2017 NY Slip Op 50586(U)

The People of the State of New York
v.
Jacqueline DePasquale, Defendant.

2016KN069749

Criminal Court of the City of New York, Kings County

Decided on May 1, 2017

Defense Counsel: Grover Francis, Esq.

People: Assistant District Attorney Laura Iheanachor

Kings County District Attorney's Office

Kim Petersen, J.

The defendant is charged with one count of Aggravated Harassment in the Second Degree (Penal Law § 240.30 [1] [a]) and one count of Harassment in the Second Degree (Penal Law § 240.26 [1]).

By notice of motion, supporting affirmation and memorandum of law submitted by Grover Francis, Esq., dated March 27, 2017, the defendant moves to dismiss the information as defective (CPL 170.30 [1] [a]) in that the information is facially insufficient (CPL 170.35 [1]; 100.40 [1]; 100.15). The defendant contends that the facts in the information do not support, or tend to support, the charges. In particular, the defendant argues: (1) the words of the text message, the subject of these charges, do not constitute a "true threat", and therefore, is protected speech under the First Amendment of the United States Constitution; and (2) the message is vague and lacks specificity.

By affirmation in opposition submitted by Assistant District Attorney Laura Iheanachor, dated April 12, 2017, the People maintain that the message constitutes a "true threat" of physical harm to the complainant.

(I)

Sufficiency of the Information CPL 100.40 provides that an information is sufficient on

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its face when it substantially conforms with the requirements of CPL 100.15 [1]). To be sufficient on its face, an information must contain an accusatory section, a factual section and must specify the offense charged (CPL 100.15 [1]-[3]). The factual section must contain a statement from the complainant "alleging facts of an evidentiary character supporting or tending to support the charges" (CPL 100.15 [3]; *People v Matthew P.*, 26 NY3d 322 [2015]; *People v Casey*, 95 NY2d 354, 360 [2000]). The factual section, along with any supporting depositions, must "provide *reasonable cause to believe* that the defendant committed the offenses charged." (emphasis added) (CPL 100.40 [1] [b]; *People v Dumay*, 23 NY3d 518, 522 [2014]; *see People v Smalls*, 26 NY3d 1064 [2015]; *People v Kalin*, 12 NY3d 225, 228 [2009]; *People v Dumas*, 68 NY2d 729, 731 [1986]).

> "Reasonable cause to believe that a person has committed an offense exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it" (CPL 70.10 [2]).

Finally, the factual section, along with any supporting depositions, must provide non-hearsay allegations which, if true, establish every element of the offenses and the defendant's commission of those offenses

(CPL 100.40 [1] [c], 100.15 [3]; *Kalin*, 12 NY3d at 228-229; *People v Henderson*, 92 NY2d 677, 679 [1999]). This *prima facie* case requirement does not require that the information allege facts that would prove defendant's guilt beyond a reasonable doubt (*id.*; *People v Jennings*, 69 NY2d 103, 115 [1986]). Rather, the factual allegations of fact only need to "give an accused sufficient notice to prepare a defendant from being tried twice for the same offense" (*People v Casey*, 95 NY2d 354, 360 [2000]); *People v Smalls*, 26 NY3d 1064; *People v Konieczny*, 2 NY3d 569 [2004]). The reviewing court must subject the allegations in the information to a "fair and not overly restrictive or technical reading, assume that those allegations are true, and consider all reasonable inferences that may be drawn from them" (*People v Jackson*, 18 NY3d 738, 747 [2012]; *see also Casey*, at 360; CPL 100.40, 100.15).

In the instant matter, the accusatory instrument provides in pertinent part:

"Deponent[1] is informed by Jessica Hennedy that, at the above times and at that above place [September 12, 2016, 10:36 a.m., inside 2416 Atlantic Avenue, Apt. 201, Kings County, New York], informant received a text message from the telephone number 347-349-1711, a number informant knows to be defendant's telephone number. The text message reads: 'You ain't low and watch when I find you, come outside, leave the kid.'

"Deponent is further informed by the informant that the above-described actions caused informant to fear imminent physical injury and to become alarmed and annoyed."

Thereafter, the People filed with the court and served upon defense counsel the

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supporting deposition of Jessica Hennedy.

Based upon the above text message, defendant was charged with one count of Aggravated Harassment in the Second Degree (Penal Law § 240.30 [1]) and one count of Harassment in the Second Degree (Penal Law § 240.26 [1]).

(II)

Analysis

(a)

Sufficiency of Aggravated Harassment In The Second Degree Count

Defendant contends that text message allegedly sent by the defendant is protected as free speech by the First Amendment and is not a true threat to cause physical harm to the complainant or to harm a member of her family. This Court agrees.

Aggravated Harassment in the Second Degree (Penal Law § 240.30 [1] [a]), as it relates to the instant case, is supported when a person:

> "[W]ith intent to harass another person, the actor . . . communicates, anonymously or otherwise, by telephone, by computer or any other electronic means, or by mail, or by transmitting or delivering any other form of communication, a threat to cause physical harm to, or unlawful harm to the property of, such person, or a member of such person's same family or household as defined in subdivision one of section 530.11 of the criminal procedure law, and the actor knows or reasonably should know that such communication will cause such person to reasonably fear harm to such person's physical

> safety or property, or to the physical safety or property of a member of such person's same family or household" (*id.*).

The factual allegations are that the defendant sent a text message to the informant that stated: "You ain't low and watch when I find you, come outside, leave the kid." The informant states that the text message caused her to fear imminent physical harm and to become alarmed and annoyed.

The free speech clause of the First Amendment to the United States Constitution, made applicable to the States through the Due Process clause of the Fourteenth Amendment (*Gitlow v New York*, 268 US 652 [1925]), protects most free expression of speech (*Virginia v Black*, 538 US 343, 358 [2003]). Such protection is also provided in the New York Constitution: "Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press" (NY Constitution art I, § 8). However, this protection is not unlimited (*see e.g. United States v Williams*, 553 US 285 [2008]).

> "Constitutional free speech protections 'have never been thought to give absolute protection to every individual to speak whenever or wherever he [or she] pleases, or to use any form of address in any circumstances that he [or she] chooses'; a person's right to free expression may be curtailed" (*People v Shack*, 86 NY2d 529, 535-536 [1995]; quoting *Cohen v California*, 403 US 15, 19, 21 [1971]). The issue in this case is whether the statement constitutes true threats: "true threats" are not protected (*see Watts v United States*, 394 US 705 [1969]).

A true threat statement is:

> "a statement meant to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals, and which an ordinary, reasonable recipient familiar with the context of the communications would interpret as a true threat of violence (*see Virginia v Black*, 538 US 343, 359 [2003]; *People v Orr*, 47 Misc 3d 1213[A], 2015 NY Slip Op 50568[U] [Crim Ct, NY County 2015])" (*People v Lewis*, 52 Misc 2d 134[A], 2016 NY Slip Op 51025[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2016]).

In *People v Orr* (47 Misc 3d 1213[A]) the court determined that New York courts have consistently found that there is no "true threat" in those cases where the communication either did not contain a threat of future violence at all or the seeming threat was not sufficiently specific (*id.* at *2). The *Orr* court found that there is a "true threat" where "the communication conveyed a clear and unambiguous message that the recipient could not help but understand as a threat of future injury" (*id.*).

The courts of coordinate jurisdiction have found the following statements clearly constitute a true threat:

• "*I'm gonna kill you*, *I'm gonna hurt*, I'm sorry and I love, you're a ho, a bitch, a slut, if you ever let my baby see another man *I'm gonna hurt you and no one will stop me from killing you*" (emphasis added) (*People v Mitchell*, 24 Misc 3d 1249[A], 2009 NY Slip

Op 51931[U], at *1 (Sup Ct, Bronx County 2009]);

• "[W]ho are the women [I]f I see you with another woman *I'll fuck you up*" (emphasis added) (*People v Olivio*, 6 Misc 3d 1034[A], at * 1)

• "If you try to keep my son away from me *I'm going to put a bullet in your head*" (emphasis added) (*People v Tiffany*, 186 Misc 2d 917, 918 [Crim Ct, NY County 2001]);

• *"I can have you handled," "Go kill yourself bitch" and "You're not worth the air to take the jump bitch"* (emphasis added) (*People v Orr*, 47 Misc 3d 1213[A]).

In the instant matter, the alleged single text message does not constitute a true threat to

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cause physical harm. At best, the text message amounts to an unclear message, subject to varying interpretation. While the People maintain that the text message constitutes a threat to physically harm the complainant, the text message could also be construed to mean that the sender of the communication was demanding to communicate with the complainant without the presence of the child. The People suggest that the phrase, "watch when I find you," suggests a threat of physical harm and that the Court should "infer that what the defendant planned to do when the defendant and complainant were to meet would not be appropriate for the complaining witness' child to be present and could possibly put the safety of the complaining witness' daughter in jeopardy." However, that inference would not be reasonable. The phrase, "watch when I find you" is not one that naturally tends to evoke immediate violence because it is unclear what is actually being threatened. A true threat is "serious, should reasonably have been taken to be serious, or was confirmed by other words or acts showing that it was anything more than a crude outburst (*People v Dietze*, 75 NY2d 47, 51 [1989]).

Although the complainant may have been annoyed at having received a communication from the defendant, the accusatory instrument fails to allege that defendant communicated a true threat of either immediate or future physical harm.

It is noted, in passing, that the People's reliance on *People v Tackie* (46 Misc 3d 1218[A], 2015 NY Slip Op 50117[U] [Crim Ct, Bronx County 2015]) and *People v Wilson* (59 AD3d 153 [1st Dept 2009], *affd on other grounds* 14 NY3d 895 [2010]) to support their position is misplaced.

In *Tackie*, the Criminal Court (Rodriguez-Morick, J.) granted the defendant's motion to dismiss one count of aggravated harassment on the grounds of facial insufficiency. The court found that the single equivocal statement for "Don't let me use my boxing on you" hardly constituted true threats. Nor could the statement "only reasonably be interpreted as presenting a clear and present danger of some serious substantive evil, sufficient for criminal liability to attach" (*People v Wilson*, 59 AD3d at 154, quoting *Dietze*, 75 NY2d at 51). That statement did not rise to the level of a "true" or "genuine threat" of physical harm. The sole statement attributed to defendant lacks the specificity of communications that trigger criminal liability under the statute (citing *People v Wilson*, 59 AD3d at 153).

Further, in *People v Wilson (id.)*, also cited by the People, the phrase "If [you] cared about [your] daughter's well-being, about [your] daughter's safety, you [will] drop the charges" was found to be sufficient. The court found that the phrase:

> "specifically referred to placing the safety of the complainant's daughter in jeopardy (*see*

> *People v Tiffany*, 186 Misc 2d 917, 920-921 [Crim Ct, NY County 2001]). Indeed, defendant had a motive for making the threat. She acknowledged that her daughter 'had something to lose' if the complainant pressed criminal charges, since defendant's daughter had a disciplinary record at the school. Additionally, the threat was credible because defendant, in her capacity as a school safety officer, was in a position to jeopardize the

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> well-being of complainant's daughter. Accordingly, the statement can only reasonably be interpreted as presenting a 'clear and present danger of some serious substantive evil,' sufficient for criminal liability to attach (*see People v Dietze*, 75 NY2d 47, 51 [1989])" (*Wilson*, 50 AD3d at 154).[2]

Clearly the *Wilson* statement crosses the line and constitutes a true threat. The instant statement does not.

Accordingly, the court finds that the information is facially insufficient as to the charge of Aggravated Harassment in the Second Degree. The factual allegations do not provide reasonable cause to believe that defendant committed the offense charged by establishing every required element.

(b)

Sufficiency of Harassment in the Second Degree Count

Harassment in the Second Degree, as it relates to the instant case, is supported when:

(1)The defendant threatens to strike, shove, kick or otherwise subject another person to physical contact;

(2)The defendant did so with the intent to harass, annoy or alarm the complainant (Penal Law § 240.26 [1]).

In the instant matter, the charge hinges on the same statement that serves as the basis for the aggravated harassment in the second-degree charge. As previously discussed, the Court finds that defendant's alleged text message is not a true threat. The Court also finds that the defendant did not attempt to subject the complainant to physical contact or threaten to do the same.

Accordingly, the charge of Harassment in the Second Degree must also be deemed facially insufficient (*People v Tackie*, 46 Misc 3d 1218[A]).

Conclusion

Defendant's motion to dismiss the charges of Aggravated Harassment in the Second Degree and Harassment in the Second Degree for facial insufficiency is granted without prejudice. The People have leave to file a superseding information (CPL 100.50).

This constitutes the Decision and Order of this Court. IT IS SO ORDERED.

May 1, 2017

42855 Brooklyn, NY

KIM PETERSEN, J.

Judge of the Criminal Court

Footnotes:

[1.] It is noted that the deponent is an employee of the Kings County District Attorney's Office.

[2.] The Court notes that the aggravated harassment in the second degree cases prior to 2014 pertain to a different law: "A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she: communicates with a person, anonymously or otherwise, by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm" (former law Penal Law § 240.30 [1] [a]). In 2014, the Court of Appeals found the law unconstitutionally "vague and overbroad" (*People v Golb*, 23 NY3d 455 [2014]: "'any proscription of pure speech must be sharply limited to words which, by their utterance alone, inflict injury or tend naturally to evoke immediate violence'" (*id.*, at 467, quoting *People v Dietze*, 75 NY2d 47, 52 [1989]). In response to this decision, the language of the law was amended.
