

Westlaw

819 N.Y.S.2d 850 (Table)

Page 1

11 Misc.3d 1085(A), 819 N.Y.S.2d 850 (Table), 2006 WL 1094556 (N.Y. Dist.Ct.), 2006 N.Y. Slip Op. 50712(U)

**Unreported Disposition****(Cite as: 11 Misc.3d 1085(A), 819 N.Y.S.2d 850, 2006 WL 1094556 (N.Y. Dist.Ct.))**

(The decision of the Court is referenced in a table in the New York Supplement.)

District Court, Nassau County, New York.  
The PEOPLE of the State of New York, Plaintiff,

v.  
**Joshua WHARTON**, Defendant.  
**No. NA 2058/04.**

April 24, 2006.

Kathleen Rice, District Attorney, for plaintiff.

Massimo & Panetta, Esqs., for defendant.

SONDRA K. PARDES, J.

\*\*\*1 The defendant was arrested on or about January 20, 2004, at approximately 8:45 p.m., and charged with Resisting Arrest in violation of Penal Law 205.30; Obstruction of Governmental Administration in violation of Penal Law 195.05 and Disorderly Conduct in violation of Penal Law 240.20(3), by accusatory instruments filed with the court on January 29, 2004. The People filed succeeding accusatory instruments on or about June 21, 2004 with respect to the original charges and, in addition, filed additional charges of Disorderly Conduct in violation of Penal Law 240.20(1) and (7). A non-jury trial was held on December 12 and 13, 2005.

#### *TRIAL TESTIMONY*

Two police officers from Nassau County's 3rd precinct, Detective Charles DeCaro and Detective George Kouril testified that on January 20, 2004 they were in an unmarked police vehicle in plain clothes and received a call from Mineola High School with respect to a "male creating a disturbance" at the school. As they approached the school, they observed four young black males walking away from the school toward Jericho Turnpike. When they arrived at the school they learned that one individual had been creating a disturbance and was asked to leave. They were advised that he had

just left the school in the company of three other males. The police officers headed back in the direction of Jericho Turnpike. They traveled down Jericho Turnpike and spotted three males in a Dunkin Donuts who "matched the description" of the males at the school and appeared to be the young men they had seen earlier. They stated that they entered the Dunkin Donuts with their badges in plain view and approached two of the males who were standing by the window and started to talk to them. The officers testified that the third male, the defendant, was standing at the counter, and immediately began to shout at them. Both of the officers testified that he yelled "Fuck that--this is my hood--we don't have to talk to you Niggers". The officers stopped speaking to the two males at the window and approached the defendant. The officers stated that they asked the defendant for identification. The defendant refused this request, collected his sandwich from the counter, walked past the officers and sat down at a table. The officers followed him and continued to ask for his identification. They testified that the defendant stated "you might as well wait for me to finish eating because I ain't talking to you Niggers." The officers testified that the defendant then pushed the table toward Officer Kouril, striking him in the leg and at that point they advised the defendant that he was under arrest. The officers stated that the defendant resisted their attempt to place him under arrest and they had to "take him down to the ground" in order to handcuff him.

The People also called two Dunkin Donuts employees to testify at trial (Employees). The first employee, Swarna Wijebelu, testified with respect to the events in question. She stated that a boy, who she identified as the defendant, came into Dunkin Donuts with two friends. The defendant ordered a sandwich and his two friends stood on the side. After the defendant got his sandwich he went over to the police officers who were speaking to his friends. She stated that the defendant said to the po-

819 N.Y.S.2d 850 (Table)

11 Misc.3d 1085(A), 819 N.Y.S.2d 850 (Table), 2006 WL 1094556 (N.Y. Dist. Ct.), 2006 N.Y. Slip Op. 50712(U)

Page 2

**Unreported Disposition**

(Cite as: 11 Misc.3d 1085(A), 819 N.Y.S.2d 850, 2006 WL 1094556 (N.Y. Dist. Ct.))

lice "Why you asking questions"? Why you asking questions." In addition, she testified that the defendant asked the police "who are you" and one officer identified himself as a police officer and showed the defendant his badge. Ms. Wijebehu said that she did not hear the rest of the conversation between the defendant and the police. She stated "then the police officer came to him and put him down and he was on the floor--then he get the handcuff."

\*\*\*2 The witness testified further that the police were in plain clothes and did not display their badges when they first came into the restaurant. She stated that she continued to serve customers after the police started to talk to the defendant and she did not hear the defendant curse at the police.

Another employee, Suraya Swedly, testified for the prosecution. She stated that the defendant got a sandwich and went to a table. The police approached him, talked to him and then they took hold of him and placed handcuffs on him. She stated that she did not hear the defendant curse. She also testified that she did not see the police officers' badges until they started to handcuff the defendant.

A video surveillance tape which recorded segments of what transpired at the Dunkin Donuts on the date and times in question was admitted into evidence on consent. The video tape revealed that an individual identified as Mr. M\* \* \*, an investigator for the Nassau County District Attorney's office was present during the entire incident. The tape shows him standing next to the defendant while he was waiting for and then paying for his sandwich. It also shows Mr. M\* \* \* approaching the police officers after they have the defendant in custody. Both officers testified that Mr. M\* \* \* approached them, identified himself as an investigator for the District Attorney's office and asked them if they needed assistance.

After the close of the Peoples' case, the defendant declined to call any witnesses and rested his case. The court agreed to accept post-trial Memoranda of

Law and specifically directed the People and the Defendant to address the issue of the People's failure to call Mr. M\* \* \* to testify.

**MISSING WITNESS**

In the course of the trial the People repeatedly made reference to an individual who was present at the time of the incident, Mr. M\* \* \*. The two police officers identified Mr. M\* \* \* as an investigator for the Nassau County District Attorney's office. They each described the fact that Mr. M\* \* \* approached them immediately after they had executed the arrest of the defendant. They each stated Mr. M\* \* \* identified himself as a employee of the District Attorney and offered to assist them. Moreover, Mr. M\* \* \* appears on the surveillance video tape standing right next to the defendant while he is at the counter waiting for and paying for his sandwich. Minutes later he is shown only a few feet from where the police officers are standing in front of the seated defendant. Mr. M\* \* \* was clearly in a position to see and hear everything that transpired during the incident in question.

This court, as the sole trier of fact, was left to question the reason for the People's decision not to call Mr. M\* \* \* to testify at this trial. Accordingly, the court directed the People and the defendant to address this issue in their Post-Trial Memoranda.

"The rule ... in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable" (*People v. Gonzalez*, 68 N.Y.2d 424[1986]; *citing Graves v. United States*, 150 U.S. 118, 121). In the instant case the People acknowledge that Mr. M\* \* \* is presently employed by the District Attorney's office. Therefore the court finds that it was within their power to produce him to testify. Additionally, the evidence adduced at trial confirms that he was in an excellent position to testify as to all of the events in question.

819 N.Y.S.2d 850 (Table)

11 Misc.3d 1085(A), 819 N.Y.S.2d 850 (Table), 2006 WL 1094556 (N.Y. Dist.Ct.), 2006 N.Y. Slip Op. 50712(U)

Page 3

**Unreported Disposition**

(Cite as: 11 Misc.3d 1085(A), 819 N.Y.S.2d 850, 2006 WL 1094556 (N.Y. Dist.Ct.))

\*\*\*3 The court does not accept the People's argument that it was the defendant's obligation to raise the issue of M\* \* \* 's testimony prior to trial, to give them the opportunity to call him.. The defendant had no obligation to advise the People with respect to their trial strategy. Moreover, the issue with respect to a missing witness may not become apparent until testimony has been given at trial. (see *People v. Gonzalez*, supra at p. 428). A party requesting a missing witness charge must raise the issue "as soon as practicable" to "avoid substantial possibilities of surprise" (Id.) Given the evidence they introduced with respect to Mr. M\* \* \* 's presence at the scene, the People cannot claim surprise at being required to explain their failure to call him to testify.

The People argue that Mr. M\* \* \* 's testimony would have been cumulative. Additionally, they assert that Assistant District Attorney Lisa Flesch spoke with M\* \* \* who informed her that he was "working on an investigation where his identity could not be compromised and that he did not desire to testify in open court." However, the People did not reveal the date on which Ms. Flesch spoke to Mr. M\* \* \* about the possibility of testifying. The court notes that this case was originally scheduled for a non-jury trial on January 11, 2005. It was adjourned repeatedly, eight more times, throughout the year. The trial commenced on December 12, 2005. The courtroom was closed to the public based on the fact that the defendant was eligible for Youthful Offender status. The Assistant District Attorney who tried the case never raised the issue of Mr. M\* \* \* 's testifying prior to or during the trial. This court could have and would have taken steps to protect the witness' identity if it was found necessary at the time of trial.

Given the disparity between the testimony of the police officers and that of the two Dunkin Donuts employees and the gaps in the surveillance video tape, the court finds that Mr. M\* \* \* 's testimony would not have been cumulative. Therefore, based on all of the above, the court concludes that it must

draw an inference that Mr. M\* \* \* 's testimony, had he been called to testify, would not have been favorable to the People.

*Specific Charges*

*Disorderly Conduct*

Penal Law § 240.20 provides in pertinent part, that A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:

1. He engages in fighting or violent, tumultuous or threatening behavior; or ...
3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or ...
7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose

The People maintain that by shouting at the police and by using "obscene and abusive language" the defendant violated P.L. § 240.20 1 and 3. Both police officers testified independently that almost immediately after they entered the Dunkin Donuts the defendant began yelling at them "Fuck that, this is my hood--we don't have to talk to you Niggers." However, the officers' testimony was contradicted by the People's two other witnesses, the Employees, who stated unequivocally that they did not hear the defendant curse at the police officers. Ms. Wjebuhu testified that she heard the defendant ask "why you asking questions"?"--"who are you". Ms. Swedly stated that she didn't hear what the police and the defendant were saying to each other just before the police put him under arrest, she said she just heard a loud noise. The court finds that the Employees' testimony controverts the police officers' statements and the People's assertion that the defendant was shouting abusive and derogatory remarks. The video tape shows the defendant standing a few inches away from the Employees when he was ordering and waiting for his sandwich at the counter. He then moved to a seat a few feet from the counter where he would have been in plain sight and easy earshot of the Employees. The court concludes that the Employees would have heard the de-

819 N.Y.S.2d 850 (Table)

11 Misc.3d 1085(A), 819 N.Y.S.2d 850 (Table), 2006 WL 1094556 (N.Y. Dist.Ct.), 2006 N.Y. Slip Op. 50712(U)

Page 4

**Unreported Disposition**

(Cite as: **11 Misc.3d 1085(A), 819 N.Y.S.2d 850, 2006 WL 1094556 (N.Y. Dist.Ct.)**)

defendant if he had been shouting curses and derogatory epithets at the top of his voice.

\*\*\*4 Moreover, both Employees testified that they continued to wait on customers while the police officers were speaking to the defendant, contradicting the People's assertion that the defendant's behavior caused patrons to flee the restaurant in alarm. In fact the video tape shows two people sitting at a table in the lower part of the screen while the defendant and his friends are standing at the counter. A later scene shows the same customers continuing to sit at the same table and eat and talk, while the police officers are standing in front of the defendant whose is seated just a very few feet away from them. Both police officers testified that this section of the tape depicts the scene *immediately after* the defendant pushed the table into Officer Kouril's leg. This evidence also negates the People's assertion that the defendant's behavior caused public inconvenience or alarm. Additionally, even if the police officers found the defendant's responses to be offensive, the statements made by the defendant could not be characterized as "fighting words" and in any event, police officers are expected to "exercise a higher degree of restraint" than ordinary citizens when dealing with belligerent responses. (see, *Lewis v. City of New Orleans*, 415 U.S. 130 [1974]).

Finally, with respect to P.L. 240.20(7) the People assert that the defendant's "condition, his statements, his actions on that day proved that he created a physically hazardous condition". The court finds that there was no evidence that the defendant created a "physically hazardous condition". This section of the statute does not pertain to acts directed at an individual, but rather the situations such as throwing fireworks into a crowd or loosening noxious chemicals within a confined area such as a theater (*Seymour v. Seymour*, 56 Misc.2d 548 [Family Ct., Tioga County 1968]; or strewn garbage, nails or noxious substances in public passages (*People v. Cook*, 152 Misc.2d 311 [Nyack Just. Ct., Rockland County 1991]).

Accordingly, based on the evidence adduced at trial the court finds the defendant Not Guilty of Disorderly Conduct in violation of Penal Law § 240.20(1), (3) or (7).

*Obstructing Governmental Administration*

Penal Law § 195.05 provides that a person is guilty of Obstructing Governmental Administration when that person:

intentionally obstructs, impairs or perverts the administration of law or other governmental function or 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.

In the instant case the People assert that the defendant attempted to prevent the police from performing an investigation of an alleged trespass at Mineola High School "first by words and eventually by physical force when he pushed the table into the leg of Officer Kouril".

It is well established that "mere words alone do not constitute physical force or interference" such as to support the charge of obstructing governmental administration", (*People v. Case*, 42 N.Y.2d 98, 102 [1977]). The police officers' testimony that the defendant's shouting at them distracted them and made them turn away from questioning his friends does not satisfy the requirements of the statute. Moreover, ignoring an officer's request does not constitute "an independently unlawful act" to satisfy that element of the charge. *People v. Offen*, 96 Misc.2d 147 (N.Y.C. Crim. Court, [1978]). The defendant was within his rights to refuse to answer the police officer's questions. He had the right to "remain silent or walk or run away" (*People v. Howard*, 50 N.Y.2d 583 [1980]).

\*\*\*5 Both police officers testified independently that they made the decision to place the defendant under arrest after he pushed the table toward Officer Kouril striking him in the leg. Officer Kouril explicitly stated "now he is being placed under ar-

819 N.Y.S.2d 850 (Table)  
 11 Misc.3d 1085(A), 819 N.Y.S.2d 850 (Table), 2006 WL 1094556 (N.Y. Dist.Ct.), 2006 N.Y. Slip Op. 50712(U)  
**Unreported Disposition**  
**(Cite as: 11 Misc.3d 1085(A), 819 N.Y.S.2d 850, 2006 WL 1094556 (N.Y. Dist.Ct.))**

Page 5

rest because of pushing the table". However, Officer De Caro acknowledged that he prepared two "Court Informations" on January 20, 2004 and neither of these documents made any reference to the defendant pushing a table or striking a police officer. Officer Kouril acknowledged that he prepared an "85A or The Crime Report" and the original District Court Information charging a violation of PL § 195.05, Obstructing Governmental Administration on the night of the incident, January 20, 2004. He also acknowledged that neither of the documents he prepared made any mention of the defendant pushing a table at him or striking him.

With respect to the allegation that the defendant pushed a table into the leg of Officer Kouril, the court finds that after reviewing all the credible evidence, the People failed to prove this allegation. The surveillance video tape provides accelerated images at four second intervals, of what transpired in the Dunkin Donuts at the date and time in question. In addition the tape rotates from views of the counter area, dining area and kitchen area. The tape shows the defendant at the counter receiving and paying for his sandwich at 8:51 and 42 seconds. The next view of the defendant shows him sitting in a chair holding his sandwich with both hands in his lap at 8:52 and 2 seconds with the Police Officers standing directly in front of him. The nearest table is in back of Officer Kouril. The police testified that the officers approached the defendant at the counter because he was shouting at them. After he received his sandwich, they followed him to the dining area several feet away and asked him for his identification. He refused to identify himself and told them "you might as well wait for me to finish eating because I ain't talking to you Niggers". They testified that after two requests for identification the defendant pushed the table which struck Officer Kouril and Officer Kouril then moved in front of the table. The court finds that it is highly improbable that this series of events could have transpired in the brief time--20 seconds--that the video tape was not recording the scene.

Moreover, it was the unequivocal independent testimony of both officers that the defendant's act of pushing the table was the basis for their decision to arrest him. However, each officer acknowledged that he failed to make any reference to the defendant pushing the table or striking Officer Kouril in any of the documents they prepared in January, 2004 in connection with the defendant's arrest. The allegation with respect to the table was not presented until June 21, 2004, six months after the arrest, when the People filed superceding informations. Based on the evidence adduced at trial the court finds that the defendant did not push a table into the Police Officer's leg. Accordingly, the court finds the defendant Not Guilty of Obstruction of Governmental Administration in violation of Penal Law § 195.05.

#### RESISTING ARREST

\*\*\*6 Under our law, as relevant to the instant case, a person is guilty of Resisting Arrest when he intentionally prevents or attempts to prevent a police officer from effecting an authorized arrest of himself. (Penal Law § 205.30). An arrest is "authorized" when the police officer making the arrest has "reasonable cause to believe" that the person being arrested has committed a crime (CPLR § 140.10).

In the instant case the testimony of the police officers and the civilian witnesses confirmed that the defendant offered some physical resistance when the officers attempted to place him under arrest. However, both officers testified that it was the defendant's action, pushing the table into Officer Kouril's leg, that precipitated the arrest. For the reasons articulated above based on the testimony and the evidence adduced at trial, the court found the defendant did not push a table and strike the police officer. Therefore, the court finds that the arrest in question was not "authorized". Accordingly, inasmuch as the arrest was not authorized, the court finds the defendant Not Guilty of Resisting Arrest. (*People v. Peacock*, 68 N.Y.2d 675 § 19861).

The foregoing constitutes the Decision and Order of

819 N.Y.S.2d 850 (Table)

Page 6

11 Misc.3d 1085(A), 819 N.Y.S.2d 850 (Table), 2006 WL 1094556 (N.Y. Dist. Ct.), 2006 N.Y. Slip Op. 50712(U)

Unreported Disposition

(Cite as: 11 Misc.3d 1085(A), 819 N.Y.S.2d 850, 2006 WL 1094556 (N.Y. Dist. Ct.))

this Court.

So Ordered.

11 Misc.3d 1085(A), 819 N.Y.S.2d 850 (Table),  
2006 WL 1094556 (N.Y. Dist. Ct.), 2006 N.Y. Slip  
Op. 50712(U) Unreported Disposition

END OF DOCUMENT

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.