

People v Buckley

[*1] People v Buckley 2013 NY Slip Op 50137(U) Decided on January 10, 2013, Buffalo City Court Fiorella, J. Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on January 10, 2013

Buffalo City Court

The People of the State of New York, Plaintiff,

against

Nathaniel J. Buckley, Defendant.

2011ER004763M

Hon. Frank A. Sedita, III, Esq., Erie County District Attorney

Susan H. Sandinsky, Esq., of Counsel, for the People

Daire B. Irwin, Esq. and Michael Kuzma, Esq., Attorneys for Defendant

Joseph A. Fiorella, J.

Upon review of the Defendant's Motions to Dismiss in the furtherance of justice, sworn to the 31st day of August 2012 and the 7th day of November 2012; affidavit of Kevin

Kreutzer, sworn to the 6th day of November 2012; affidavit of Zach Jaworski, sworn the 5th day of November 2012; and numerous letters of support and other papers; all in support of Defendant's motion; the People's responding affidavit of ADA Susan H. Sadinsky, sworn to the 12th day of September 2012; the supplemental affidavit of ADA Susan H. Sadinsky, sworn to the 11th day of October 2012; the reply affidavit ADA Susan H. Sadinsky, sworn to the 27th day of November 2012, all in opposition thereto; and upon hearing oral arguments on the motion the 24th day of September 2012, and allowing for adjournments for counsel submissions.

Procedural History

Defendant was arrested on April 8, 2011, and arraigned on April 15, 2011, on the following charges: PL §§ 240.05 — Riot in the Second Degree; 240.08 — Inciting to Riot; 240.10 — Unlawful Assembly; 240.20 (1,2,3,6,7) [*2]— Disorderly Conduct; 195.05 — Obstructing Governmental Administration in the Second Degree; 205.30 — Resisting Arrest; and 140.05 — Trespass.

On May 5, 2011, the People on their own motion dismissed the following charges §§ 240.05, 240.08, 240.20 (1,2,3,7). On or about June 8, 2011, the People filed a Superseding Information, charging PL §§ 240.20(6), 195.05, 205.30, and 140.05.

The Court granted Defendant's Motion to Dismiss PL § 240.20(6) on August 9, 2011. On September 19, 2011, the Court conducted a Wade/Huntley hearing. On October 13, 2011, a city-only jury trial was scheduled for January 9, 2012, which was subsequently rescheduled. Trial was set for May 29, 2012, and then adjourned until June 4, 2012. Dual trials were held simultaneously for Defendant Nathaniel Buckley and co-Defendants Elliot Zyglis and Jason Wilson (PL § 140.05) on June 4. The jury trial as to Defendant Buckley, charging violations of PL §§ 195.05, 205.30, and 140.05 ended in a mistrial due to juror misconduct on June 14. Co-defendants Elliot Zyglis and Jason Wilson were found not guilty of Trespass after their nonjury trial before me.

A pretrial conference was held on July 10 wherein defense attorney Leigh Anderson was relieved as counsel and replaced by Daire B. Irwin and Michael Kuzma, jury selection was scheduled for October 16.

On August 31, the Defendant filed a Motion to Dismiss in the furtherance of justice, which the Court will now decide. The Court finds the following:

With regard to the charge of Obstructing Governmental Administration in the Second Degree, the Information, in pertinent part reads: on April 8, 2011, at approximately 6:30 PM, at the M & T Bank, 3 Fountain Plaza, Buffalo, New York and on the public sidewalk, adjacent to 3 Fountain Plaza, the defendant congregated in a public place and refused to comply with the lawful order of the police to disperse. NFTA responded to a report

from the bank security that several dozen protestors were outside the bank. The protestors were advised by bank security that they should leave the bank's private property. The defendant refused even after being told that a criminal complaint for trespass would be filed against him. The police told the defendant that he was on private property and would have to leave. Defendant refused to leave and begin to chant "F ** k no, we won't go" and "This is what a police state looks like." The defendant was told once again that he was trespassing and ordered to "move along." Defendant eventually moved from the bank's private property onto the public sidewalk. Police Officer Richard Russo was pursuing another protester when the Defendant stepped directly in front of the officer impeding his physical movement. The defendant was advised to move out of Officer Russo's way, but he refused to do so.

With regard to the charge of Resisting Arrest: while Officer Russo attempted to place the Defendant under arrest for Trespass, Disorderly [*3]Conduct and Obstructing Governmental Administration, the Defendant attempted to flee, struggled with the officer and broke free and began to flee. In their attempts to capture the Defendant, he engaged in a physical altercation with the officers and grabbed Russo's arm with his left hand, refused to let handcuffs be placed on him, and when apprehended did fight with the arresting officers. The Defendant had to be forcibly subdued and cuffed.

With regard to the charge of Trespass: the Defendant knowingly entered, or remained unlawfully on the premises of M & T Bank. The supporting depositions of Jacqueline M. Jackson and Adam Rees of Allied Barton Security Services, specifically state that both are "authorized to maintain order and security on the bank's premises. They are authorized to exclude members of the public from bank property."

The Defendant in his Motion to Dismiss argues: Point one, that the Defendant has spent his entire life fighting for justice on behalf of others. Point two, that he never trespassed on private property, but rather was exercising rights afforded him under the federal and state constitutions. Point three, that this case should never have been brought.

The People in opposition assert that Defendant's motion is untimely, in that this motion should have been made within 45 days after arraignment; and further, the Defendant has failed to demonstrate good cause to explain his failure to timely file the motion.

CPL § 255.20 (1),(3), provides in pertinent part:

"[A]ll pre-trial motions shall be served or filed within forty-five days after arraignment and before the commencement of trial, but the court, in the interest of justice, and for good cause shown, may, in its discretion, at any time before sentence, entertain and dispose

of the motion on the merits. Any other pre-trial motion made after the forty-five day period may be summarily denied.

Notwithstanding the provisions of subdivisions one and two hereof, the court must entertain and decide on its merits, at any-time before the end of the trial, and appropriate pretrial motion based upon grounds of which the defendant could not, with due diligence, have been previously aware, or which, for other good cause, could not reasonably have been raised within the period specified in subdivision one of this section or included within the single set of motion papers as required by subdivision two."

The Fourth Department has stated that "a trial judge . . . is authorized to entertain and determine at any time before sentence a motion to dismiss the indictment in furtherance of justice pursuant to CPL 255.20(3) (People v. [*4]Weaver, 112 AD2d 782 [4 Dept 1985]; see also People v. Newton, 30 Misc 3d 1204(A) [2010]).

The People contend that the Defendant failed to demonstrate good cause. This Court finds that this contention lacks merit. As the Defendant argues, and this Court agrees, the People failed at trial to proffer proof, beyond a reasonable doubt, sufficient to convict.

"Motions for dismissal in the interests of justice are addressed to the sound discretion of the court and must be evaluated in light of the factors enumerated in CPL 170.40(1)" (People v. Shaugnessy, 168 Misc 2d 53 [1996]). The Court must state on the record the basis for dismissal and is not required to state which of the factors, (a) through (j) is relied on (People v. Rickert, 58 NY2d 122 [1983]).

"Dismissal should be exercised sparingly and only in that rare and unusual case where it cries out for fundamental justice beyond the confines of conventional considerations" (People v. Belge, 41 NY2d 60, 62 1976]).

The People assert that there are no compelling reasons to justify a dismissal of the charges under CPL 170.30. This Court disagrees. CPL

§ 170.40 lists ten factors to be considered in concluding if a dismissal is warranted in the furtherance of justice and provides:

1. An information, or any count thereof, may be dismissed in the interest of 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 grounds 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 the 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 personnel in the investigation, arrest, and prosecution of the defendant;
- (f) the purpose and effect of imposing upon the defendant a sentence [*5]authorized for the offense;
- (g) the impact of a dismissal on the safety or welfare of the community;
- (h) the impact of 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.

2. An order dismissing an accusatory instrument specified in subdivision one in the interest of justice may be issued upon motion of the people or of the court itself as well as upon that of the defendant. Upon issuing such an order, the court must set forth its reasons therefor upon the record.

The Defendant was one of several people protesting M & T Bank's involvement in the war-related activity. Several were standing on the brick wall located on Fountain Plaza. The open-air area is designed for the public's use for numerous year-round activities. There are no enclosures to prevent public access nor is the area posted as private

property. At trial, the bank's deed was the only tangible document put into evidence to establish the People's contention that the subject area was private property belonging to the bank. There was nothing, however, on the deed that substantiated that claim. A survey of the property would have delineated the bank's property boundaries, but the People failed to produce any such survey.

Even if this area was private property, the People failed to offer any evidence that the Defendant, as a member of the public, had any knowledge as to private versus the public status of the property. For instance, in New York City at Rockefeller Center, a private street called Rockefeller Plaza is situated between the RCA Building and the sunken skating rink. In order to preserve Rockefeller Center's right of ownership of the street, each year the street is closed to all traffic, even pedestrian, for one day to assert its continuing status as private property (see Dukeminier & Krier, Property (4th Ed. 1998) p. 814, fn. 14.). Here in Buffalo, M & T Bank has made no such similar effort. For more than thirty years, the public has used Fountain Plaza with no limitation. The Bank has made no effort to assert its claim that the subject area is private property nor made any effort to so inform the public. [*6]

Therefore, it was the finding of this Court, that the People had failed to establish beyond a reasonable doubt that Fountain Plaza is private property.

As a result, the Court, as the trier-of-fact, found Wilson and Zyglis not guilty. With regard to Defendant Buckley, during the deliberation stage of his jury trial, it was learned that there had been juror misconduct and a mistrial was declared. Since this Court has determined that the People failed to meet their burden of proof beyond a reasonable doubt at the bench trial as to the charge of Trespass against his co-Defendants, it would be a travesty of justice to find that the same proof would have been sufficient to convict Defendant Buckley.

In addition, the Court is troubled by the actions of the NFTA. A crucial element of the charge of Trespass is missing here. In order to be found guilty, the People are required to prove that "a person who, regardless of his intent, remains in or upon premises which are at the time open to the public does so with license and privilege unless he defies a lawful order not to remain, personally communicated to him by the owner of such premises or another authorized person." Here, after being ordered to leave, Buckley complied and went onto the public sidewalk, thereby precluding any finding of trespass. The initial encounter between Buckley and the police officers had ended. But the bank's surveillance video shows that officers followed the Defendant onto the public sidewalk. Officer Adam Brodsky grabbed the Defendant, and when he struggled, Officer Brodsky hit the Defendant with his nightstick. Even though the Defendant had been subdued

against the wall and had stopped struggling, Officer Brodsky pepper-sprayed the Defendant in the face.

"While due process is a flexible doctrine, certain types of police action manifest a disregard for cherished principles of law and order. Upon an inquiry to determine whether due process principles have been transgressed in a particular factual frame, there is no precise line of demarcation or calibrated measuring rod with a mathematical solution. Each instance in which deprivation is asserted requires its own testing in the light of fundamental and necessarily general but pliant postulates. All components of the complained-of conduct must be scrutinized but certain aspects of the action are likely to be indicative, i.e., whether the police themselves engaged in improper conduct repugnant to a sense of justice or whether the record reveals simply a desire to obtain a conviction with no reading that the police motive is to prevent further crime or protect the populace (People v. Isaacson, 44 NY2d 511 [1978]; see also People v. Hirsch, 85 AD2d 902 [4 Dept 1981]).

This Court finds that the NFTA officers did engage in improper conduct which is repugnant to this Court's sense of justice. Officer Brodsky's motive clearly could not have been to prevent further crime or protect the populace since [*7]Defendant Buckley had left the private property and moved onto a public sidewalk free of pedestrians. It must be noted that the charges of Obstructing Governmental Administration in the Second Degree and Resisting Arrest flowed from the illegal actions of the NFTA Police after Defendant Buckley had left Fountain Plaza. Since there was no Trespass, the subsequent charges must also fall.

As to the seriousness and circumstance of the offense, prior to NFTA officers' escalation, only an alleged trespass had occurred. A mere violation, as trespass, does not rise to the level of a crime. The Defendant's goal that day was to exercise his First Amendment right to free speech, he had committed no crime.

As to the extent of harm caused by the offense, the Defendant caused no harm.

As to the evidence of guilt, as noted above, this Court found none.

As to the history, character, and condition of the Defendant, throughout Buffalo, he is known as a community activist involved in numerous organizations and causes. Prior to this court proceeding, the Defendant had one prior conviction of Petit Larceny in 2009 for which he received a conditional discharge. Due to this Judge's scheduled vacation, the parties were notified that the Court would be rendering its decision on the motion to dismiss in the interest of justice upon my return. During that interval, the Defendant was arrested on charges stemming from a vehicle and traffic violation. The People have

asked that the Court reconsider its decision based on the new arrest, as it is their contention that the Defendant now poses a risk to the safety of the community.

The new arrest does not change the facts of the case before me. Whether the Defendant now poses a risk to the community will be decided in another Court. At this stage, the Defendant has only been charged and not convicted of a crime. Our system of jurisprudence dictates innocence until proven guilty.

It is hereby the Decision and Order of this Court that the Information, charging Defendant Nathaniel Buckley with Trespass, Obstructing Governmental Administration in the Second Degree, and Resisting Arrest is dismissed in the interest of justice with prejudice.