Dictionary" as a preposition meaning, "another word for on". http://www.thefreedictionary.com/upon (Accessed 12/15/16). Prepositions are used to express the relationship of a pronoun to the rest of the sentence. http://www.thefreedictionary.com/preposition (Accessed 12/15/16). Thus, in reading the statute literally, it would prohibit the offender from entering "on" any school grounds or other facility. While one can logically and physically enter "on" school grounds, one cannot logically or physically enter "on" any facility. But, one can enter "on" or "upon" the grounds of a facility, the same as one can enter "on" or "upon" the grounds of a school. Thus, the Court must depart "from literal construction and will sustain the legislative intention although it is contrary to the literal letter of the statute." (Statutes, *supra* at §111). The Court concludes that the subject statutory section requires the Defendant to refrain from entering into or upon any school grounds or any facility **grounds** such as the daycare center at issue herein. That said, the Court's next step is to determine what constitutes the grounds of a facility or institution primarily used for the care or treatment of person under the age of eighteen while one or more of such persons under the age of eighteen are present such as the subject day care center. The Court looks to the history of the subject legislation and other law and statutes for the answer.

It is clear from the history of the subject legislation that the legislature intended to secure

a safe space for all children from access by certain sex offenders. The legislature incorporated the 1,000 foot perimeter to school grounds utilizing the definition that is used to provide safe spaces to children from drug dealers. Logic, practicality, and consistency demand that the Court construe the statute to provide the same safe space to children located in facilities that, while not defined as schools, provide care and treatment to children under the age of eighteen, thereby, giving "meaning, intention, purpose or beneficial end for which the statute has been designed." (Statutes, *supra* at §111, Comment)(citation omitted). Thus, the Court interprets the language of the statute to include the 1,000 safety zone perimeter residency restriction from entry into or upon the grounds of the day care facility.

In doing so, the Court might simply apply to the subject facility, the 1,000 foot safety perimeter to the subject facility as applied to school grounds under the explicit statutory language, but the Court finds support in the law and other statutory sections involving child care centers as well.

Significantly, in *Diack, supra*, the Court of Appeals stated, as noted above, "[t]he practical effect is that any sex offender who is subject to the school grounds mandatory condition is unable to reside within 1,000 feet of a *school or facility* as defined in Penal Law §220.00(14)(b) (italics added)." While the above quote is merely *dicta* from the *Diack* court, it can be reasoned that including "facility" in the quoted sentence reflects the Court's thinking in how Penal Law §65.10(4-a) might be interpreted by the Court should this issue of a safety zone come directly before them. It is a logical and reasonable leap to conclude that the Court of Appeals would find the subject day care center a facility protected by the 1,000 foot residency restriction. Additionally, Penal Law §220.44, Criminal Sale of a controlled substance in or near school grounds, provides in subdivision (5) that,

> the grounds of a child day care or education facility" means (a) in or on or within any building, structure, athletic playing field, a playground of land contained within the real property boundary line of a public or private child day care center as such term

> is defined in paragraph (c) of subdivision one of section three hundred ninety of the social services law or nursery, pre-kindergarten or kindergarten or (b) any area accessible to the public located within one thousand feet of the real property boundary line comprising any such facility or any parked automobile or other parked vehicle located within one thousand feet of the real property boundary line comprising any such facility.

This statutory section again provides a safe zone of 1,000 feet for children but in this instance specifically identifies the premises as the grounds of a child day care or education facility to be included in the definition of school grounds (See also, PL §220.34[8]).

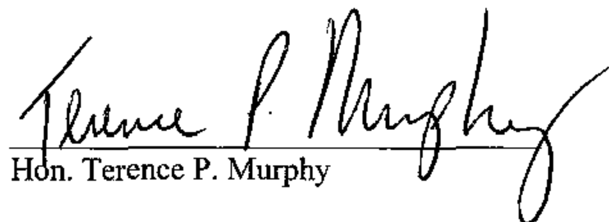
Given the general intent and spirit underlying the subject legislation was "protecting all children and families from sex offenders" (Report, p. 1), the Court's interpretation to include a safe zone of 1,000 feet for children present in the subject day care center against access to them by certain sex offenders is reasonable and furthers the object, spirit and purpose of the statute. In construing the statute in this manner, no one, including the Defendant can claim objectionable results. The statute's intent is to protect children from access by certain sex offenders such as the Defendant. With this decision, the statutory intent is fulfilled. Defendant is inconvenienced only in that he must find new living accommodations outside of the 1,000 foot restrictive area.

Accordingly, the Defendant is directed to come into compliance with all conditions of his probationary sentence imposed by the Court, including Sex Offender Conditions (3) and (9) relative to his housing and residency restrictions, within 60 days of service of a copy of said Order with notice of entry upon him.

The foregoing constitutes the decision and Order of this Court.

Dated: Mineola, NY
December 19, 2016

ENTER,



Hon. Terence P. Murphy