

**People of the State of New York
v. Michael Mc Cormack
Dockets: 2006SU51940, 2006SU50356**

DC-88 Order on Motion Docket No. 2006SU51940, 2006SU50356

DISTRICT COURT OF THE COUNTY OF SUFFOLK, 1ST DISTRICT

Present:

HON. PAUL M. HENSLEY

MOTION DATE : AUG. 7, 2008

PEOPLE OF THE STATE OF NEW YORK

AGAINST

PEO'S/PLTF'S/PET'S ATTY:

DEFT'S/RESP'S ATTY:

MICHAEL MC CORMACK

Defendant/Respondent

Upon the following papers numbered 1 to 6 read on this motion TO DISMISS

Notice of Motion and supporting papers 1, 2;

Notice of Cross Motion and supporting papers ; Answering

Affidavits and supporting papers4; Replying Affidavits

and supporting papers ; Filed papers6; Other EXH. 3; 5.

it is,

ORDERED that this motion by the Defendant to dismiss in the interest of justice the informations in the above referred to dockets is granted.

The Defendant is charged with Criminal Possession of a Weapon in the Fourth Degree in violation of PL §265.01 and with Operating a Motor Vehicle While Under the Influence of Drugs in violation of V&TL §1192(4), and moves to dismiss the informations on the ground that the prosecution of the Defendant would constitute an injustice. CPL §170.40(1) states that an information may be dismissed in the interests of justice as provided in CPL §170.30(1)(g) when "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... would constitute or result in injustice."

In the matter sub judice, the Court has reviewed the moving and answering papers, as well as considered the factors listed in CPL §170.40(1)(a)-(j). "Motions for dismissal in the interest 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" (People v. Shaughnessy, 168 Misc2d 53). Michael McCormack is an American hero. The Court notes with admiration the Defendant's lengthy service to his country and to his community, and acknowledges the many letters and documents

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concerning his outstanding service on September 11, 2001 and his injuries. Upon examination of the CPL §170.40 factors, the Court finds that the Defendant has demonstrated the existence of compelling factors, considerations or circumstances which show that his prosecution or conviction upon the accusatory instruments herein would constitute an injustice. In fact, the Congressional Record of the United States of America on September 10, 2002 reflects that on September 14, 2001, Captain (Michael) Mc Cormack was digging through the rubble of Tower One when he noticed a bright red cloth amid the debris, assisted by four men the American flag was recovered. Since its recovery, this flag has become as important symbol of that day, and has been treated with reverence wherever it has been displayed by the Port Authority of New York and New Jersey, which now has possession of the flag, a symbol of national strength and pride. Moreover, the Defendant in this action has been offered for the charge of Criminal Possession of a Weapon in the 4th Degree, an Adjournment in Contemplation of Dismissal with a forfeiture of the firearm. In other words, in six months the matter would be dismissed. That charge relates to an incident within the Defendant's home where he assisted a police investigation that occurred on September 12, 2006, much more than six months ago. Additionally, in District of Columbia v. Heller, the United States Supreme Court determined that "the Second Amendment conferred an individual the right to keep and bear arms", and that an individual can use a firearm for the traditionally lawful means of self-defense within the home (128 S.Ct. 2783, 2816 [2008]). In that decision, the Supreme Court struck down a local government ordinance totally banning gun possession, even in one's home. This Court need not reach the constitutionality of the New York Statute here except to say the weapon was in a lock-box in Defendant's home, was licensed in the state of Pennsylvania and a significant issue regarding the extent of the consent to search, the operability of the weapon and the sufficiency of the information exist.

Pursuant to CPL §170.40:

A Court may dismiss a misdemeanor complaint in furtherance of justice, pursuant to CPL §170.40(1), "when, even though there may be no basis for dismissal as a matter of law... 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

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defendant... would constitute or result in
injustice".

A dismissal in the interests of justice involves a sensitive balance between the individual and the State (People v. Clayton, 41 AD2d 204 [2nd Dept. 1973]). The "judicial discretion" to dismiss in furtherance of justice should be "exercised sparingly" and only in the rare case where there is a "compelling factor" which clearly demonstrates that continued prosecution would be an injustice (People v. M.R., 43 AD3d 1188 [2nd Dept., 2007]; People v. Sherman, 35 AD3d 568 [2nd Dept., 2006]).

A motion to dismiss in the interest of justice should not be used as a substitute for a trial or when the motion merely raises a trial defense. (People v. Rahmen, 302 AD2d 408 [2d Dept., 2003]; People v. Lagnese, 236 AD2d 629 [2nd Dept., 1997]; People v. Prunty, 101 Misc2d 163 [Crim. Ct. NY County, 1979]). Further, a weakness in the People's case is not a sufficient basis to dismiss in the interests of justice. (Id.)

Upon the failure of a Defendant to make a prima facie showing of a right to dismissal in the interests of justice, the Court may summarily deny the motion without a hearing. (CPL §§170.45 and 210.45; People v. Thomas, 108 AD2d 884 [2nd Dept., 1985]; People v. Schlessel, 104 AD2d 501 [2nd dept., 1984]).

The statute sets forth ten factors to be considered when determining a motion pursuant to CPL §170.40, as follows:

- (a) the seriousness and circumstances by 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 authorized for the offense;
- (g) the impact of dismissal upon the safety and 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

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motion;

(j) any other relevant fact indicating that a judgment of conviction would have no useful purpose.

The Court need not recite an analysis of each of the factors in reaching its determination. (People v. Gragert, 1 Misc3d 646; [Crim. Ct. NY County, 2003]; People v. Curtis, 2 Misc3d 1003(A) [Crim. Ct. NY County, 2003]). Rather, the Court must consider individually and collectively each of the factors listed in CPL §170.40 and must, where dismissal is granted, state the reasons for the record. (People v. Berrus, 1 NY3d 535 [2003]).

Given the totality of the circumstances presented, the Criminal Possession of a Weapon in the Fourth Degree charge is hereby dismissed.

As to the September 24, 2006 charge of Operating a Motor Vehicle While Under the Influence of Alcohol or Drugs, in violation of NYS V&TL §1192(4), it is significant that no alcohol was detected using a SD2 58259 field sobriety testing unit. Moreover, the toxicology report detected only Alprazolam, prescribed to Defendant as described by Dr. Charles Bagley, a board certified neurologist. This prescription was for injuries sustained by the Defendant at Ground Zero, as Defendant was a member of the rescue effort without adequate protection. He now suffers from a myriad of other medical problems. He has a 5mm nodule in his left lung along with other debris. Both of his sinus cavities are severely and permanently damaged. He also suffers from hypertension. He is diabetic, and has been permanently diagnosed with reactive airway disease and post traumatic stress disorder. Additionally, at the time of the World Trade Center Recovery, according to Dr. Jane Nicholson of Stony Brook Department of Orthopedics, "(Michael Mc Cormack) lost his four front teeth". Significantly, the Defendant was offered a reduced charge of imprudent speed in violation of V&TL §1180(a) in satisfaction of the V&TL §1192(4) charge. Pursuing the charge further would be a waste of judicial resource and would serve no legitimate purpose. A balance must be struck between the interests of the individual and the interest of society (People v. Clayton, 41 AD2d 204, 208 [2nd dept. 1973]). In fact, the Court of Appeals, in interpreting Criminal Procedure Law §170.40 has stated that, "its thrust, even to the disregard, or legal or factual merit, has been to allow the letter of the law gracefully and charitably to succumb to the spirit of justice". (People v. Reichert, 58 NY2d 122, 126

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[1983]). In that spirit, and in the spirit of President George Bush's letter of September 13, 2002 to Michael Mc Cormack, "During these extraordinary times Americans have been united in helping others and supporting our nation. I appreciate the encouragement and support of so many of our citizens. God bless you, and God bless America."

The charge V&TL §1192(4) herein is also dismissed.

New court date: _____

Decision to be published on line:

yes _____ no _____

Dated:

J. D. C.