Legal Sufficiency Regarding Weapons Charges in JD Petitions

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LEGAL SUFFICIENCY OF WEAPONS CHARGES IN JUVENILE DELINQUENCY PETITIONS

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GENERAL RULES FOR LEGAL SUFFICIENCY

A JUVENILE DELINQUENCY PETITION MUST BE BASED ON NON-HEARSAY DEPOSITION(S) ALLEGING ALL ELEMENTS OF THE CRIME AND THE RESPONDENT'S COMMISSION OF SUCH.

FCA 311.1, 311.2

Matter of Detrece H., 78 N.Y.2d 107 (1991)

Must present a prima facia case-the petition must be based upon depositions which if presented as testimony at trial would allege the respondent's commission of all the elements of the crime.

A Juvenile Delinquency Petition with all non-hearsay depositions is the sole accusatory instrument in a juvenile delinquency Case.

***Matter of Detrece H.*,**
78 N.Y.2d 107 (1991)

This is in contrast to a Criminal Case, where a felony complaint is superseded by an indictment or a superior court information; or in misdemeanor cases, a complaint may be converted to an information.

A legally insufficient juvenile delinquency petition is a non-waivable jurisdictional defect.

This issue can be raised for the first time on appeal.

See Matter of Antwaine T., 23 N.Y.3d 512 (2014); Matter of Divine D., 79 A.D.3d 940 (2d Dept. 2010)

AMENDMENTS TO THE PETITION

A petition may not be amended for the purpose of curing:

(a) a failure to charge or state a crime; or

(b) legal insufficiency of the factual allegations; or

(c) a misjoinder of crimes.

FCA 311.5(2)

A defect in the petition for failure to state a factual allegation pertaining to an element of the crime cannot be cured with an amendment—i.e. such as failure to attach a non-hearsay deposition alleging operability of a firearm.

See Matter of Rodney J., 83 N.Y.2d 503 (1994); FCA 311.5(2)

- However, a petition may be amended to change date, time, and location, and similar information, as long as such amendment does not prejudice the respondent on the merits. ***FCA 311.5(1)***

- Note: Even though a petition cannot be amended to include a lesser included offense—at trial, the Court may consider such a charge.

See Matter of Dwight M., 80 N.Y.2d 792 (1992)

A better practice is to charge the lesser included offense in the petition in the first place!

FILING A SUPERSEDING PETITION

- If you realize you filed a legally insufficient petition, or you want to add additional counts, you can do so by filing a superseding petition.

See Matter of Detrece H., 78 N.Y.2d 107 (1991)

However, note that the speedy trial time runs from the initial appearance on the original (now dismissed) petition.

See Matter of Shannon FF., 189 A.D.2d 420 (3d Dept. 1993)

LEGAL SUFFICIENCY OF GUN CHARGES

OPERABILITY

Operability is an element of a gun charge, therefore this is needed to be alleged in a non-hearsay deposition. ***See Matter of Rodney J., 83 N.Y.2d 503 (1994); Matter of William B., 215 A.D.2d 377 (2d Dept. 1995)***

Operability is most often alleged in a non-hearsay deposition by the officer who test-fired the gun. It must be made crystal clear on the face of the deposition that the person who test fired the gun is the deponent.

In cases where the gun was fired in the commission of the crime, a non-hearsay deposition by a witness describing the gun being fired is legally sufficient to support operability. ***See People v. Gillespie, 205 A.D.3d 1212 (3d Dept. 2022)***

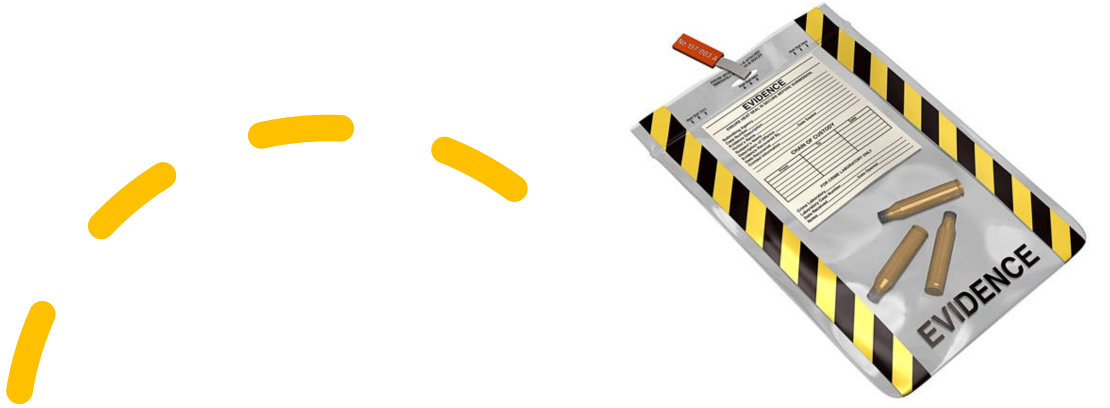
Note: If the respondent is being charged with possesing a loaded firearm, then a non-hearsay deposition attesting to the operability of the ammunition being test fired must also be attached.

Operability exception

- If a gun was not operable but the circumstances show an intent to use it and/or respondent believed it to be operable, then a charge of Attempted Criminal Possession of a Weapon 2nd degree for a loaded firearm suffices.

See Matter of Lavar D., 90 N.Y.2d 963 (1997)

> "The allegations that respondent carried a weapon on a public street and that the weapon was loaded, are sufficient to support the inference that the respondent believed and intended the firearm to be operable."
>
> ***Matter of Lavar D., at 965 (1997)***



- Non-hearsay deposition(s) should contain the case number, evidence number, and/or serial number (if any) of the firearm to show that the gun that was test fired is the same one possessed by respondent.

  See Matter of Jonathan T., 247 A.D.2d 482 (2d Dept. 1998) (similarly applied in possession of drugs)

- A perfect chain of custody is not required, but one must be able to reasonably infer that the same gun that was test fired to be operable is the same gun that the respondent is charged with possessing.

- Need to be able to distinguish each gun if more than one gun was involved in an incident.

CHAIN OF CUSTODY

EXCEPTIONS OR EXEMPTIONS

- Criminal Possession of a Weapon 2nd Degree, PL 265.03(3) specifically states that there is an exception if such place for possession of a loaded firearm was in a home or business. Therefore, if you are charging a respondent under this subdivision, you must plead in the petition itself that the respondent possessed it specifically outside of his home or place of business. ***See People v. Chata, 8 A.D.3d 674 (2d Dept. 2004)***

- "If the defining statute contains an exception, the indictment must allege that the crime is not within the exception. But when the exception is found outside of the statute, the exception is a matter for the defendant to raise in defense, under either a general issue or an affirmative defense." ***See People v. Webb., 172 A.D.3d 920 (2d Dept. 2019) quoting People v. Kohut, 30 N.Y.2d 183, 187 (1972)***

- There is a long list of exceptions contained in PL 265.00 (22) and 265.20 (Exemptions) outside of the specific penal code provisions for 265.03 and 265.02. It does not matter whether it's referred to as an Exception or an Exemption, if it is outside of the statute, you do not have to plead it. The issue must be raised by defense at trial.

AUTOMOBILE PRESUMPTION

Penal Law 265.15 applies a presumption of possession of guns in a motor vehicle, with certain exceptions as to who can be charged.

It generally provides that the presence in an automobile of any firearm and certain other weapons is presumptive evidence of its possession by all persons in the motor vehicle.

The automobile presumption is a permissible inference, therefore the Court can accept or reject such inference.

People v. Boyd, 153 A.D.3d 1608 (4th Dept. 2017)

CRIMINAL POSSESSION OF A WEAPON IN THE 2ND DEGREE (ON SCHOOL GROUNDS)

In order for the petition to be legally sufficient, a non-hearsay deposition must be attached to the petition to show that the possession was on school grounds

- Criminal Possession of a Weapon in the 2nd degree, PL 265.03 committed by a person while 14 or 15, "on school grounds," constitutes a juvenile offender ***(PL 10.00(18)*** crime, and becomes a designated felony if transferred to Family Court. ***FCA 301.2(8).***

- If the respondent is 16 or 17 yoa when such possession occurred, they are charged as an adolescent offender. If such case is then removed to Family Court for prosecution, then it becomes a designated felony, if respondent possessed the gun on school grounds.

- PL 10.00(18)(2) and FCA 301.2(8) effectively make "school grounds" an element of the crime for purposes of charging CPW 2nd Degree as a JO/DF crime. The allegation that possession occurred on school grounds must be proven by the prosecution at trial. ***See People v. Raul A., 215 A.D.3d 500 (1st Dept 2023).***

- The definition of school grounds for purposes of this section is Penal Law Section 220.00(14), which includes not only the school building or property surrounding the school itself, but also any area, accessible to the public, located within 1000 feet of the real property boundary line, as well as sidewalks, stores, restaurants, and motor vehicles within that boundary line.

- To have the case treated as a Designated Felony, the petition must be prominently marked as such, otherwise you lose the ability to prosecute the matter as a Designated Felony. ***See FCA 311.1(5); Matter of Warren W., 216 A.D.2d 225(1st Dept. 1995); Matter of Vladimir M., 206 A.D.2d 482 (2d Dept. 1994)***

However, compare CPW 2nd with:

Criminal Possession of a Weapon on School Grounds, PL 265.01-a:

- The expanded definition of school grounds in PL 220.00 does not apply here. The ordinary definition of school grounds applies.

See People v. Wright, 42 Misc.3d 428 (Kings County Supreme Court 2013)

- Therefore, when referring to school grounds on this charge, the petition must specifically allege that the possession was on school grounds (i.e. in the building or surrounding property or school bus).

UNLAWFUL POSSESSION OF A WEAPON BY PERSONS UNDER 16 (AIR-GUN, SPRING-GUN, BB GUN)

- Penal Law 265.05 makes it a juvenile delinquency adjudication for a person under the age of 16 "to possess any air-gun, spring-gun, or other instrument or weapon in which the propelling force is a spring or air, or any gun or instrument or weapon in which any loaded or blank cartridges may be used, or any loaded or blank cartridges or ammunition therefor…"
- A possession of a CO2 gun by a person under 16yoa is also prohibited pursuant to 265.05. ***See Matter of Cesar P., 230 A.D.2d 61 (2nd Dept. 1997)***
- Even in these cases, operability is an element of the crime, and test-firing is required of the weapon and/or the ammunition. The test-firing should indicate the means of how the weapon is fired, i.e. spring, air, CO2.
- Note: There is an exception for possessing a rifle or shotgun or ammunition by the holder of a hunting license or permit, so you want to be sure to state that the possession is not permissible under any such licenses or permits.

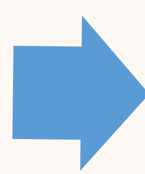
Gel Blasters? Paint ball guns?

YES….powered by spring or air! Needs to be specified in the test-firing.

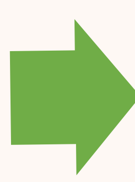
AGE OF YOUTH FOR PENAL LAW 265.05

The age of the youth is an element of the crime, so a non-hearsay deposition is needed to show that the respondent is under the age of 16.

See Matter of Matthew W.,
48 A.D.3d 587 (2d Dept. 2008)



This deposition can be by signed by an officer who asked the respondent their age, or can be a deposition by an immediate family member.



However, a cousin is not deemed to be an immediate family member for purposes of verifying the respondent's age.

See Matter of Diamond J.,
134 A.D.3d 1117 (2nd Dept. 2015)

UNLAWFUL POSSESSION OF A WEAPON ON SCHOOL GROUNDS PL 265.06

- It is unlawful for any person age 16 or older to knowingly possess any air-gun, spring-gun, or other instrument in which the propelling force is a spring, air, piston or CO2 cartridge in or upon a building or grounds, used for educational purposes, or any school, college or university, without the written authorization of such educational institution.
- Violation level offense, normally prosecuted through the Local Criminal Court.
- The County Attorney's Office would potentially get this charge if it's part of a misdemeanor juvenile delinquency case and/or part of a felony case that was removed to Family Court.

PROHIBITED USE OF WEAPONS
PL 265.35 (3)

Under this section, it is classified as a class A misdemeanor and makes it unlawful for a person to discharge any firearm, air-gun, or other weapon, in a public place, or in any place where there is any person to be endangered nearby.

This would include a bb-gun or air-soft pistol.

In addition, this section criminalizes intentionally, without malice, pointing or aiming a firearm or any other gun, the propelling force of which is gunpowder, at another person even with no injury, as well as injuring another person by discharge of a firearm by intentionally pointing it at another person, but without malice. This would not include a bb gun or air-soft pistol.

Compare to Menacing 2nd degree, PL 120.14(1), whereby a respondent is charged with aiming or pointing a gun at another person with intent for them to fear injury of some sort, thereby needing intent and malice.

LEGAL SUFFICIENCY OF KNIFE CHARGES

CRIMINAL POSSESSION OF A WEAPON FOURTH DEGREE 265.01 (1) AND (2) criminalizes various types of knives and other weapons.

UPW 265.05 makes it an act of delinquency to possess a "dangerous knife" by a person under the age of 16.

See Matter of Jamie D., 59 N.Y.2d 589 (1983)

Non-hearsay depositions are needed describing the type of knife in detail, and the circumstances surrounding its possession.

DANGEROUS KNIVES BY INTENT

Under PL 265.05, a dangerous knife is a knife designed to be a weapon, such as a switchblade or a dagger, or il can be a utilitarian knife that under the circumstances is intended to be a weapon.

See Matter of Jamie D., 59 N.Y.2d 589 (1983)

The npossession of a machete, with a 14-inch blade, by a person under the age of 16, late at night, in the street in Brooklyn, is legally sufficient for a charge of unlawful possession of a weapon by persons under 16 pursuant to 265.05.

Matter of Antwaine T., 23 N.Y.3d 512 (2014)

The allegations in the petition that the respondent possessed a straight razor (i.e. boxcutter razor) while on school grounds is legally sufficient to charge as UPW 265.05.

See Matter of Gilberto A., 237 A.D.2d 285 (2d Dept. 1997)

The possession of a boxcutter razor or straight razor without unlawful intent is not prohibited under CPW 4th—

However, the mere possession of a boxcutter razor or straight razor may be prohibited by a person under the age of 16 pursuant to PL 265.05 depending upon the circumstances surrounding the possession.

See Matter of Patrick L., 244 A.D. 244 (1st Dept.) (Note: this possession did not take place on school grounds)

PL 265.05 does not contain a requirement that there is intent to use the item unlawfully against another person, while 265.01(2) does. ***See Matter of Patrick L., 244 A.D. 244 (1st Dept.)***

LEGAL SUFFICIENCY OF OTHER DANGEROUS INSTRUMENTS

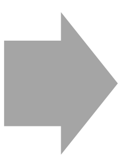
DANGEROUS INSTRUMENT as defined by Penal Law Section 10.00(13), is "any instrument, article or substance, including a "vehicle" as that term is defined in this section, which, under the circumstances under which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury".

FOOTWEAR

Footwear used to kick the victim can be charged as a dangerous instrument, even if the complainant cannot articulate the specific type of footwear used.

See Matter of Jason J., 187 A.D.2d 652 (2d Dept. 1992)

This can be charged as an Assault, but the deposition by the complainant needs to articulate that they were kicked using footwear and that there was injury to the area where they were kicked.



Remember, it is important to know that when you have an Assault 2nd finding for a person under the age of 18, it becomes a 2-strike predicate for a designated felony. FCA 301.2(8)

People v. Ray, 273 A.D.2d 611 (3d Dept. 2000): Work boots could be dangerous instrument as used to kick victim for purposes of attempted second-degree assault charge.

MORE DANGEROUS INSTRUMENTS…

CELL PHONE

A cell phone that the defendant used to strike the victim is legally sufficient as a charge for dangerous instrument.

See People v. Delgado,
214 A.D.3d 542 (1st Dept. 2023)

UNOPENED CAN OF SODA

Legally sufficiency to show that an unopened can of soda is a dangerous instrument.

In re Joy T.,
106 A.D.3d 456 (1st Dept. 2013)

SIDEWALK

Evidence that defendant was seen atop victim, holding victim's head with both hands and striking it against sidewalk demonstrated that sidewalk was used as a "dangerous instrument".

See People v. Galvin, 65 N.Y.2d 761 (1985)

FLOOR AND COUNTERTOP

Using the kitchen floor and countertop as a dangerous instrument by repeatedly forcing the victim's head against each surface intending to cause physical injury.

See People v. Bonney,
69 A.D. 3d 1116 (3d Dept. 2010)

WIRE HANDLE OF FLY SWATTER

Wire handle of flyswatter, which was used to strike five-year-old child on the back, over her clothing, was capable of causing serious physical injury.

People v. Wade
232 A.D.2d 290 (1st Dept. 1996)

THANK YOU!

QUESTIONS?

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CASELAW

COURT OF APPEALS

People v. Cavines, 70 N.Y.2d 882 (1987)
People v. Rodney J., 83 N.Y.2d 503 (1994)
Matter of Detrece H., 78 N.Y.2d 107 (1991)
Matter of Lavar D., 90 N.Y.2d 963 (1997)
Matter of Antwaine T., 23 N.Y.3d 512 (2014)
Matter of Jamie D., 59 N.Y.2d 589 (1983)
People v. Galindo, 23 N.Y.3d 719 (2014) (For reference, not attached)
People v. Rodriguez, 68 N.Y.2d 674 (1986) (For reference, not attached)
People v. Wallace., 31 N.Y.3d 503 (2018) (For reference, not attached)

1st DEPARTMENT

Matter of Randy S., 194 A.D.2d 474 (1st Dept. 1993)
People v. Hancock, 71 Misc. 3d 133(A) (Supreme Court Appellate Term 1st Dept. 2021)
People v. Raul A., 215 A.D.3d 500 (1st Dept. 2023)
In re Patrick L., 244 A.D.2d 244 (1st Dept. 1997)
Matter of Henry J., 222 A.D.2d 339 (1st Dept. 1995) (For reference, not attached)
In re Jonathan F., 290 A.D.2d 385 (1st Dept. 2002) (For reference, not attached)
People v. Campos, 93 A.D.3d 581 (1st Dept 2012) (For reference, not attached)

2nd DEPARTMENT

Matter of Jason J., 187 A.D.2d 652 (2nd Dept. 1992)
Matter of William B., 215 A.D.2d 377 (2nd Dept. 1995)
Matter of Cesar P., 230 A.D.2d 61 (2nd Dept. 1997)
Matter of Gilberto A., 237 A.D.2d 285 (2nd Dept 1997)
Matter of Jonathan T., 247 A.D.2d 482 (2nd Dept. 1998)
People v. Chata, 8 A.D.3d 674 (2nd Dept. 2004)
Matter of Divine D., 79 A.D.3d 940 (2nd Dept. 2010)
Matter of Diamond J., 134 A.D.3d 1117 (2nd Dept. 2015)
People v. Webb, 172 A.D.3d 920 (2nd Dept. 2019)
People v. Holloway, 210 A.D.3d 1007 (2nd Dept 2022)
Matter of Javen C., 57 A.D.3d 537 (2nd Dept. 2008) (For reference, not attached)
Matter of Carolina P., 83 A.D.3d 847 (2nd Dept. 2011) (For reference, not attached)
Matter of Ricki I., 157 A.D.3d 792 (2nd Dept. 2018) (For reference, not attached)
People v. Amos, 198 A.D.3d 797 (2nd Dept. 2021) (For reference, not attached)

3rd DEPARTMENT

People v. Gillespie, 205 A.D.3d 1212 (3d Dept. 2022)
Matter of Shannon FF., 189 A.D.2d 420 (3d Dept. 1993)

4th DEPARTMENT

People v. Boyd, 153 A.D.3d 1608 (4th Dept. 2017)
People v. Graham., 192 A.D.3d 1489 (4th Dept. 2021)
People v. Torres, 211 A.D.3d 1571 (4th Dept. 2022) (For reference, not attached)People v. Washington, 173 A.D.3d 1644 (4th Dept. 2019) (For reference, not attached)

KINGS COUNTY SUPREME COURT

People v. Wright, 42 Misc.3d 428 (Kings County Supreme Court 2013)
People v. Matos, 73 Misc.3d 1167 (Kings County Supreme Court 2021)

STATUTES FOR REFERENCE (NOT ATTACHED)

Criminal Possession of a Weapon 4th Degree, NYS Penal Law 265.01

Criminal Possession of a Weapon 3rd Degree, NYS Penal Law 265.02

Criminal Possession of a Weapon 2nd Degree, NYS Penal Law 265.03

Criminal Possession of a Weapon 1st Degree, NYS Penal Law 265.04

Presumptions of Possession, Unlawful Intent, and Defacement, NYS Penal Law 265.15

Exemptions, NYS Penal Law 265.20 (NOT ATTACHED)

Criminal Possession of a Firearm, NYS Penal Law 265.01-b

Criminal Possession of a Weapon on School Grounds, NYS Penal Law 265.01-a

Unlawful Possession of a Weapon by Persons Under 16 yoa, NYS Penal Law 265.05

Unlawful Possession of a Weapon upon School Grounds, NYS Penal Law 265.06

Prohibited Use of Weapons, NYS Penal Law 265.35

Family Court Act Section 311.1: The petition; definition and contents

Family Court Act Section 311.2: Sufficiency of Petition

Family Court Act Section 311.5: Amendment of the Petition

COURT OF APPEALS

70 N.Y.2d 882, 518 N.E.2d 1170, 524 N.Y.S.2d 178

The People of the State of New York, Respondent,

v.

Felton Cavines, Appellant.

Court of Appeals of New York
332
Argued November 13, 1987;
decided December 15, 1987

CITE TITLE AS: People v Cavines

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered April 27, 1987, which affirmed a judgment of the Supreme Court (Philip J. Chetta, J.), rendered in Queens County upon a verdict convicting defendant of criminal possession of a weapon in the second degree.

People v Cavines, 129 AD2d 805, affirmed.

HEADNOTES

Crimes
Possession of Weapon
Criminal Possession of Weapon in Second Degree--Operability of Firearm

(1) In a criminal prosecution for possession of a loaded firearm, wherein defendant contended that the prosecution failed to sustain its burden of proving that the firearm was operable when he possessed it, an order of the Appellate Division, which affirmed a judgment convicting defendant of criminal possession of a weapon in the second degree (Penal Law § 265.03), should be affirmed. Viewing the evidence most favorably for the prosecution, the evidence was sufficient to support the jury's finding that the gun and ammunition were operable, since the jury was entitled to conclude from the evidence that a police officer responding to the crime scene did not materially alter the gun when he removed a jammed bullet, and that the gun could readily have discharged. Moreover, the fact that the gun malfunctioned, standing alone, does not defeat the overwhelming inference that immediately prior to the pulling of the trigger, the gun was capable of discharging the ammunition, particularly in view of the uncontradicted evidence that when subsequently test-fired, the gun and the bullets were found to be operable.

APPEARANCES OF COUNSEL

Harold V. Ferguson, Jr., and *Philip L. Weinstein* for appellant.
***883**
John J. Santucci, District Attorney (Alexander P. Schlinger of counsel), for respondent.

OPINION OF THE COURT

The order of the Appellate Division should be affirmed.

On December 12, 1982, defendant pointed a gun at Ron Humphrey. Humphrey threw himself to the ground, put his hands over his face, and heard two clicks, but the gun did not fire. Humphrey fled. After defendant and the gun were seized, Humphrey identified both. The gun was examined and found to be loaded with live ammunition but jammed. A member of the Police Emergency Services Unit (ESU) examined the gun and determined that the bullet had to be removed because "it's possible the thing could go off again." He dismantled the gun and removed the jammed round of ammunition; the gun was reassembled. The officer observed that the bullet had a small dent, indicating that it had been struck by the gun's firing pin when the trigger was pulled. A member of the Police Ballistics Squad then test-fired the gun and the ammunition; both worked. Following a jury trial, defendant was acquitted of attempted murder and criminal use of a firearm, but convicted of criminal possession of a weapon in the second degree (Penal Law § 265.03). On appeal, defendant contends that his conviction should be reversed on the ground that the prosecution failed to sustain its burden of proving that the firearm was operable when he possessed it, and the People urge that they satisfied this burden.

Viewing the evidence most favorably for the prosecution, the evidence was sufficient to support the jury's finding that the gun and the ammunition were operable. The jury was entitled to conclude from the evidence that the ESU officer did not materially alter the gun when he removed the jammed bullet, and that the gun could readily have discharged. Moreover,

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the fact that the gun malfunctioned, standing alone, does not defeat the overwhelming inference that immediately prior to the pulling of the trigger, the gun was capable of discharging the ammunition, particularly in view of the uncontradicted evidence that when subsequently test-fired, the gun and the bullets were found to be operable *(compare, People v Shaffer,* 66 NY2d 663, 664 [evidence of operability insufficient where gun misfired and ammunition was not test-fired to establish that it was live]). ***884**

Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone, Hancock, Jr., and Bellacosa concur.

Order affirmed in a memorandum.

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83 N.Y.2d 503, 633 N.E.2d 1089, 611 N.Y.S.2d 485

In the Matter of Rodney J., a Person Alleged to be a Juvenile Delinquent, Respondent.

Court of Appeals of New York
1 NO. 70
Argued March 17, 1994;
Decided April 28, 1994

CITE TITLE AS: Matter of Rodney J.

SUMMARY

Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that Court, entered June 8, 1993, which (1) reversed an order of disposition of the Family Court, Bronx County (Rhoda J. Cohen, J.), adjudicating respondent a juvenile delinquent and placing respondent with the Division for Youth for 18 months, entered upon an admission by respondent that he committed an act which, if committed by an adult, would constitute the crime of criminal possession of a weapon in the third degree, and (2) dismissed the petition.

Matter of Rodney J., 194 AD2d 342, affirmed.

HEADNOTES

Infants
Juvenile Delinquents
Facial Sufficiency of Petition--Nonhearsay Allegations--Ballistics Report Concerning Operability of Weapon

(1) A juvenile delinquency petition charging respondent with various weapon possession offenses, and its supporting documents, were jurisdictionally defective on their face insofar as they failed to contain a nonhearsay allegation of the weapon's operability where the deposition of the police officer who observed respondent in possession of the weapon was silent regarding that element and the annexed ballistics report, although attesting to the gun's operability, purports only to be a copy of the original report, and gives no indication that it was signed by the person who tested the gun and prepared the original report. Although the signature of a detective appears on the report, he only certified that the report is an accurate copy of the original report, and did not actually attest to any personal knowledge of the gun's operability. However likely it may be that the detective was the technician who tested the gun and prepared the original report, the fact remains that the nonhearsay nature of the annexed report is not clear on its face. Because the test of the sufficiency of the petition is a facial one, any reliance by the presentment agency on its oral representation to Family Court that the detective prepared the original report is misplaced.

Infants
Juvenile Delinquents
Facial Sufficiency of Petition--Amendment to Remedy Defect as to Nonhearsay Form of Allegations Precluded

(2) A juvenile delinquency petition charging respondent with various weapon possession offenses that is jurisdictionally defective on its face for failure to contain a nonhearsay allegation of the weapon's operability cannot be cured by amendment. Family Court Act § 311.5 (2) (b), which bars ***504** amendment of the petition for the purpose of curing legal insufficiency of the factual allegations, extends to a petition's legal insufficiency for failure to contain allegations in the requisite nonhearsay form, and thus amendment to remedy such a defect is precluded by the statute. Moreover, the deficiency here cannot be characterized as a latent one so as to avoid mandatory dismissal of the petition.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children, §§ 40-42; Pleadings, §§ 68-70, 348.

Carmody-Wait 2d, General Rules of Pleading § 27:55.

Family Ct Act §311.5 (2) (b).

NY Jur 2d, Evidence and Witnesses, §§468, 470; Pleading, §§43, 46, 59-61, 64.

ANNOTATION REFERENCES

See ALR Index under Ballistics; Hearsay; Juvenile Courts and Delinquent Children; Petitions; Reports; Weapons and Firearms.

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POINTS OF COUNSEL

Paul A. Crotty, Corporation Counsel of New York City (*Elizabeth I. Freedman* and *Francis F. Caputo* of counsel), for appellant.

I. The petition and annexed supporting documents properly alleged, in nonhearsay form, every element of the crime of criminal possession of a weapon in the third degree. The certified ballistics report annexed to the petition, attesting to the operability of the weapon and ammunition in nonhearsay form, fully comported with Family Court Act requirements governing facial sufficiency of the petition, and did not render the petition jurisdictionally defective. (*Matter of Philip M.*, 179 AD2d 1034; *People v Sullivan*, 56 NY2d 378; *People v Bromley*, 85 Misc 2d 988; *Matter of Alex B.*, 189 AD2d 813; *Johnson v Lutz*, 253 NY 124; *Matter of Gregory M.*, 184 AD2d 252, 81 NY2d 708; *Matter of Ronald B.*, 61 AD2d 204; *Matter of Rodney J.*, 108 AD2d 307.)

II. Assuming any defect existed, such defect was purely technical rather than jurisdictional, and did not render the petition fatally deficient or mandate dismissal, since any such defect could have been adequately cured by amendment, if necessary. (*Matter of Philip M.*, 179 AD2d 1034; *Matter of Edward B.*, 80 NY2d 458; *Matter of Bruce T.*, 190 AD2d 805; ***505** *People v DeLeon*, 157 Misc 2d 62; *Matter of Christopher B.*, 192 AD2d 180.)

III. In the absence of a timely objection relating to the ballistics report being "unsigned" by the maker of the report, respondent in effect abandoned this argument. As the claimed defect was not apparent from the face of the accusatory instrument, it was not the type of nonwaivable jurisdictional flaw that may be considered even in the absence of a timely objection. (*Matter of Edward B.*, 80 NY2d 458; *Drexel Burnham Lambert v Ruebsamen*, 171 AD2d 457; *Shepherd v Whispering Pines*, 188 AD2d 786; *Morey v Sings*, 174 AD2d 870; *Davis v Sapa*, 107 AD2d 1005; *VDR Realty Corp. v Mintz*, 167 AD2d 986.)

Marcia Egger, New York City, *Lenore Gittis* and *Arlene Libowitz* for respondent.

The Court below properly found the petition charging criminal possession of a weapon to be jurisdictionally defective for failure to make out a prima facie case where (a) the ballistics report needed to establish the operability of the weapon was hearsay because it was not signed by its maker and (b) the ballistics report was not sworn to and therefore was not the equivalent of sworn testimony. (*Matter of David T.*, 75 NY2d 927; *Matter of Jahron S.*, 79 NY2d 632; *Matter of Detrece H.*, 78 NY2d 107; *People v Potwora*, 44 AD2d 207; *People v Cavines*, 70 NY2d 882; *People v Arroyo*, 188 AD2d 655; *People v Wesley*, 168 AD2d 940; *People v Lugo*, 161 AD2d 122, 76 NY2d 860; *People v Wearing*, 126 AD2d 586; *Matter of Alex B.*, 189 AD2d 813.)

OPINION OF THE COURT

Levine, J.

A juvenile delinquency petition was filed against respondent in Family Court, Bronx County, charging him with criminal possession of a weapon in the second degree, two counts of criminal possession of a weapon in the third degree and the unlawful possession of a weapon by a person under 16 years of age. A supporting deposition was attached to the petition, sworn to by Police Officer John Lowe, stating that he had observed respondent in possession of a .22 caliber gun, which upon inspection proved to be loaded. Officer Lowe's deposition contained no allegations regarding the operability of the weapon. Also affixed to the petition was a copy of a police laboratory analysis report, setting forth the results of a ballistics examination of the weapon and stating that the "GUN AND AMMO TESTED ARE OPERABLE". The report did not contain the signature of any person expressly identified as the tester of ***506** the weapon. However, it was signed by a Detective Robert Cotter, identified as a "CHEMIST/TECHNICIAN" in the police laboratory, *below* a certification which stated:

"I hereby certify that the foregoing report is a true and full copy of the original report. False statements made herein are punishable as a Class 'A' misdemeanor pursuant to section 210.45 of the Penal Law."

Respondent moved to dismiss the petition as jurisdictionally defective due to the absence of nonhearsay allegations establishing every element of the crimes charged, specifically the operability of the gun. Family Court denied the motion, having elicited from the presentment agency a representation that Detective Cotter was in fact the person who prepared the original ballistics report. Respondent ultimately entered an admission to conduct constituting criminal possession of a weapon in the third degree and a final order of disposition was entered.

Respondent appealed and the Appellate Division reversed and dismissed the petition, with one Justice dissenting (194 AD2d 342). The Court held that the petition and its supporting documents were facially deficient because they lacked a nonhearsay allegation that the weapon was operable. The Appellate Division granted the presentment agency leave to appeal to this Court and we now affirm.

A juvenile delinquency petition is "the sole instrument for the commencement, prosecution, and adjudication of the juvenile delinquency proceeding" (*Matter of Detrece H.*, 78 NY2d 107, 110) and we have cautioned that a careful assessment of the petition "is particularly acute at the outset of a juvenile delinquency proceeding, where there is no independent Grand Jury-like body to review the evidence and the petition is often the sole 'instrument upon which the [accused] is prosecuted' " (*Matter of Edward B.*, 80 NY2d 458, 464-465 [quoting *People v Alejandro*, 70 NY2d 133, 137]).

Family Court Act § 311.1 sets forth the definition and required contents of a petition, and provides in part that it must include "a plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of the crime charged and the respondent's commission thereof" (Family Ct Act § 311.1 [3] [h]). Family Court Act § 311.2 addresses the sufficiency ***507** of the petition and provides in pertinent part that it is facially sufficient when, *inter alia*, "non-hearsay allegations of the factual part of the petition or of any supporting depositions establish, if true, every element of each crime charged and the respondent's commission thereof" (Family Ct Act § 311.2 [3]). A petition which does not substantially conform to the requirements of sections 311.1 and 311.2 is defective and subject to dismissal (Family Ct Act § 315.1 [1] [a]; [2]).

In *Matter of Jahron S.* (79 NY2d 632), we construed the foregoing provisions as requiring that the petition and supporting depositions, to be legally sufficient, must contain nonhearsay allegations establishing a prima facie case of delinquency (*id.*, at 639). Thus, while the sufficiency of the petition is to be assessed by the factual allegations contained in the petition as well as any supporting documents that may be attached (*id.*, at 638), the omission of nonhearsay allegations concerning any element of the offenses charged renders the petition legally insufficient and constitutes a nonwaivable jurisdictional defect (*see, Matter of Detrece H.*, 78 NY2d 107, 109, *supra*; *Matter of David T.*, 75 NY2d 927, 929).

(1) We agree with the majority at the Appellate Division that the petition and its supporting documents in the instant case were jurisdictionally defective on their face insofar as they failed to contain a nonhearsay allegation of the weapon's operability. [1] The deposition of Officer Lowe is silent regarding this element. The annexed ballistics report, although attesting to the gun's operability, purports only to be a copy of the original report, and gives no indication that it was signed by the person who tested the gun and prepared that original report. Although the signature of Detective Cotter appears on the report, he only certified that the report is an accurate copy of the original report, and did not actually attest to any personal knowledge of the gun's operability. However likely it may be, as the presentment agency argues, that Detective Cotter was the technician who tested the gun and prepared the original report, the fact remains that the nonhearsay nature of the annexed report is not clear on its face. Because the test of the sufficiency of the petition is a facial one (Family Ct Act § 311.2; *Matter of Jahron S.*, *supra*), any reliance by the presentment agency on its oral representation to Family ***508** Court that Detective Cotter prepared the original report is misplaced. [2]

(2) We further reject the presentment agency's alternative contention that the asserted defect in the petition did not mandate dismissal but could have been properly cured by amendment. Although Family Court Act § 311.5 permits certain amendments to the petition before or during the fact-finding hearing, subdivision (2) (b) of that provision bars amendment for the purpose of curing "legal insufficiency of the factual allegations". In *Matter of Detrece H.* (78 NY2d 107, *supra*), we held that the plain language of section 311.5 (2) (b) extended to a petition's legal insufficiency for failure to contain allegations in the requisite nonhearsay form, and thus amendment to remedy such a defect was precluded by the statute (*id.*, at 110). The presentment agency's reliance on *Matter of Edward B.* (80 NY2d 458, *supra*) in an attempt to characterize the deficiency here as a latent one is unpersuasive. In *Matter of Edward B.*, we held that dismissal of a juvenile delinquency petition is not mandatory when a deficiency in the petition is not facially apparent but only is revealed during the course of the Family Court proceedings. Unlike the defect at issue in *Matter of Edward B.*, however, the deficiency in the instant case is apparent from

the face of the document, and therefore *Matter of Detrece H.* is controlling and dismissal of the petition was warranted.

Accordingly, the order of the Appellate Division should be affirmed, without costs.

Chief Judge Kaye and Judges Simons, Titone, Bellacosa, Smith and Ciparick concur.
Order affirmed, without costs. ***509**

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Footnotes

1 The presentment agency does not dispute on this appeal that operability is an element of a weapon possession charge *(see, People v Cavines,* 70 NY2d 882, 883).

2 The presentment agency's alternative contention that the ballistics report qualified under the business record exception to the hearsay rule is without merit, as the foundational requirements for the applicability of that exception are not apparent on the face of the document *(see,* CPLR 4518). We need not decide on this appeal whether a report setting forth the proper foundation under CPLR 4518 would suffice to establish the requisite nonhearsay allegations.

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78 N.Y.2d 107, 575 N.E.2d 385, 571 N.Y.S.2d 899

In the Matter of Detrece H., a Person Alleged to be a Juvenile Delinquent, Appellant.

Court of Appeals of New York
117
Argued May 1, 1991;
Decided June 4, 1991

CITE TITLE AS: Matter of Detrece H.

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered February 6, 1990, which modified, on the law, and, as modified, affirmed an order of the Family Court, Bronx County (Elrich Eastman, J.), adjudicating respondent a juvenile delinquent upon a finding that she committed acts which, if committed by an adult, would constitute the crimes of burglary in the third degree and criminal trespass in the third degree. The modification consisted of dismissing the charge of criminal trespass in the third degree.

Matter of Detrece H., 158 AD2d 307, reversed.

HEADNOTES

Infants
Juvenile Delinquents
Amendment of Petition to Supply Nonhearsay Factual Allegations Prohibited

(1) A juvenile delinquency petition that is legally insufficient because it fails to contain nonhearsay factual allegations establishing every element of the crime charged cannot be amended with a supplemental supporting deposition to cure the defect. Family Court Act § 311.5 (2) (b) states "[a] petition may not be amended for the purpose of curing ... [the] legal insufficiency of the factual allegations". Giving the section what appears to be its intended meaning, a petition containing such a defect may not be amended. Any other result would not only be at variance with the plain wording of section 311.5 (2) (b), but would deprive that provision of any practical effect.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children, § 42.

Family Court Act §311.5 (2) (b).

NY Jur 2d, Domestic Relations, §1651.

ANNOTATION REFERENCES

Comment Note.--Power of court to make or permit amendment of indictment. 17 ALR3d 1181.

POINTS OF COUNSEL

Marcia Egger and *Lenore Gittis* for appellant.
A petition ***108** which does not set forth nonhearsay allegations establishing every element of the crimes charged is legally insufficient, a jurisdictional defect which is not subject to cure by amendment. (*Matter of David T.*, 75 NY2d 927; *People v Alejandro,* 70 NY2d 133; *People v Hall*, 48 NY2d 927; *Matter of Verna C.*, 143 AD2d 94; *Matter of Michael G.*, 93 AD2d 836; *Matter of Noel V.*, 142 Misc 2d 552; *Matter of Rodney J.*, 108 AD2d 307.)
Victor A. Kovner, Corporation Counsel (Kristin M. Helmers and *Stephen McGrath* of counsel), for respondent.
The court below properly held that respondent presentment agency was permitted to file a supporting deposition, prior to fact finding, which supplemented the petition and remedied the alleged deficiencies identified in appellant's motion to dismiss. (*Matter of David T.*, 75 NY2d 927; *People v Alejandro,* 70 NY2d 133; *People v Cibro Oceana Term. Corp.*, 148 Misc 2d 149; *People v Phillipe,* 142 Misc 2d 574; *People v Lynch,* 145 Misc 2d 354; *People v Escalera,* 143 Misc 2d 779; *People v Paul,* 133 Misc 2d 234; *People v Burton,* 133 Misc 2d 701; *Matter of Rodney J.*, 108 AD2d 307.)

OPINION OF THE COURT

Hancock, Jr., J.

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At issue on this appeal is whether a juvenile delinquency petition that is legally insufficient because it fails to contain nonhearsay factual allegations establishing every element of the crime charged can be amended with a supplemental supporting deposition to cure the defect. We conclude that such a deficiency in the juvenile delinquency petition cannot be rectified by subsequent amendment. There should, accordingly, be a reversal.

I

On January 30, 1989, the presentment agency filed a juvenile delinquency petition against respondent Detrece H. alleging that she committed acts, which, if committed by an adult, would constitute, among other crimes,[*] third degree burglary. With respect to that charge, the petition stated that on December 17, 1988, respondent knowingly entered and remained unlawfully in a building under the control of Anthony ***109** Hidalgo with the intent to commit a crime therein. The only supporting deposition filed with the petition was one by Hidalgo in which he stated that he was the person in control of the Kingsley Store at 388 East Fordham Road on the date in question, and that he had not given permission to respondent to be in or about the premises.

Respondent moved to dismiss because the petition failed to contain nonhearsay factual allegations which tended to support each and every element of the crimes charged as Family Court Act § 311.2 requires. In response, the presentment agency moved to amend the petition, seeking to add a supporting deposition by Police Officer Dennis Suarez stating that on December 17, 1988 he had observed respondent "in [the store] in possession of one hammer", that throughout the store, "there were big plastic garbage bags full of clothing" and that respondent said to him "we used the hammer".

Family Court granted the motion to amend the petition, and denied respondent's motion to dismiss, concluding that the petition, as amended, contained the requisite nonhearsay factual allegations. After a fact- finding hearing, Family Court found that respondent had committed acts which would constitute third degree burglary and third degree criminal trespass.

The Appellate Division modified by dismissing the third degree criminal trespass charge and, as modified, affirmed. It reasoned that third degree criminal trespass is a lesser included offense to third degree burglary, and that the amendment to the petition was proper because the Suarez supporting deposition merely restated in nonhearsay form the hearsay allegations contained in the petition and the first supporting deposition. We granted leave.

II

A juvenile delinquency petition must contain "non-hearsay allegations ... establish[ing] ... every element of each crime charged and the respondent's commission thereof" (Family Ct Act § 311.2 [3]). Any petition that does not contain such factual allegations is both legally insufficient and jurisdictionally defective *(see,* Family Ct Act § 311.2; *Matter of David T.,* 75 NY2d 927). Here, the supporting deposition filed with the petition established only that respondent did not have permission to be in the store on the night in question. The allegation that respondent was actually in the store was hearsay. Thus, as initially filed, the petition was legally insufficient ***110** because it failed to contain the requisite nonhearsay factual allegations; such failure constituted a nonwaivable jurisdictional defect *(see,* Family Ct Act § 311.2 [3]; *Matter of David T., supra,* at 929). The issue presented is whether the petition may be amended to cure this deficiency. Respondent contends that Family Court Act § 311.5 precludes amendment to the petition for such purpose. We agree.

Section 311.5 (1) authorizes amendment to the petition at any time before or during the fact-finding hearing. However, section 311.5 (2) (b) states "[a] petition *may not* be amended for the purpose of curing ... [the] legal insufficiency of the factual allegations" (emphasis added). Here, the petition's factual allegations were legally insufficient because they were not in the required nonhearsay form. Therefore, if section 311.5 (2) (b) is given what appears to be its intended meaning, the petition may not be amended. Any other result would not only be at variance with the plain wording of section 311.5 (2) (b), but would deprive that provision of any practical effect (*see, Ferres v City of New Rochelle,* 68 NY2d 446, 452; McKinney's Cons Laws of NY, Book 1, Statutes § 144, at 291 [statutes will not be construed as to render them ineffective]).

We find no merit in the presentment agency's contention that the Family Court Act should be construed to permit an amendment of the petition to include the required nonhearsay allegations so as to give the presentment agency the greater flexibility and the wider range of options for commencing a criminal action available to the prosecution under CPL

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100.50, 100.15 (3) and 170.65. The Family Court Act contains no provisions analogous to CPL 100.50, 100.15 (3) and 170.65, and there is no basis for reading such provisions into the act.

As we have only recently noted in another context, the Criminal Procedure Law and the Family Court Act have " 'very different language, history and purposes' " (*Matter of Randy K.*, 77 NY2d 398, 405, quoting *Matter of Frank C.*, 70 NY2d 408, 412). The Criminal Procedure Law offers the option of a two-step process for prosecuting misdemeanors: (1) the initial filing of a misdemeanor complaint and (2) the subsequent conversion of that instrument into an information *(see,* CPL 100.15 [3]; 170.65). In contrast, the Family Court Act provides for a one-step process in which the petition is the sole instrument for the commencement, prosecution, and adjudication of the juvenile delinquency proceeding *(see,* ***111** Family Ct Act § 310.1). Further, in Family Court practice there is no equivalent to the superseding information available in criminal actions (CPL 100.50). Rather, the presentment agency's recourse for minor errors in the petition is an amendment pursuant to Family Court Act § 311.5; for major deficiencies of the type in question its recourse is to file a new petition *(see,* Sobie, Practice Commentary, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 311.5, at 347). CPL 100.15 (3) and 100.50 were not intended to apply to juvenile proceedings, and any effort to incorporate these provisions into the Family Court Act "would amount to nothing less than an impermissible judicial rewriting of the statute." *(Matter of Randy K.,* 77 NY2d 398, 404, *supra.)*

Nor are we persuaded by the presentment agency's argument that disallowance of the amendment of the petition under the circumstances here would introduce a "technical" requirement into juvenile proceedings that would undermine the Family Court Act's goal of providing a quick response to children in need of supervision, treatment, or confinement. Juvenile delinquency proceedings serve at least two distinct functions: (1) to determine in accordance with due process whether a person is a juvenile delinquent and (2) to provide for the rehabilitation of a person adjudicated a juvenile delinquent through consideration of that person's needs and interests *(see,* Family Ct Act § 301.1; *Matter of Randy K.,* 77 NY2d 398, 402, *supra; see also,* Sobie, Practice Commentary, McKinney's Cons Law of NY, Book 29A, Family Ct Act § 301.1, at 263-267). Far from being "technical" requirements unrelated to the underlying purposes of juvenile proceedings, sections 311.2 and 311.5 (2) (b) provide substantive protections for the individual accused of juvenile delinquency, and thus further the goal of determining whether an individual is a juvenile delinquent without compromising that individual's rights. The presentment agency's argument runs counter to this goal because it would dilute the accused's statutory protections.

Accordingly, the order of the Appellate Division should be reversed, without costs, and respondent's motion to dismiss the proceeding granted.

Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone and Bellacosa concur.
Order reversed, etc. ***112**

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Footnotes

* In addition to burglary third, respondent was charged with third degree and fourth degree criminal mischief, fifth degree criminal possession of stolen property, and third degree criminal trespass.

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90 N.Y.2d 963, 688 N.E.2d 486, 665 N.Y.S.2d 612, 1997 N.Y. Slip Op. 08597

In the Matter of Lavar D., a Person Alleged to be a Juvenile Delinquent, Appellant.

Court of Appeals of New York
176
Argued Argued September 10, 1997;
Decided October 21, 1997

CITE TITLE AS: Matter of Lavar D.

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered October 28, 1996, which modified, on the law, and, as modified, affirmed an order of the Family Court, Kings County (Maureen McLeod, J.), adjudging respondent to be a juvenile delinquent and placing him with the Division for Youth for a period not to exceed 18 months, entered upon a fact-finding order of said court (Maureen McLeod, J.), finding that respondent had committed acts which, if committed by an adult, would have constituted the crimes of attempted criminal possession of a weapon in the second degree, attempted criminal possession of a weapon in the third degree (two counts), attempted criminal possession of a weapon in the fourth degree (two counts), and unlawful possession of weapons by persons under 16. The modification consisted of adding to the order of disposition a provision vacating the provision of the fact-finding order that respondent had committed an act which constituted unlawful possession of weapons by persons under 16, and dismissing that count of the petition.

The nonhearsay allegations in the petition set forth that the respondent was observed by a police officer on a public street, holding a .25 caliber automatic gun in his hand, that the gun had been defaced, and that it contained ammunition.

The Appellate Division concluded that although the ballistics report annexed to the petition stated that the firearm was inoperable, and did not indicate that the ammunition was live, the nonhearsay allegations in the petition constituted sufficient evidence, if unexplained or uncontradicted, to support the finding that the respondent committed an act which, if committed by an adult, would have constituted the five counts of attempted criminal possession of a weapon charged in the petition; but that since there was no indication in the petition that the ammunition was live, the petition was insufficient with respect to the count charging the respondent with unlawful possession of weapons by persons under 16 based upon his possession of ammunition.

Matter of Lavar D., 232 AD2d 634, affirmed.

HEADNOTES

Infants
Juvenile Delinquents
Weapons Possession--Attempt

(1) In a juvenile delinquency proceeding arising out of respondent being seen on a public street holding a firearm that later proved to be loaded but inoperable, ***965** both respondent and the presentment agency have proceeded from the outset on the assumption that the counts charging respondent with acts constituting attempted criminal possession of a weapon in the second, third and fourth degrees required proof that he specifically intended to possess a firearm that was operable. The allegations that respondent carried a weapon on a public street and that that weapon was loaded are sufficient to support the inference that respondent believed and intended the firearm to be operable.

APPEARANCES OF COUNSEL

Valerie Pels, New York City, *Carol Goldstein* and *Jane M. Spinak* for appellant.
Paul A. Crotty, Corporation Counsel of New York City (*Elizabeth I. Freedman* and *Francis F. Caputo* of counsel), for respondent presentment agency.

OPINION OF THE COURT

Memorandum.

The order of the Appellate Division should be affirmed, without costs.

Respondent was charged with and found to have committed acts which, if committed by an adult, would constitute the crimes of attempted second degree criminal possession of

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a weapon (Penal Law § 265.03), attempted third degree criminal possession of a weapon (Penal Law § 265.02 [3]) (two counts), attempted fourth degree criminal possession of a weapon (Penal Law § 265.01 [1]) (two counts) and unlawful possession of a weapon by a person under 16 (Penal Law § 265.05). The charges arise out of an incident in which respondent was seen on a public street holding a firearm that later proved to be loaded but inoperable.

Both respondent and the presentment agency have proceeded from the outset on the assumption that the counts charging respondent with acts constituting attempt crimes required proof that he specifically intended to possess a firearm that was operable. The allegations that respondent carried a weapon on a public street and that that weapon was loaded are sufficient to support the inference that respondent believed and intended the firearm to be operable.

Chief Judge Kaye and Judges Titone, Bellacosa, Smith, Levine, Ciparick and Wesley concur.
Order affirmed, without costs, in a memorandum. ***966**

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23 N.Y.3d 512, 15 N.E.3d 1175, 992 N.Y.S.2d 166, 2014 N.Y. Slip Op. 04042

**1 In the Matter of Antwaine T., a Person Alleged to be a Juvenile Delinquent, Respondent. Presentment Agency, Appellant

Court of Appeals of New York
Argued May 8, 2014
Decided June 5, 2014

CITE TITLE AS: Matter of Antwaine T.

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered April 10, 2013. The Appellate Division (1) reversed, on the law, so much of an order of disposition of the Family Court, Kings County (Wavny Toussaint, J.), dated April 17, 2012, as had adjudicated respondent a juvenile delinquent upon his admission that he committed an act which constituted the crime of possession of weapons by persons under sixteen, upon a prior order of disposition of the same court, dated October 28, 2011, adjudging him to be a juvenile delinquent, and upon a finding that he violated the terms and conditions of the order of disposition dated October 28, 2011, (2) dismissed the appeal from so much of the order of disposition dated April 17, 2012 as placed the appellant on probation for a period of six months, as that period had expired, (3) on the Court's own motion, deemed the notice of appeal from the order of disposition dated October 28, 2011 to be a premature notice of appeal from the order of disposition dated April 17, 2012, (4) dismissed the juvenile delinquency petition, and (5) remitted the matter to Family Court for further proceedings pursuant to Family Court Act § 375.1.

Matter of Antwaine T., 105 AD3d 859, reversed.

HEADNOTE

Infants
Juvenile Delinquents
Sufficiency of Petition—Unlawful Possession of Weapons by Persons under 16—Machete as Dangerous Knife

A juvenile delinquency petition charging the 15-year-old respondent with unlawful possession of weapons by persons under sixteen (Penal Law § 265.05) based on allegations in the arresting officer's sworn statement that he recovered from respondent at 11:23 p.m. in Brooklyn "a dangerous instrument or deadly . . . weapon," i.e., a machete with a blade approximately 14 inches long, which respondent possessed "with the intent to use . . . unlawfully against another," was facially sufficient. Penal Law § 265.05 makes it unlawful for any person under the age of sixteen to possess "any dangerous knife." While the statute does not define "dangerous knife," the term has been held to connote a knife which may be characterized as a weapon. A knife designed and primarily intended for use as a utilitarian utensil can fall within the definition of a "dangerous knife" if it is converted into a weapon or if the ***513** circumstances of its possession permit a finding that on the occasion of its possession it was essentially a weapon rather than a utensil. A machete is generally defined as a large, heavy knife used for cutting plants and as a weapon. While a machete has utilitarian purposes, the officer's statement that the machete was being carried by respondent late at night on a street in Brooklyn adequately stated the circumstances of possession to support the charge that respondent was carrying a weapon. It would be unreasonable to infer from the officer's statement that the machete was being used for cutting plants.

RESEARCH REFERENCES

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 56, 57; Am Jur 2d, Weapons and Firearms §§ 10, 26.

New York Family Court Practice 2d, §§ 10:15, 10:30.

NY Jur 2d, Criminal Law: Substantive Principles and Offenses §§ 1853, 1884; NY Jur 2d, Domestic Relations § 1407.

ANNOTATION REFERENCE

See ALR Index under Juvenile Courts and Delinquent Children; Knives and Knifings.

FIND SIMILAR CASES ON WESTLAW

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Database: NY-ORCS

Query: juvenile /2 delinq! & possess! /3 weapon & machete

POINTS OF COUNSEL

Michael A. Cardozo, Corporation Counsel, New York City (*Dona B. Morris, Pamela Seider Dolgow* and *Jeffrey D. Friedlander* of counsel), for appellant.

The petition was sufficient to establish the elements of unlawful possession of a dangerous weapon by persons under sixteen (Penal Law § 265.05) because a machete with a 14-inch blade is inherently a dangerous knife. (*Matter of Jahron S.*, 79 NY2d 632; *Matter of Jamie D.*, 59 NY2d 589; *People v Campos*, 93 AD3d 581; *Ash v Reilly*, 433 F Supp 2d 37; *United States v Massey*, 461 F3d 177; *United States v Introcaso*, 506 F3d 260; *United States v Masciandaro*, 638 F3d 458; *United States v Burling*, 420 F3d 745; *Matter of Ricci S.*, 34 NY2d 775; *Matter of Edwin O.*, 91 AD3d 654.)

Steven Banks, The Legal Aid Society, New York City (*John A. Newbery, Tamara Steckler* and *Briana Fedele* of counsel), for respondent.

Where this Court in *Matter of Jamie D.* (59 NY2d 589 [1983]), required the prosecution, in order to make out a charge ***514** brought under Penal Law § 265.05 for possession of a "dangerous knife," to show that a utilitarian knife either had been modified so as to convert it into a weapon or that the circumstances of its possession were such as to indicate that it was possessed as a weapon, the Appellate Division correctly held that an allegation that respondent simply possessed an unmodified knife with a 14-inch blade, summarily described as a "machete," was, without more, facially insufficient to show that the knife was a "dangerous knife" within the meaning of the statute. (*Matter of Jahron S.*, 79 NY2d 632; *Matter of Michael M.*, 3 NY3d 441; *Matter of Neftali D.*, 85 NY2d 631; *Matter of Rodney J.*, 83 NY2d 503; *Matter of Detrece H.*, 78 NY2d 107; *Matter of David T.*, 75 NY2d 927; *People v Thomas*, 4 NY3d 143; *People v Casey*, 95 NY2d 354; *People v Alejandro*, 70 NY2d 133; *People v Almodovar*, 62 NY2d 126.)

OPINION OF THE COURT

Pigott, J.

The issue in this juvenile delinquency proceeding is whether the petition was facially sufficient to charge respondent Antwaine T. with a violation of Penal Law § 265.05, which proscribes a juvenile's possession of "any dangerous knife." We conclude that the petition ****2** was facially sufficient.

On November 23, 2010, a petition was filed in Family Court against respondent, then 15 years old, charging him with criminal possession of a weapon in the fourth degree (Penal Law § 265.01 [2]) and unlawful possession of weapons by persons under sixteen (Penal Law § 265.05). The two counts of the petition were supported by a sworn statement of the arresting officer. In the statement, the officer recounted that at approximately 11:23 p.m. in Brooklyn, respondent,

> "a person under the age of [16], possessed a dangerous instrument or deadly . . . weapon, to wit: a machete, with the intent to use the same unlawfully against another; in that:
>
> "At the above date, time and location, I was working in my official capacity as a police officer, when I recovered a machete from [respondent]. The blade of the machete was approximately 14 inches in length. I then vouchered the machete using New York Property Clerk Invoice Number R648888.
>
> "Later, [respondent's] mother informed me that [he] was born on January 30, 1995 and that he is 15 ***515** years old. The . . . mother also provided me with a photocopy of [respondent's] birth certificate, which confirmed this information."

Respondent initially entered a denial of the petition, but later withdrew that denial and made an admission to the count of unlawful possession of weapons by persons under sixteen. Specifically, he admitted that at the pertinent time and place, he was 15 years old and he "[was] in possession of a dangerous knife, and more specifically a machete that had a blade of approximately [14] inches." Family Court granted respondent an adjournment in contemplation of dismissal (ACD).

On June 3, 2011, the case was restored to the Family Court's calendar because respondent had not complied with the terms of his ACD. Family Court placed him under enhanced

probation supervision for a period of nine months. Later, upon finding that respondent had violated the conditions of his probation, the court revoked the earlier order of disposition, adjudicated respondent a juvenile delinquent, and placed him on probation for six months.

On appeal, the Appellate Division found the petition facially insufficient "because it did not contain allegations which, if true, would have established that the knife he possessed was a 'dangerous knife' " pursuant to section 265.05 (105 AD3d 859, 860 [2d Dept 2013], citing *Matter of Neftali D.*, 85 NY2d 631, 635 [1995]). Rather, the arresting officer's account "merely **3 described the unmodified, utilitarian knife which [respondent] possessed, and contained no allegations as to the 'circumstances of its possession' " (105 AD3d at 860, quoting *Matter of Jamie D.*, 59 NY2d 589, 593 [1983]). Thus, it held, there were insufficient allegations to permit a finding that, when respondent was arrested, the knife served as "a weapon rather than a utensil" (*id.*).

This Court granted the presentment agency leave to appeal and we now reverse.

A petition commencing a juvenile delinquency proceeding must contain "a plain and concise factual statement in each count which . . . asserts facts supporting every element of the crime charged and the respondent's commission thereof with sufficient precision to clearly apprise the respondent of the conduct which is the subject of the accusation" (Family Ct Act § 311.1 [3] [h]). The petition is sufficient on its face when ***516** "nonhearsay allegations of the factual part of the petition or of any supporting depositions establish, if true, every element of each crime charged and the respondent's commission thereof" (*id.* § 311.2 [3]). The absence of factual allegations supporting each element of the crimes alleged constitutes a nonwaivable jurisdictional defect (*Matter of David T.*, 75 NY2d 927 [1990]).

Penal Law § 265.05 provides, in relevant part:

> "It shall be unlawful for any person under the age of sixteen to possess any air-gun, spring-gun or other instrument or weapon in which the propelling force is a spring or air, or any gun or any instrument or weapon in or upon which any loaded or blank cartridges may be used, or any loaded or blank cartridges or ammunition therefor, *or any dangerous knife*; provided that the possession of rifle or shotgun or ammunition therefor by the holder of a hunting license or permit issued pursuant to article eleven of the environmental conservation law and used in accordance with said law shall not be governed by this section" (emphasis added).

The statute does not define the term "dangerous knife." In *Matter of Jamie D.* (59 NY2d 589 [1983]), however, this Court held that the term, as used in the statute, "connotes a knife which may be characterized as a weapon" (*id.* at 592). We explained that certain knives may fall within the scope of the statute based solely on the knife's particular characteristics. For instance, "a bayonet, a stiletto, or a dagger" would come within the meaning of "dangerous knife" because those instruments are "primarily intended for use as a weapon" (*id.* at 592-593).

We also explained that other knives, which are designed and primarily intended for use as "utilitarian utensils," may also come within the statutory language in at least two ways (*id.* at 593). First, a knife may be converted into a weapon, and second, "the circumstances of its possession, although there has been no modification of the implement, may permit a finding that **4 on the occasion of its possession it was essentially a weapon rather than a utensil" (*id.* at 593).

A "machete" is generally defined as "a large, heavy knife that is used for cutting plants and as a weapon" (Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/machete). While a machete has utilitarian purposes, under the circumstances of this case, it would be unreasonable ***517** to infer from the statement supporting the petition that respondent was using the machete for cutting plants. Rather, the arresting officer's description of the "machete," with its 14-inch blade, being carried by respondent late at night on a street in Brooklyn, adequately states "circumstances of . . . possession" (*Jamie D.* at 593) that support the charge that defendant was carrying a weapon.

Accordingly, the order of the Appellate Division should be reversed, without costs, and the order of Family Court reinstated.

Chief Judge Lippman and Judges Graffeo, Read, Smith, Rivera and Abdus-Salaam concur.

Order reversed, without costs, and order of Family Court, Kings County, reinstated.

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New York
Official Reports

59 N.Y.2d 589, 453 N.E.2d 515, 466 N.Y.S.2d 286

In the Matter of Jamie D., a Person Alleged to be a Juvenile Delinquent, Respondent. City of New York, Appellant.

Court of Appeals of New York
Argued June 8, 1983;
decided July 12, 1983

CITE TITLE AS: Matter of Jamie D.

SUMMARY

Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered March 18, 1982, which (1) reversed, on the law, an order of the Family Court, Bronx County (Gertrud Mainzer, J.), adjudicating respondent a juvenile delinquent and placing him on probation for one year, and (2) dismissed the petition.

On January 31, 1980, respondent, then under 16 years of age, and another youth were observed with guns attempting to rob a youngster and when a passer-by went to the assistance of the youngster the two youths told him to get away or they would blow his head off. A police officer and a security officer from a nearby department store apprehended the two youths after a chase. When respondent placed his hand at his belt line, one of the officers ordered him to remove his hand. When he refused to do so, after the other officer came to the assistance of the first, respondent's resistance was overcome, his hand was removed and a knife was revealed protruding from his belt. The knife was removed and both youths were arrested. The knife was described by the Family Court Judge as "the kind of knife usually found in the kitchen, in the home or in a place where food is served and [the kind] used for such activities as cutting steaks". The court estimated that its blade measured five inches in length, and sustained a charge of unlawful possession of a weapon by a person under 16 against respondent.

The Court of Appeals reversed the order appealed from and remitted the case to the Appellate Division, holding, in an opinion by Judge Jones, that a knife which may not come within the term "dangerous knife" under section 265.05 of the Penal Law by reason of its inherent characteristics may nonetheless be determined to fall within the statutory prescription when the circumstances of its possession including the behavior of its possessor demonstrate ***590** that the possessor himself considered it a weapon and thus a "dangerous knife" within the contemplation of the statute.

Matter of Jamie D., 87 AD2d 548, reversed.

HEADNOTES

Infants
Juvenile Delinquents
Unlawful Possession of Weapon

(1) A knife which may not come within the term "dangerous knife" under section 265.05 of the Penal Law (unlawful possession of a weapon by a person under 16) by reason of its inherent characteristics may nonetheless be determined to fall within the statutory prescription when the circumstances of its possession including the behavior of its possessor demonstrate that the possessor himself considered it a weapon and thus a "dangerous knife" within the contemplation of the statute; accordingly, a charge of unlawful possession of a weapon by a person under 16 was properly sustained by the Family Court against respondent, who had demonstrated his disposition to violence and criminal activity and, when accosted, by his behavior and reluctance to give up a kitchen knife which was in his possession, effectively manifested that he himself considered it a weapon of significance and not an innocent utilitarian utensil.

POINTS OF COUNSEL

Frederick A. O. Schwarz, Jr., Corporation Counsel (*Michael S. Adler, Leonard Koerner* and *Carolyn E. Demarest* of counsel), for appellant.

I. The phrase "any dangerous knife" in section 265.05 of the Penal Law should be interpreted as encompassing both knives that are dangerous per se and utilitarian knives that are dangerous under the surrounding circumstances. The steak knife protruding from respondent's belt was a dangerous knife under the circumstances. (Fall v Esso Std. Oil Co., 297 F2d 411, 371 US 814; United States v Hamilton, 626 F2d 348, 449 US 902; United States v Buchanon, 529 F2d 1148, 425 US 950; United States v Johnson, 324 F2d 264;

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United States v Barber, 297 F Supp 917; Matter of Ricci S., 41 AD2d 406, 34 NY2d 775; Matter of Bush v Bethlehem Steel Corp., 39 AD2d 989; Matter of Sheehy v Doyle, 8 AD2d 267.) II. Assuming, *arguendo,* that the phrase "any dangerous knife" in section 265.05 of the Penal Law is interpreted as encompassing only knives that are designed, modified, or adapted for use primarily as a weapon, the knife carried by respondent satisfies that criterion.

John F. McGlynn and *Lenore Gittis* for respondent.

An ordinary steak knife designed for innocent and lawful culinary purposes does not constitute a "dangerous knife" within the meaning of section 265.05 of the Penal Law. ***591** (People v Criscuoli, 157 App Div 201; Matter of Ricci S., 34 NY2d 775; People v Rosello, 36 AD2d 595; Matter of Chidi N., 65 AD2d 688; People v Glassman, 255 App Div 997; Matter of Talmadge v Talmadge, 54 AD2d 581; People v Kinred, 18 AD2d 1086; People v Panitz, 251 App Div 276; People v Criscuoli, 164 App Div 119; Feder v Caliquira, 8 NY2d 400.)

OPINION OF THE COURT

Jones, J.

A knife which may not come within the term "dangerous knife" under section 265.05 of the Penal Law by reason of its inherent characteristics may nonetheless be determined to fall within the statutory prescription when the circumstances of its possession including the behavior of its possessor demonstrate that the possessor himself considered it a weapon and thus a "dangerous knife" within the contemplation of the statute.

A petition was filed in Bronx County Family Court alleging that respondent had possessed a dangerous knife in violation of subdivision (2) of section 265.01 (criminal possession of a weapon with intent to use it unlawfully against another) and section 265.05 of the Penal Law (unlawful possession of a weapon by a person under 16). At the fact-finding hearing evidence was introduced that on January 31, 1980 respondent, then under 16 years of age, and another youth were observed with guns attempting to rob a youngster and that when a passer-by went to the assistance of the youngster the two youths told him to get away or they would blow his head off. A police officer and a security officer from a nearby department store apprehended the two youths after a chase. When respondent placed his hand at his belt line one of the officers ordered him to remove his hand. When he refused to do so, after the other officer came to the assistance of the first, respondent's resistance was overcome, his hand was removed and a knife was revealed protruding from his belt. The knife was removed, and both youths were arrested.

Family Court dismissed the charge under subdivision (2) of section 265.01 (possession with intent to use against another) but sustained the charge under section 265.05 ***592** (possession by a person under 16). Following a dispositional hearing respondent was adjudicated a juvenile delinquent and placed on probation for one year. The Appellate Division reversed the order of disposition, on the law, and dismissed the petition on the ground that the knife in question was not a "dangerous knife" within the contemplation of the statute. We reverse and reinstate the order of disposition.

Section 265.05 of the Penal Law provides:

"Unlawful possession of weapons by persons under sixteen.

"It shall be unlawful for any person under the age of sixteen to possess any air-gun, spring-gun or other instrument or weapon in which the propelling force is a spring or air, or any gun or any instrument or weapon in or upon which any loaded or blank cartridges may be used, or any loaded or blank cartridges or ammunition therefor, or any dangerous knife.

"A person who violates the provisions of this section shall be adjudged a juvenile delinquent."

The knife here in question was described by the Family Court Judge as "the kind of knife usually found in the kitchen in the home or in a place where food is served and [the kind] used for such activities as cutting steaks". The court estimated that its blade measured five inches in length.

The statute contains no definition of the term "dangerous knife" (cf. Penal Law, § 10.00, subd 13, defining "dangerous instrument"). In the context in which it appears the term "dangerous knife" connotes a knife which may be characterized as a weapon. The title to the section refers to weapons and the other articles enumerated in it are inherently weapons or for use with weapons. It is the possession of "an instrument of offensive or defensive combat" (Webster's Third New International Dictionary, defining "weapon", p 2589) which is the essence of the criminal prescription.

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Viewed from this perspective a knife may come within the scope of the statute in some instances because of its own characteristics. Thus, a bayonet, a stiletto, or a dagger, ***593** while each may possibly be employed for utilitarian purposes, is primarily intended for use as a weapon. Possession of such an instrument without more would fall within the scope of the statute.

Whether other knives, designed and primarily intended for use as utilitarian utensils, would come within the statutory contemplation may be determined by either of two, or perhaps other, considerations. First, as we suggested in Matter of Ricci S. (34 NY2d 775, 776), in consequence of physical modification what would otherwise be a utensil may be converted into a weapon. Alternatively, the circumstances of its possession, although there has been no modification of the implement, may permit a finding that on the occasion of its possession it was essentially a weapon rather than a utensil. The definition of a "dangerous instrument" found in subdivision 13 of section 10.00 of the Penal Law* is not made explicitly applicable to the term "dangerous knife" in section 265.05. Nonetheless, the subdivision states a sound criminological principle, that criminal behavior may be determined from the particular manner and context of activity which might be wholly innocent in other circumstances. The application of the principle may be illustrated by comparison of the factual situations in *Ricci S.* and in the present case.

In *Ricci S.* while the police were conducting a search of an apartment which they had had under surveillance in connection with suspected activity in narcotics, the defendant came on the scene. When he was being searched for possession of narcotics, the police discovered a hunting knife on his person. There was nothing in the characteristics of the knife or in the circumstances of its possession to suggest that it was other than what it appeared to be -- a utilitarian hunting knife and not a weapon.

By contrast, in the present case, respondent had demonstrated his disposition to violence and criminal activity and then, when accosted, by his behavior and reluctance to give up the knife effectively manifested that he himself ***594** considered it a weapon of significance to the police and not an innocent utilitarian utensil. In these circumstances Family Court was warranted in determining that the knife in question was a dangerous knife within the meaning of section 265.05 of the Penal Law.

Accordingly, the order of the Appellate Division should be reversed, without costs, and the case remitted to the Appellate Division pursuant to CPLR 5613.

Simons, J.

(Dissenting).

The majority's effort to define what is and what is not a "dangerous knife" within the meaning of section 265.05 of the Penal Law is understandable, but doing so by reference to the conduct and intent of the possessor is unwarranted. I, therefore, dissent and vote to affirm.

The statute makes it a crime for a person under 16 years of age to possess a "dangerous knife". The term is undefined and almost beyond salvage by judicial construction because all knives are dangerous. The majority has construed the statute to define the crime by reference to defendant's subjective intent, "the possessor himself considered it a weapon", and by his behavior subjectively evaluated, a demonstrated "disposition to violence and criminal activity" (pp 591, 593). Nothing in the statute or its history indicates that the Legislature intended the crime to include some lesser element of mental culpability and insofar as it does so, it encroaches on the previously dismissed count charging respondent with criminal possession with intent to use it against another (Penal Law, § 265.01, subd [2]). Moreover, the inclusion of respondent's behavior as an element of the crime introduces another subjective element and criminalizes conduct other than the possession of a knife when there is no indication the Legislature intended to do so. The provisions of the Penal Law are to be construed according to the fair import of their terms, but nothing suggests that section 265.05 encompasses possession in which subjective thoughts and behavior of the respondent are elements of the crime.

In the only other case in which this court considered the statute, we defined it by objective standards of size or modification (see Matter of Ricci S. (34 NY2d 775). Although ***595** that definition may not be entirely satisfactory, it is appropriate and should be followed until the Legislature amends the statute. It is not for this court to redefine the crime.

The order should be affirmed.

Chief Judge Cooke and Judges Jasen and Meyer concur with Judge Jones; Judge Simons dissents and votes to affirm in a separate opinion in which Judge Wachtler concurs.

Order reversed, without costs, and matter remitted to the Appellate Division, First Department, for further proceedings in accordance with the opinion herein. ***601**

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Footnotes

* Subdivision 13 provides: " 'Dangerous instrument' means any instrument, article or substance, including a 'vehicle' as that term is defined in this section, which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury."

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1ST DEPARTMENT

New York
Official Reports

194 A.D.2d 474, 599 N.Y.S.2d 967 (Mem)

In the Matter of Randy S., a Person Alleged to be a Juvenile Delinquent, Appellant.

Supreme Court, Appellate Division, First Department, New York
(June 24, 1993)

CITE TITLE AS: Matter of Randy S.

Order, Family Court, New York County (Ruth Zuckerman, J.), entered May 14, 1992, which adjudicated respondent a juvenile delinquent upon a fact-finding determination that he had committed an act, which if committed by an adult, would constitute the crime of criminal possession of a weapon in the second degree, ***475** and placed him in the custody of New York State Division for Youth, Title II, for 18 months, unanimously reversed, on the law, and the petition dismissed, without costs.

The petition failed to contain nonhearsay factual allegations that established every element of criminal possession of a weapon in the second degree (Family Ct Act § 311.2 [3]; *Matter of Jahron S.*, 79 NY2d 632, 639), in that it did not include a ballistic report, and the arresting officer's supportive deposition did not allege that the gun was operable (*Matter of Alex A.*, 189 AD2d 596). Therefore, as the presentment agency concedes, the petition must be dismissed.

Concur--Wallach, J. P., Kupferman, Ross and Kassal, JJ.

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New York
Official Reports

Unreported Disposition
71 Misc.3d 133(A), 143 N.Y.S.3d 494 (Table),
2021 WL 1538308 (N.Y.Sup.App.Term),
2021 N.Y. Slip Op. 50330(U)

This opinion is uncorrected and will not be published in the printed Official Reports.

*1 The People of the State of New York, Respondent,
v.
Chris Hancock, Defendant-Appellant.

Supreme Court, Appellate Term, First Department
570287/14
Decided on April 16, 2021

CITE TITLE AS: People v Hancock

ABSTRACT

Crimes
Possession of Weapon
Attempt—Sufficiency of Information

Crimes
Disorderly Conduct
Legal Sufficiency of Evidence

People v Hancock (Chris), 2021 NY Slip Op 50330(U). Crimes—Possession of Weapon—Attempt—Sufficiency of Information. Crimes—Disorderly Conduct—Legal Sufficiency of Evidence. (App Term, 1st Dept, Apr. 16, 2021)

PRESENT: McShan, J.P., Brigantti, Hagler, JJ.

Defendant appeals from a judgment of the Criminal Court of the City of New York, New York County (Robert M. Mandelbaum, J.), rendered February 14, 2014, after a nonjury trial, convicting him of attempted criminal possession of a weapon in the fourth degree and disorderly conduct, and imposing sentence.

OPINION OF THE COURT

Per Curiam.

Judgment of conviction (Robert M. Mandelbaum, J.), rendered February 14, 2014, affirmed.

The prosecutor's information charging attempted criminal possession of a weapon in the fourth degree (*see* Penal Law §§ 110, 265.01) was jurisdictionally valid because the factual allegations in the original information establish every element of the offense and defendant's commission thereof (*see People v Inserra*, 4 NY3d 30 [2004]). The original information alleges that on a specified street corner at 9:05 p.m., defendant was standing with other individuals, obstructing pedestrian traffic; that he refused to leave when requested to do so, causing a crowd to gather; and that when the police attempted to place defendant under arrest, he "twisted away, threw his arms up and refused to put his hands behind his back thereby making handcuffing difficult"; and that police observed that defendant was carrying a knife and that the arresting officer was cut by said knife.

These allegations, "given a fair and not overly restrictive or technical reading" (*People v Casey*, 95 NY2d 354, 360 [2000]), were sufficient for pleading purposes to establish the elements of criminal possession of a weapon in the fourth degree, including that defendant possessed a "dangerous knife" within the contemplation of Penal Law § 265.01(2). The trier of fact could infer from the circumstances surrounding defendant's possession of the knife as well as his attempt to resist arrest that on the occasion of its possession it was essentially a weapon rather than a utensil (see *Matter of Jamie D.*, 59 NY2d 589, 592 [1983]; *Matter of Carolina P.*, 83 AD3d 847 [2011]; *Matter of Patrick L.*, 244 AD2d 244 [1997], *lv denied* 91 NY2d 811 [1998]; *People v Ortiz*, 61 Misc 3d 133[A], 2018 NY Slip Op 51470 [App Term, 1st Dept 2018], *lv* *2 *denied* 32 NY3d 1176 [2019]; *People v Edward*, 51 Misc 3d 36 [App Term, 1st Dept 2016], *affd sub nom. People v McCain*, 30 NY3d 1121 [2018]).

With respect to the verdict, defendant only challenges the legal sufficiency of the evidence supporting the disorderly conduct charge. At trial, defendant made a general claim of lack of proof that he intended to cause or recklessly created a risk of public inconvenience annoyance and alarm

in failing to move off the sidewalk when ordered to do so by police because he was standing there videotaping the arrest of another. However, this did not preserve defendant's present argument that he acted without the requisite mens rea because he was walking with another officer who had retrieved his identification to write a summons. We decline to review this unpreserved contention in the interest of justice. As an alternative holding, we reject it on the merits, since the evidence showed that defendant disobeyed several police orders to move off the sidewalk before an officer asked him for identification.

Similarly, defendant's contention that the trial evidence rendered duplicitous the disorderly conduct count is a claim requiring preservation (*see People v Hill*, 124 AD3d 456 [2015], *lv denied* 25 NY3d 1073 [2015]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. The evidence at trial was consistent with the single count in that it showed that defendant engaged in an uninterrupted course of conduct that was intended to cause or recklessly created a risk of a potential or immediate public problem.

Nor was the verdict against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis upon which to disturb the trial court's determinations concerning credibility.

Defendant's remaining arguments, to the extent preserved for appellate review, have been considered and found to be unpersuasive.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Clerk of the Court

Decision Date: April 16, 2021

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215 A.D.3d 500, 187 N.Y.S.3d 32, 2023 N.Y. Slip Op. 01970

**1 The People of the State of New York, Respondent,
v
Raul A., Appellant.

Supreme Court, Appellate Division,
First Department, New York
17606, 2021-00828, 70103/20
April 18, 2023

CITE TITLE AS: People v Raul A.

HEADNOTES

Crimes
Possession of Weapon
Second-Degree Criminal Possession of Weapon—Possession on School Grounds as Element of Crime

Crimes
Plea of Guilty
Plea to Crime for Which Defendant Could Not be Criminally Responsible

Caprice R. Jenerson, Office of the Appellate Defender, New York (Samuel Steinbock-Pratt of counsel), for appellant.
Alvin L. Bragg, Jr., District Attorney, New York (Kerry Fulham of counsel), for respondent.

Judgment, Supreme Court, New York County (Stephen M. Antignani, J.), rendered March 1, 2021, as amended March 3, 2021, convicting defendant, upon his plea of guilty, of attempted murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of one to three years, unanimously modified, on the law, to the extent of vacating the conviction for criminal possession of a weapon in the second degree and dismissing the fifth count of the indictment, vacating the sentence imposed on the attempted murder conviction and remanding the matter for resentencing, including a youthful offender determination, and otherwise affirmed.

***501** On December 29, 2019, defendant, then 15 years old, and Shakur Parker were driving a minivan, which they parked near the corner of East 121st Street and Second Avenue in New York County. Defendant and Parker exited the van and interacted with two other individuals. The two individuals then chased Parker around the corner onto 121st Street, where defendant stood waiting. As the two individuals turned the corner, defendant fired two shots from a nine-millimeter semiautomatic pistol toward the individuals, began to retreat back to the van, and then turned around and fired two more shots behind him. The two individuals fired seven shots back with their own weapons. No one was hit during the shooting, which took place within 1,000 feet of school grounds. Police recovered eleven cartridge cases and three weapons from the scene. A video, depicting the majority of these events, was also recovered.

On January 27, 2020, the People filed an indictment charging defendant with one count of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]); one count of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]); and two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]).

Approximately two days later, police executed a search warrant at defendant's home and recovered a loaded nine millimeter handgun. The firearm recovered from defendant's home matched cartridge cases recovered from the scene of the shooting. The People then filed a superseding indictment, retaining the four counts charged in their original indictment and adding three additional counts, namely: criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]), criminal possession of a firearm (Penal Law § 265.01-b [1]); and unlawful possession of ammunition (Administrative Code of City of NY § 10-131 [i] [3]). As relevant here, the possession counts three and four relate to the shooting that occurred on December 29, 2019. The possession count five relates to the weapon that was recovered on January 29, 2020, in defendant's home.

Defendant argues that his plea of guilty to criminal possession of a weapon in the second degree under the fifth count of the indictment must be vacated because that count of the indictment did not allege that **2 the possession occurred on school grounds.

As a preliminary matter, we agree with defendant that although the "school grounds" requirement is found outside the crime-defining statute, it appears that the intent of the Legislature was that it be included as an element of the applicable ***502** crimes. Given this, "the 'distinction between a proviso and an exception will be wholly disregarded' " (*People v Tatis*, 170 AD3d 45, 47 [1st Dept 2019], *lv denied* 33 NY3d 981 [2019]).

As argued by the People, the placement of the required act of possession on "school grounds" in the "defense of infancy" section, rather than in the section that defines the crime, raises a question of proof that would have to be raised at trial, requiring the People to disprove such defense beyond a reasonable doubt (Penal Law § 25.00).

"Here, however, it appears that the Legislature intended to make the situs of the possession of the weapon 'on school grounds' an element of the applicable crime, to be alleged and proven by the People regardless of whether the defense of infancy is raised. In accord with that intent, a separate statute requires that the Grand Jury find that the possession was on 'school grounds,' in addition to the other elements of the crime defined in the substantive statute, before it may indict the juvenile [CPL 190.71]. Those elements should then be alleged in the indictment [CPL 200.50(7)], and the People should accordingly be required to prove possession 'on school grounds' beyond a reasonable doubt regardless of whether a defense of infancy is raised" (William C. Donnino, Prac Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law § 30.00 at 231 [2009 ed]).

The People concede that the "on school grounds" language, which was included in counts three and four, was not included in count five of the indictment to which defendant entered a plea of guilty. They acknowledge that the weapon was recovered from defendant's home and not on school grounds. They also acknowledge that given this, defendant, as a juvenile, could not be held criminally responsible for the crime. They argue, however, that pursuant to CPL 200.20 (6), the plea should not be vacated.

The People are correct that where a juvenile is charged with a crime for which he may not be criminally responsible, as well as others for which he may be criminally responsible, Supreme Court may assume jurisdiction over the case (*see* *Green v Montgomery*, 95 NY2d 693, 698 [2001]; CPL 200.20 [6]). However, if convicted of a crime for which he cannot be criminally responsible, Supreme Court then "must order that the verdict be deemed vacated and replaced by a juvenile delinquency fact determination," and remove the matter to Family Court (*Green*, 95 NY2d at 698-699, quoting CPL 310.85 [3]).

Here, it is clear that defendant was convicted, by a plea of ***503** guilty to a crime to which he cannot be criminally responsible. This was not a case where a jury returned a verdict of guilty to the charge of criminal possession of a weapon in the second ****3** degree, thus requiring Supreme Court to transfer the case to Family Court for disposition (*see Green*, 95 NY2d at 699; *Matter of Equcon M.*, 291 AD2d 332 [1st Dept 2002]). Rather, the People specifically requested that in addition to the charge of attempted murder in the second degree, defendant enter a plea of guilty to the fifth count charging criminal possession of a weapon in the second degree, a crime for which the People now concede that defendant cannot be held criminally responsible. Given this, defendant's conviction for criminal possession of a weapon in the second degree must be vacated and that charge dismissed.

With regard to the remaining conviction of attempted murder, the People concede, defendant is entitled to a youthful offender determination pursuant to *People v Rudolph* (21 NY3d 497 [2013]). Concur—Manzanet-Daniels, J.P., Kapnick, Webber, Friedman, Rodriguez, JJ.

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244 A.D.2d 244, 665 N.Y.S.2d 70, 1997 N.Y. Slip Op. 10119

In the Matter of Patrick L., a Person Alleged to be a Juvenile Delinquent, Appellant.

Supreme Court, Appellate Division, First Department, New York
61591
(November 20, 1997)

CITE TITLE AS: Matter of Patrick L.

HEADNOTE

INFANTS
JUVENILE DELINQUENTS
Possession of Weapon

(1) Order adjudicating appellant juvenile delinquent upon finding that he had committed acts constituting criminal possession of marihuana and two counts of unlawful possession of weapon by person under 16 affirmed --- Officer testified that he saw appellant smoking marijuana cigarette on street; when officer asked appellant whether he had anything on him, appellant disclosed that he had box cutter in his pants pocket and razor blade in his wallet --- Under Penal Law § 265.05, it is unlawful for person under 16 to possess 'any dangerous knife' --- Family Court did not err in finding that razor blade and box cutter were 'dangerous knives' within meaning of section 265.05 --- Court of Appeals has set forth guidelines for determining whether sharp object comes within scope of section 265.05; utensil which has innocent utilitarian functions will be considered 'dangerous knife' if (1) it was physically modified in way that converted it into weapon, or (2) circumstances of its possession, although there has been no modification of implement, may permit finding that on occasion of its possession it was essentially weapon rather than utensil --- Neither box cutter nor razor blade was modified to become more dangerous than ordinary box cutter or razor blade; each of these objects could be used as weapon, but each one also has common utilitarian functions; question here, then, is whether circumstances surrounding appellant's possession of these objects indicated that he considered either of them to be weapons ---Manner in which appellant was carrying razor blade tips balance in favor of treating it as weapon; it is unlikely that he would carry single unpackaged blade in his wallet if he intended use other than in fight on street ---Administrative Code of City of New York § 10-134.1 supports inference that box cutters possessed by unsupervised juveniles are likely to be weapons; section 10-134.1 bans sale of box cutters to persons under 18 years of age, requires sellers of box cutters to ensure that their wares are not displayed in manner that facilitates their theft by minors, and bans possession of box cutters by persons under 22 years of age on school grounds unless box cutter is being used for 'valid school-related purpose' (§ 10-134.1 [e]) under staff supervision.

Order, Family Court, New York County (Gloria Sosa-Lintner, J.), entered September 16, 1996, adjudicating the appellant a juvenile delinquent, after a fact-finding determination that he had committed acts which, if committed by an adult, would constitute the crimes of criminal possession of marijuana in the fifth degree, and two counts of unlawful possession of a weapon by a person under 16, and placing him with the Division for Youth for one year, unanimously affirmed, without costs.

In support of the presentment agency's petition to declare the appellant a juvenile delinquent, Officer Quillian Virgil testified that on the morning of May 15, 1996, he saw the appellant ***245** smoking a marijuana cigarette on the street in front of 262 West 132nd Street. When the officer asked the appellant whether he had anything on him, the appellant disclosed that he had a box cutter in his pants pocket and a razor blade in his wallet. The Family Court found that the appellant had committed acts which, if committed by an adult, would violate Penal Law § 221.10 (1) and § 265.05.

Under section 221.10 (1), a person commits criminal possession of marijuana in the fifth degree if he knowingly and unlawfully possesses marijuana in a public place and such marijuana is burning or open to public view. The appellant does not challenge the Family Court's determination that he violated this statute.

Under section 265.05, it is unlawful for a person under 16 to possess "any dangerous knife". There is no explicit requirement of intent to use the object unlawfully against another (*compare,* § 265.01). The appellant contends that the Family Court erred in finding that the razor blade and

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box cutter were "dangerous knives" within the meaning of section 265.05. For the reasons below, we affirm the Family Court's determination.

According to case law, the ban on "dangerous knives" would cover not only an obvious weapon but also an ordinary sharp object that, based on the circumstances of its possession and use, functions as an instrument of offensive or defensive combat (*Matter of Jamie D.*, 59 NY2d 589, 592 [1983]). This broad interpretation complicates courts' attempts to apply the statute, since many sharp objects (e.g., knitting needles or penknives) are capable of inflicting injury if used as weapons, but are also utilitarian objects that are often carried for lawful purposes (*Matter of Alicia P.*, 112 Misc 2d 326, 330 [Sup Ct 1982]).

In *Matter of Jamie D.*, the Court of Appeals set forth guidelines for determining whether a sharp object comes within the scope of section 265.05. Some knives are clearly covered by the statute because they are primarily designed as weapons, such as bayonets. In addition, a utensil which has innocent utilitarian functions will also be considered a "dangerous knife" if (1) it was physically modified in a way that converted it into a weapon, or (2) "the circumstances of its possession, although there has been no modification of the implement, may permit a finding that on the occasion of its possession it was essentially a weapon rather than a utensil." (*Supra*, at 593.)

Subsequent judicial application of these principles has produced varying results and often seems to depend on case-specific facts that are not detailed at length in the opinions (*see, e.g., Matter of Chidi N.*, 65 AD2d 688 [1st Dept 1978], ***246** holding that a folding knife with four-inch blade is not a dangerous knife). It appears clear, though, that this Court must evaluate the particular facts of each case as a whole in order to apply the *Jamie D.* "circumstances" test.

In the instant case, neither the box cutter nor the razor blade was modified to become more dangerous than an ordinary box cutter or razor blade. Each of these objects could be used as a weapon, but each one also has common utilitarian functions (breaking down cartons, shaving, etc.). The question here, then, is whether the circumstances surrounding the appellant's possession of these objects indicated that he considered either of them to be weapons.

The appellant's unlawful intent is not immediately apparent as it was in *Matter of Jamie D.* (59 NY2d, *supra*, at 591, 593-594), where the teenaged appellant was observed trying to rob another youth at gunpoint, and when apprehended placed his hand on his belt and refused to show the police what he was carrying. The object, a steak knife, was deemed a dangerous knife under section 265.05, because appellant's disposition to violence and his attempt to conceal the knife from the police indicated that he viewed it as a weapon rather than a kitchen utensil. (*Supra*, at 593.)

By contrast, in *Matter of Ricci S.* (34 NY2d 775), the appellant (along with others) entered an apartment that the police were searching for drugs. The hunting knife that they found on him was not deemed a dangerous instrument, presumably because he had not engaged in violent or illicit activity that suggested any intent to use a weapon.

The instant case falls somewhere between these situations. The appellant did not try to conceal the box cutter or razor blade from Officer Virgil, and did not do anything violent, but neither did he simply wander into a location where criminal activity was occurring. He was arrested for smoking marijuana. This alone does not prove that he meant to misuse the box cutter and razor blade, but it raises a suspicion of misbehavior that affects our analysis, especially since teenagers who are involved in buying drugs may be more likely to carry weapons.

However, it is the manner in which the appellant was carrying the razor blade that ultimately tips the balance in favor of treating it as a weapon. It would be legitimate for him to possess a package of razor blades that he might be taking home from the store for personal use. However, it is unlikely that he would carry a single unpackaged blade in his wallet if he intended a use other than in a fight on the street.

The box cutter presents a closer question because the appellant ***247** was not carrying it in a suspicious manner. It was in his pocket, with the blade retracted. We believe, nonetheless, that Administrative Code of the City of New York § 10-134.1 supports the inference that box cutters possessed by unsupervised juveniles are likely to be weapons. In 1995, concerned about the widespread use of box cutters by juveniles as weapons, the City Council passed section 10-134.1. This ordinance bans the sale of box cutters to persons under 18 years of age; requires sellers of box cutters to ensure that their wares are not displayed in a manner

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that facilitates their theft by minors; and bans the possession of box cutters by persons under 22 years of age on school grounds unless the box cutter is being used for a "valid school-related purpose" (§ 10-134.1 [e]) under staff supervision.

It seems safe to conclude that the City Council looked with suspicion upon juveniles' unsupervised possession of box cutters. While we do not hold that this ordinance creates a burden-shifting presumption that a box cutter is a dangerous knife under Penal Law § 265.05, we hold that Administrative Code § 10-134.1 and the facts relied on by the City Council in passing this ordinance provide additional support for concluding that the appellant's box cutter was a weapon.

The determination of the Family Court is therefore affirmed. We have considered the appellant's other contentions and find them to be without merit.

Concur--Sullivan, J. P., Rosenberger, Ellerin and Nardelli, JJ.

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2ND DEPARTMENT

New York
Official Reports

187 A.D.2d 652, 590 N.Y.S.2d 893

In the Matter of Jason J., a Person Alleged to be a Juvenile Delinquent, Appellant.

Supreme Court, Appellate Division, Second Department, New York
91-10287
(November 23, 1992)

CITE TITLE AS: Matter of Jason J.

HEADNOTES

INFANTS
JUVENILE DELINQUENTS
Sufficiency of Petition

(1) Juvenile delinquency petition, along with its supporting deposition, was legally sufficient; while petition incorrectly alleged appellant had committed assault in second degree by means of 'deadly weapon, to wit a boxcutter razor', juvenile delinquency petition need not set forth facts which are evidentiary in nature; moreover, petition substantially conformed to requirements prescribed in Family Court Act § 311.1, despite agency's failure to designate assault as having been committed by means of 'dangerous instrument'; in any event, complainant's supporting deposition, which contained nonhearsay allegations, clarifies 'boxcutter razor' was not used in assault, but related, instead, to weapon possession charges; furthermore, nonhearsay allegations in supporting deposition established 'dangerous instrument' element of crime of assault in second degree; complainant averred he was thrown to ground and kicked by appellant, as well as five other attackers; while he did not specify that appellant wore footwear at time of assault, it was logical assumption given date of incident, January 24, 1991; shoe, sneaker, or boot with which appellant kicked complainant, under circumstances of case, constituted 'dangerous instrument' within meaning of Penal Law § 10.00 (13) and, thus, satisfied requirements of Family Court Act § 311.2 (3).

INFANTS
JUVENILE DELINQUENTS
Assault --- Sufficiency of Evidence

(2) Evidence was legally sufficient to establish, beyond reasonable doubt, 'physical injury' element of crimes of assault in second degree and assault in third degree; complainant's testimony established he was punched in his head and chest, and was thrown to ground where six assailants, including appellant, kicked him; as result of assault, he sustained 'chest pain for at least three days', and 'big bump' on his forehead which later developed into bruise; he requested medical attention after assault, and subsequently treated his injuries by taking aspirin, rubbing topical medication on his chest, and putting icepack on his head; he also felt 'dizzy and weak' for about day; evidence was sufficient to support fact-finder's determination complainant had sustained 'physical injury' within meaning of Penal Law § 10.00 (9).

In a juvenile delinquency proceeding pursuant to Family Court Act article 3, the appeal is from an order of disposition of the Family Court, Kings County (Hepner, J.), dated April 30, 1991, which, upon a fact-finding order of the same court, dated April 11, 1991, made after a hearing, finding that the appellant had committed acts which, if committed by an adult, would have constituted the crimes of assault in the second degree, criminal possession of a weapon in the fourth degree, assault in the third degree, and menacing, and was guilty of unlawful possession of a weapon by a person under 16, adjudged him to be a juvenile delinquent, and placed him with the Division for Youth for a period not to exceed 18 months. The appeal brings up for review the fact-finding order dated April 11, 1991.

Ordered that the order of disposition is affirmed, without costs or disbursements.

Contrary to the appellant's contention, the juvenile delinquency petition, along with its supporting deposition, was legally sufficient *(see,* Family Ct Act § 311.2). While it is true that the petition incorrectly alleged that the appellant had committed assault in the second degree by means of a "deadly weapon, to wit a boxcutter razor", a juvenile delinquency petition need not set forth facts which are evidentiary in nature *(see,* Family Ct Act § 311.1 [3] [h]). Moreover, the petition substantially conformed to the requirements prescribedin ***653** Family Court Act § 311.1, despite the agency's failure to designate the assault as having been

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committed by means of a "dangerous instrument" (Family Ct Act § 311.2 [l]). In any event, the complainant's supporting deposition, which contained nonhearsay allegations, clarifies that the "boxcutter razor" was not used in the assault, but related, instead, to the weapon possession charges.

Furthermore, the nonhearsay allegations in the supporting deposition established the "dangerous instrument" element of the crime of assault in the second degree (Family Ct Act § 311.2 [3]; Penal Law § 120.05 [2]; *Matter of Jahron S.*, 79 NY2d 632; *Matter of Detrece H.*, 78 NY2d 107; *Matter of David T.*, 75 NY2d 927, 929; *Matter of Verna C.*, 143 AD2d 94). The term "dangerous instrument" is defined in Penal Law § 10.00 (13) as "any instrument, article or substance ... which, under the circumstances in which it is used ... is readily capable of causing death or other serious physical injury". The complainant averred in his supporting deposition that he was thrown to the ground and kicked by the appellant, as well as five other attackers. While he did not specify that the appellant wore footwear at the time of the assault, it was a logical assumption given the date of the incident--January 24, 1991. We find that the shoe, sneaker, or boot with which the appellant kicked the complainant, under the circumstances of this case, constituted a "dangerous instrument" within the meaning of Penal Law § 10.00 (13) and, thus, satisfied the requirements of Family Court Act § 311.2 (3) *(see,* *People v Carter,* 53 NY2d 113; *People v O'Hara,* 124 AD2d 895; *People v Bidwell,* 153 AD2d 960).

Viewing the evidence in the light most favorable to the presentment agency *(see,* *People v Contes,* 60 NY2d 620; *Matter of Jamal C.,* 186 AD2d 562), we find that it was legally sufficient to establish, beyond a reasonable doubt, the "physical injury" element of the crimes of assault in the second degree and assault in the third degree *(see,* Penal Law § 120.05 [2]; § 120.00 [1]; § 10.00 [9]). The complainant's testimony established that he was punched in his head and chest, and was thrown to the ground where six assailants, including the appellant, kicked him. As a result of the assault, he sustained "chest pain for at least three days", and a "big bump" on his forehead which later developed into a bruise. He requested medical attention after the assault, and subsequently treated his injuries by taking aspirin, rubbing a topical medication on his chest, and putting an icepack on his head. He also felt "dizzy and weak" for about a day. This evidence was sufficient ***654** to support the fact-finder's determination that the complainant had sustained "physical injury" within the meaning of Penal Law § 10.00 (9) *(see,* *Matter of Philip A.,* 49 NY2d 198, 200; *see also,* *People v Greene,* 70 NY2d 860; *People v Miller,* 146 AD2d 809; *People v Scott,* 162 AD2d 479; *People v Soto,* 184 AD2d 673).

The hearing court properly denied the appellant's request for a missing witness charge, since he failed to demonstrate that the uncalled witness--the complainant's father--was knowledgeable about a material issue in the case, and that the uncalled witness would naturally be expected to provide testimony favorable to the prosecution *(see,* *People v Kitching,* 78 NY2d 532, 537; *People v Gonzalez,* 68 NY2d 424, 427; *People v Farrow,* 187 AD2d 667 [decided herewith]).

The appellant's remaining contention is unpreserved for appellate review *(see,* CPL 470.05 [2]).

Thompson, J. P., Eiber, Copertino and Pizzuto, JJ., concur.

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New York
Official Reports

215 A.D.2d 377, 626 N.Y.S.2d 213

In the Matter of William B. a Person Alleged to be a Juvenile Delinquent, Appellant.

Supreme Court, Appellate Division, Second Department, New York
94-03875
(May 1, 1995)

CITE TITLE AS: Matter of William B.

HEADNOTE

INFANTS
JUVENILE DELINQUENTS
Sufficiency of Petition

(1) In juvenile delinquency proceeding, order of disposition entered upon fact-finding order finding that appellant had committed acts constituting criminal possession of stolen property in fourth degree and criminal possession of weapon in fourth degree reversed --- Petition is jurisdictionally defective because it contains neither ballistics report, nor other non-hearsay allegations sufficient to make out prima facie case that weapon was operable at time respondent possessed it.

In a juvenile delinquency proceeding pursuant to Family Court Act article 3, the appeal is from an order of disposition of the Family Court, Westchester County (Bellantoni, J.), entered March 31, 1994, which, upon a fact-finding order of the same court, entered February 15, 1994, made after a hearing, finding that the appellant had committed acts which, if committed by an adult, would have constituted the crimes of criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [4]) and criminal possession of a weapon in the fourth degree (Penal Law § 265.01 [1]), adjudged him to be a juvenile delinquent, and placed him on probation for a period of one year. The appeal brings up for review the fact-finding order entered February 15, 1994.

Ordered that the order of disposition is reversed, on the law, without costs or disbursements, the fact-finding order is vacated, the petition is dismissed, and the matter is remitted to the Family Court, Westchester County, for the purpose of entering an order pursuant to Family Court Act § 375.1.

The petition is jurisdictionally defective because it contains neither a ballistics report, nor other non-hearsay allegations sufficient to make out a prima facie case that the weapon was operable at the time the respondent possessed it *(see, Matter of Rodney J.*, 83 NY2d 503; *Matter of Alex A.*, 189 AD2d 596). ***378** Accordingly, the petition is dismissed.

Balletta, J. P., Ritter, Altman and Goldstein, JJ., concur.

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230 A.D.2d 61, 656 N.Y.S.2d 684

In the Matter of Cesar P., a Person Alleged to be a Juvenile Delinquent, Respondent.

Supreme Court, Appellate Division,
Second Department, New York
95-10854
April 28, 1997

CITE TITLE AS: Matter of Cesar P.

SUMMARY

Appeal from an order of the Family Court, Queens County (Guy P. De Phillips, J.), entered October 25, 1995, which, in a juvenile delinquency proceeding pursuant to Family Court Act article 3, granted respondent's motion to dismiss the petition.

HEADNOTES

Infants
Juvenile Delinquents
Possession of Carbon Dioxide Pistol

(1) Family Court erred in dismissing a juvenile delinquency petition charging respondent with possessing a "Daisy Air Pistol" that fires metal BBs propelled by a cartridge containing compressed carbon dioxide on the ground that a carbon dioxide pistol is not an "air-gun" within the proscriptions of Penal Law § 265.05 and Administrative Code of the City of New York § 10-131 (b) (1). Rather, a BB gun, powered by a carbon dioxide cartridge, qualifies as an "air-gun" within the statutory proscriptions. There is no meaningful distinction between an air-gun and a weapon powered by carbon dioxide. Both utilize a compressed gas to propel a projectile that can maim and injure. In fact, carbon dioxide pistols can propel pellets or BBs at even greater velocities than air pistols. Both are potentially dangerous in the hands of children under the age of 16. Both are subject to legislative prohibition. Whether powered by air or carbon dioxide, the aim of Penal Law § 265.05 was to prohibit weapons utilizing gaseous propellants and there is no logical reason to treat such weapons differently. A court should not be constrained by hypertechnical interpretations of a criminal statute and may punish, as criminal, conduct which falls within the plain, natural language of a Penal Law provision. Accordingly, the petition should be reinstated and the matter remitted to Family Court for further proceedings.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Weapons and Firearms, § 2.

Penal Law § 265.05.

NY Jur 2d, Criminal Law, §§ 5002, 5019; Domestic Relations, § 1324.

ANNOTATION REFERENCES

See ALR Index under Air Guns and BB Guns; Juvenile Courts and Delinquent Children; Weapons and Firearms.

APPEARANCES OF COUNSEL

Paul A. Crotty, Corporation Counsel of New York City *(Stephen J. McGrath* and *Alan Beckoff* of counsel), for appellant. ***62**
Jane M. Spinak, New York City *(Jonathan M. Kratter* of counsel), for respondent.

OPINION OF THE COURT

Miller, J. P.

The instant appeal provides us with an opportunity to reconsider whether a BB gun, powered by a carbon dioxide cartridge, qualifies as an "air-gun" within the proscriptions of Penal Law § 265.05 and Administrative Code of the City of New York § 10-131 (b) (1). Notwithstanding our contrary determination in *People v Delisser* (177 AD2d 702), we now hold that it does.

The facts of the underlying matter are not in serious dispute. The respondent, Cesar P., a person under the age of 16, was observed by a police officer to be in possession of a gun that turned out to be a so-called "Daisy Air Pistol". This type of weapon fires metal BBs propelled by a cartridge containing compressed carbon dioxide (CO_2).

A juvenile delinquency petition was filed which alleged that the respondent had committed two relevant acts. Count

one alleged that the respondent, being under the age of 16, possessed an air-gun in violation of Penal Law § 265.05. Count two alleged that the respondent committed an act which, if committed by an adult, would constitute a violation of Administrative Code § 10-131 (b) (1). This provision proscribes, among other things, possession of air pistols.

The respondent moved to dismiss these counts (a third count alleging possession of ammunition had previously been dismissed), arguing that these provisions prohibited possession of air-guns, but that a gun powered by a carbon dioxide cartridge was not covered thereby. On the authority of *People v Delisser* (177 AD2d 702, *supra),* the Family Court granted the motion and dismissed the petition. We now reverse the order and reinstate the first and second counts of the petition.

Penal Law § 265.05 proscribes the possession of certain weapons by persons under the age of 16. Insofar as pertinent to this appeal, it provides that: "It shall be unlawful for any person under the age of sixteen to possess any air-gun, spring-gun or other instrument or weapon in which the propelling force is a spring or air, or any gun or any instrument or weapon in or upon which any loaded or blank cartridges may be used". The Penal Law does not define the term air-gun. In a related vein, Administrative Code § 10-131 (b) (1) provides that: "It ***63** shall be unlawful for any person to ... have in such person's possession any air pistol or air rifle or similar instrument in which the propelling force is a spring or air". As noted, the Daisy Air Pistol possessed by the respondent shoots BBs propelled by compressed carbon dioxide which is contained in a cannister inserted into the grip of the weapon.

The Family Court was constrained to dismiss the petition on the authority of *People v Delisser (supra).* In that case, this Court reversed a judgment convicting a defendant of violating Administrative Code § 10-131 (b) (1), holding that a gun powered by a carbon dioxide cartridge is not included in the definition of air-gun. We hereby overrule *People v Delisser (supra)* insofar as it holds that a carbon dioxide pistol is not an air-gun.

People v Delisser (supra) reached its erroneous conclusion in reliance upon *People v Pestronk* (3 Misc 2d 845), a 1956 decision of the City Magistrates' Court, Borough of Manhattan, Lower Manhattan Court. In that case, the proprietor of a store selling scuba diving supplies sold a scuba diver's spear gun, powered by a carbon dioxide cartridge, and was charged with violating a predecessor provision of the Administrative Code proscribing the sale of air pistols or air rifles " 'in which the propelling force is a spring or air' " (*People v Pestronk, supra,* at 846). Recognizing that the Administrative Code provision was not intended to cover spear guns used by divers to spear passing fish, the court determined that air and carbon dioxide were not synonymous and that the rule could have been written to prohibit carbon dioxide powered weapons as well. Since the provision, construed strictly, prohibited the sale of only air-guns, the court held that the evidence against the defendant was legally insufficient.

The holding of *People v Pestronk* was eminently reasonable under the facts of that case. However, the facts of both *People v Delisser* and of the instant case are clearly distinguishable, both in terms of the type of weapon involved and the potential that each might be put to a legitimate use. A spear gun sold by a merchant to a scuba diver is very different from a carbon dioxide pistol carried by a burglar or placed in the hands of a teenager in an urban setting. *Pestronk* clearly did not compel a reversal of the order in *Delisser* and the error made therein should not be perpetuated. Rather, we are persuaded by the reasoning of *Adamowicz v Shafer* (155 Misc 2d 695), where the Supreme Court, Allegany County, recognized that whether powered by air or carbon dioxide, the aim of ***64** Penal Law § 265.05 was to prohibit weapons utilizing gaseous propellants and that there was no logical reason to treat such weapons differently.

Clearly there is great merit in the presentment agency's argument that there is no meaningful distinction between an air-gun and a weapon powered by carbon dioxide. Both utilize a compressed gas to propel a projectile that can maim and injure. In fact, carbon dioxide pistols can propel pellets or BBs at even greater velocities than air pistols. Both are potentially dangerous in the hands of children under the age of 16. Both are subject to legislative prohibition. There is no logical reason to treat these two similar kinds of weapons differently.

Several cases from other jurisdictions support this reasoning. The Supreme Courts of Iowa and Minnesota have held that both carbon dioxide pistols and air pistols constitute dangerous weapons despite statutory omission *(see, State v Dallen,* 452 NW2d 398 [Iowa]; *State v Seifert,* 256 NW2d 87 [Minn]). The Supreme Judicial Court of Massachusetts held that a carbon dioxide pistol is an air-gun under a statute

exempting air-guns from criminal liability *(Commonwealth v Fenton,* 395 Mass 92, 478 NE2d 949). New Jersey's statutory definition of a "firearm" expressly includes guns utilizing compressed air *or* carbon dioxide *(see,* NJ Stat Annot 2 § C:39-1 [f]; *State v Orlando,* 269 NJ Super 116, 634 A2d 1039). Despite the omissions in both the Penal Law and the New York City Administrative Code, there appears to be no legitimate reason not to hold the respondent's carbon dioxide pistol to be a variety of air pistol proscribed by both enactments.

Penal Law § 5.00 provides that the Penal Law is to be "construed according to the fair import of [its] terms to promote justice and effect the objects of the law". Clearly, the obvious intent behind both Penal Law § 265.05 and Administrative Code § 10-131 (b) (1) is to keep dangerous weapons out of the hands of children. Governor Wilson's approval memorandum upon the enactment of chapter 1041 of the Laws of 1974, which included Penal Law § 265.05, noted that this statute was part of his legislative program to discourage the possession and use of handguns (1974 McKinney's Session Laws of NY, at 2132). There is simply no justification to construe the term "air-gun" so as to exclude a carbon dioxide pistol. A court should not be constrained by hypertechnical interpretations of a criminal statute and may punish, as criminal, conduct which falls within the plain, natural language of a Penal Law provision *(People v Ditta,* 52 NY2d 657, 660). As the Appellate Division, First ***65** Department, recognized in an analagous context, "[w]hen due consideration is given to the mischief to be remedied and the general purpose and spirit of article 265 of the Penal Law ... there is no question that the weapon taken from the defendant's possession constitute[d] an illegal [air-gun]" *(People v Crivillaro,* 170 AD2d 312). Accordingly, we hereby adopt that sound logic, and hold that possession of an air-gun, powered by a carbon dioxide propellant, is prohibited by both Penal Law § 265.05 and Administrative Code § 10-131 (b) (1). In light of the foregoing, the order appealed from is reversed, on the law, without costs or disbursements, the motion is denied, the petition is reinstated, and the matter is remitted to the Family Court, Queens County, for further proceedings on the petition.

Thompson, Joy and Luciano, JJ., concur.
Ordered that the order is reversed, on the law, without costs or disbursements, the motion is denied, the petition is reinstated, and the matter is remitted to the Family Court, Queens County, for further proceedings on the petition. ***66**

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237 A.D.2d 285, 654 N.Y.S.2d 400, 1997 N.Y. Slip Op. 01958

In the Matter of Gilberto A., a Person Alleged to be a Juvenile Delinquent, Respondent. Westchester County Presentment Agency, Appellant.

Supreme Court, Appellate Division, Second Department, New York
96-01223
(March 3, 1997)

CITE TITLE AS: Matter of Gilberto A.

In a juvenile delinquency proceeding pursuant to Family Court Act article 3, the petitioner appeals, as limited by its brief, from so much of an order of the Family Court, Westchester County (Spitz, J.), entered January 10, 1996, as granted that branch of the respondent's motion which was to dismiss that branch of the petition which charged him with acts which, if committed by an adult, would have constituted the crime of unlawful possession of weapons by persons under sixteen.

HEADNOTE

INFANTS
JUVENILE DELINQUENTS
Possession of Weapon

(1) In juvenile delinquency proceeding, motion to dismiss petition charging respondent with acts constituting unlawful possession of weapons by persons under sixteen should have been denied --- Allegations in petition that respondent possessed straight razor (i.e., box-cutter/razor) while on school grounds were sufficient to allege that he possessed dangerous knife in violation of Penal Law § 265.05.

Ordered that the order is reversed insofar as appealed from, without costs or disbursements, that branch of the respondent's motion which was to dismiss that branch of the petition which charged him with acts, which if committed by an adult, would have constituted the crime of unlawful possession of weapons by persons under sixteen is denied, that branch of the petition is reinstated, and the matter is remitted to the Family Court, Westchester County, for further proceedings.

The allegations in the petition that the respondent possessed a straight razor (*i.e.,* a box-cutter/razor) while on school grounds were sufficient to allege that he possessed a dangerous knife in violation of Penal Law § 265.05.

Thompson, J. P., Santucci and Luciano, JJ., concur.

Friedmann, J.

Dissents and votes to affirm the order appealed from with the following memorandum: I respectfully dissent, and would vote to affirm the order appealed from, dismissing the juvenile delinquency petition as defective.

The nonhearsay allegations of a juvenile delinquency petition and its supporting depositions must establish, if true, every element of the crime charged and the respondent's commission thereof (*see,* Family Ct Act § 311.2 [3]; *Matter of Jahron S.,* 79 NY2d 632). The presentment agency is required to set forth in the petition and any supporting depositions sufficient nonhearsay ***286** evidence to warrant a conviction, should the respondent's behavior remain unexplained or uncontradicted (*see, Matter of Jahron S., supra*). Otherwise the petition is subject to dismissal for legal insufficiency (*see,* Family Ct Act § 315.1; *Matter of Jahron S., supra; Matter of Detrece H.,* 78 NY2d 107, 110; *see also, Matter of Rodney J.,* 83 NY2d 503; *Matter of Wesley M.,* 83 NY2d 898).

The petition at bar alleged, "[u]pon information and belief", that the respondent had violated Penal Law § 265.05 in that he "possessed a dangerous knife, to wit: Respondent did possess a boxcutter/razor, which act if committed by an adult would constitute the crime of Unlawful Possession of Weapons by Persons Under Sixteen". In the only sworn statement supporting the petition, Police Officer Garbowski related that he had been "informed" that the respondent had assaulted the complainant (who refused to press charges) in retaliation for an earlier attempt by the complainant's cousin to assault the respondent with a razor. The sole nonhearsay allegation in the officer's sworn statement concerned his apprehension of the respondent, whom he found sitting in

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front of Gorton High School with a "straight razor" in his pants.

As the Family Court properly observed, neither "razor" nor "box-cutter" is named in Penal Law § 265.05 as one of the "weapons" whose mere possession by a person under the age of 16 is prohibited. The omission arguably is significant inasmuch as the Legislature has expressly banned the possession of a "razor" in Penal Law § 265.01 (2). Consequently, the respondent's simple possession of a box-cutter does not, without more, constitute a violation of Penal Law § 265.05.

The Court of Appeals has held that an otherwise "innocent utilitarian utensil" may be determined to fall within the statutory proscription when the circumstances of its possession, including the behavior of its possessor, demonstrate that the possessor himself considered it a weapon and thus a "dangerous knife" within the contemplation of the statute (*see, e.g., Matter of Jamie D.,* 59 NY2d 589). Here, however, the presentment agency failed to support its petition with nonhearsay allegations establishing that the respondent had used his "box-cutter" like a "dangerous knife", with the result that the petition was properly dismissed for legal insufficiency.

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247 A.D.2d 482, 668 N.Y.S.2d 682, 1998 N.Y. Slip Op. 01275

In the Matter of Jonathan T., a Person Alleged to be a Juvenile Delinquent, Respondent.

Supreme Court, Appellate Division, Second Department, New York
97-00346
(February 9, 1998)

CITE TITLE AS: Matter of Jonathan T.

***482** In a juvenile delinquency proceeding pursuant to Family Court Act article 3, the appeal is from an order of the Family Court, Westchester County (Spitz, J.), dated December 10, 1996, which dismissed the petition as legally insufficient pursuant to Family Court Act § 311.1 (4) and § 311.2 (3).

HEADNOTE

INFANTS
JUVENILE DELINQUENTS
Sufficiency of Petition

(1) In juvenile delinquency proceeding, Family Court erred in dismissing petition for legal insufficiency --- Petition, which charged respondent with certain drug offenses, was supported by properly-verified report prepared by police officer; police officer, who described himself as 'surveillance officer' on 'buy-and-bust' operation, stated in report that he 'did observe the following events'; those events included respondent's display of cocaine to passersby, his arrest by back-up team, and removal of six tinted bags of cocaine from his pocket; in verified laboratory report, forensic scientist who tested substance stated that six bags contained cocaine --- Verified police and laboratory reports, taken together, provided sufficient nonhearsay allegations to establish every element of crimes charged and respondent's commission thereof; police report, on its face, indicated that allegations were based on officer's firsthand observations at scene of crime; furthermore, caption, incident number, and description of packaging of drugs in laboratory report were sufficient to connect substance tested to substance recovered from respondent; respondent's contention that laboratory report was facially insufficient because it failed to establish chain of custody is rejected.

Ordered that the order is reversed, on the law, without costs or disbursements, the petition is reinstated, and the matter is remitted to the Family Court, Westchester County, for further proceedings consistent herewith.

The petition, which charged the respondent with certain drug offenses, was supported by a properly-verified report prepared by a police officer (*see, Matter of Neftali D.*, 85 NY2d 631; *Matter of Kishana B.*, 243 AD2d 561; *Matter of Michael FF.*, 210 AD2d 758; *Matter of Kerwin C.*, 207 AD2d 890; *see also*, CPL 100.30 [1] [d]). The police officer, who described himself as the "surveillance officer" on a so-called "buy-and-bust" operation, stated in the report that he "did observe the following events". Those events included the respondent's display of cocaine to passersby, his arrest by the back-up team, and the removal of six tinted bags of cocaine from his pocket. In a verified laboratory report, the forensic scientist who tested the substance stated that the six bags contained cocaine. ***483**

The verified police and laboratory reports, taken together, provided sufficient nonhearsay allegations to establish every element of the crimes charged and the respondent's commission thereof (*see, Matter of Jahron S.*, 79 NY2d 632; Family Ct Act § 311.2 [3]). Contrary to the respondent's contention, the police report, on its face, indicated that the allegations were based on the officer's firsthand observations at the scene of the crime. Furthermore, the caption, incident number, and description of the packaging of the drugs in the laboratory report were sufficient to connect the substance tested to the substance recovered from the respondent. We reject the respondent's contention that the laboratory report was facially insufficient because it failed to establish the chain of custody.

Accordingly, the Family Court erred in dismissing the petition for legal insufficiency, and the matter is remitted to the Family Court, Westchester County, for further proceedings consistent herewith.

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8 A.D.3d 674, 779 N.Y.S.2d 249, 2004 N.Y. Slip Op. 05667

****1** The People of the State of New York, Respondent
v
Munir Chata, Appellant.

Supreme Court, Appellate Division,
Second Department, New York
June 28, 2004

CITE TITLE AS: People v Chata

HEADNOTE

Crimes
Possession of Weapon

Conviction of criminal possession of weapon in third degree under Penal Law § 265.02 (4) must be vacated—Penal Law § 265.02 (4) exempts from criminal liability under that subdivision person's possession of loaded firearm provided that such possession takes place in person's home or place of business—indictment charging violation of Penal Law § 265.02 (4) should have alleged that defendant's possession of subject weapon was outside of his home or place of business; although insufficiency of factual allegations of this count of indictment was not timely raised, since indictment failed to allege every material element of subject crime, it was jurisdictionally defective and defect was not waivable.

Appeal by the defendant from a judgment of the Supreme ***675** Court, Queens County (Rotker, J.), rendered December 19, 2002, convicting him of criminal possession of a weapon in the third degree (two counts) and false personation, after a nonjury trial, and imposing sentence.

Ordered that the judgment is modified, on the law, by vacating the conviction on the count of the indictment charging the defendant with criminal possession of a weapon in the third degree under Penal Law § 265.02 (4), vacating the sentence imposed thereon, and dismissing that count of the indictment; as so modified, the judgment is affirmed.

The defendant's contention that the evidence adduced at trial was legally insufficient to demonstrate that he knowingly possessed a weapon, and thus legally insufficient to support his conviction of criminal possession of a weapon in the third degree under Penal Law § 265.02 (1), is unpreserved for appellate review since he did not specify that ground in his motion to dismiss at the trial (*see* CPL 470.05 [2]; *People v Gray*, 86 NY2d 10 [1995]; *People v Udzinski*, 146 AD2d 245 [1989]). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620 [1983]), we find the evidence was legally sufficient to establish the defendant's guilt beyond a reasonable doubt.

However, we agree with the defendant that his conviction of criminal possession of a weapon in the third degree under Penal Law § 265.02 (4) must be vacated. Penal Law § 265.02 (4) exempts from criminal liability under that subdivision a person's possession of a loaded firearm provided that such possession takes place in the person's home or place of business. In this case, ****2** the indictment charging a violation of Penal Law § 265.02 (4) should have alleged that the defendant's possession of the subject weapon was outside of his home or place of business (*see People v Rodriguez*, 68 NY2d 674 [1986], *revg on dissent of Lazer, J.,* 113 AD2d 337, 343-348 [1985]; *People v Newell*, 95 AD2d 815 [1983]). Although the insufficiency of the factual allegations of this count of the indictment was not timely raised, since the indictment failed to allege every material element of the subject crime, it was jurisdictionally defective and the defect was not waivable (*see People v Newell, supra*). H. Miller, J.P., Goldstein, Cozier and Mastro, JJ., concur.

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134 A.D.3d 1117, 23 N.Y.S.3d 275, 2015 N.Y. Slip Op. 09689

**1 In the Matter of Diamond J., a Person Alleged to be a Juvenile Delinquent, Appellant.

Supreme Court, Appellate Division, Second Department, New York
2014-08330, D-7429-14
December 30, 2015

CITE TITLE AS: Matter of Diamond J.

HEADNOTE

Crimes
Juvenile Offender
Possession of Weapons by Persons under 16—Adequacy of Petition

Seymour W. James, Jr., New York, NY (Tamara A. Steckler and John A. Newbery of counsel), for appellant.
Zachary W. Carter, Corporation Counsel, New York, NY (Scott Shorr and Susan Paulson of counsel; Anna Gordan on the brief), for respondent.

Appeal from an order of disposition of the Family Court, Kings County (Michael Ambrosio, J.), dated August 1, 2014. The order adjudicated Diamond J. a juvenile delinquent and placed her on probation for a period of 12 months. The appeal brings up for review a fact-finding order of that court dated July 14, 2014, which, after a hearing, found that Diamond J. committed acts which, if committed by an adult, would have constituted the crimes of menacing in the second degree and criminal possession of a weapon in the fourth degree, and that she committed the juvenile act of unlawful possession of weapons by persons under sixteen.

Ordered that the appeal from so much of the order of disposition as placed the appellant on probation for a period of 12 months is dismissed as academic, without costs or disbursements, as the period of probation has expired; and it is further,

Ordered that the order of disposition is modified, on the law, by deleting the provision thereof adjudicating the appellant a juvenile delinquent based on a finding that she committed the juvenile act of unlawful possession of weapons by persons under sixteen, and substituting therefor a provision dismissing count four of the petition; as so modified, the order of disposition is affirmed, without costs or disbursements, and the fact-finding order is modified accordingly. ***1118**

The evidence adduced at the fact-finding hearing proved beyond a reasonable doubt that the appellant committed acts that, if committed by an adult, would have constituted the crimes of menacing in the second degree and criminal possession of a weapon in the fourth degree (*see Matter of Eugene D.*, 126 AD3d 529, 529 [2015]; *Matter of Markquel S.*, 93 AD3d 505, 505-506 [2012]; *cf.* Penal Law §§ 120.14 [1]; 265.01 [2]; *Matter of Anisha McG.*, 27 AD3d 749, 751 [2006]). Moreover, upon the exercise of our factual review power, we are satisfied that the findings of fact as to those counts are not against the weight of the evidence (*see Matter of Isaiah D.*, 127 AD3d 1184, 1185-1186 [2015]).

Nevertheless, the order of disposition must be modified with respect to count four of the petition, which alleged that the appellant committed the juvenile act of unlawful possession of weapons by persons under sixteen in violation of Penal Law § 265.05. The petition in a juvenile delinquency proceeding is sufficient on its face if "the allegations of the factual part of the petition, **2 together with those of any supporting depositions which may accompany it, provide reasonable cause to believe that the respondent committed the crime or crimes charged," and the "non-hearsay allegations of the factual part of the petition or of any supporting depositions establish, if true, every element of each crime charged and the respondent's commission thereof" (Family Ct Act § 311.2 [2], [3]). The failure to satisfy this requirement is a jurisdictional defect (*see Matter of Michael Grudge M.*, 80 AD3d 614, 615 [2011]).

Here, the petition failed to provide an adequate nonhearsay allegation of an essential element of Penal Law § 265.05, namely, that the appellant was under the age of sixteen at the time of the incident. The complainant's supporting deposition alleged that the appellant was his "14-year-old cousin," but it did not state the source of the complainant's knowledge of the appellant's age. The presentment agency contends that the allegation is sufficient, and it relies on the proposition that "it is generally recognized that the ages of family members are

common knowledge within a family" (*Matter of Brandon P.*, 106 AD3d 653, 653 [2013]). That proposition, however, applies to close family relationships. Notably, in *Matter of Brandon P.*, the allegation as to the appellant's age was made by the appellant's sister (*see id.* at 653). The relationship of "cousin," by contrast, is too distant and too broad in degree of consanguinity (*see* Black's Law Dictionary 442-443 [10th ed 2014]) to meet the requirements of Family Court Act § 311.2 in this case. Specifically, the complainant's statement regarding the appel ***1119** lant's age was not a sufficient nonhearsay allegation based on personal knowledge establishing reasonable cause to believe that the age element of the offense was met. Since count four of the petition was jurisdictionally defective, that count must be dismissed, and the order of disposition and the order of fact-finding modified accordingly (*see Matter of Michael Grudge M.*, 80 AD3d at 615). Rivera, J.P., Balkin, Leventhal and Dickerson, JJ., concur.

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172 A.D.3d 920, 100 N.Y.S.3d 66, 2019 N.Y. Slip Op. 03633

**1 The People of the State of New York, Respondent,
v
Yusef Webb, Appellant.

Supreme Court, Appellate Division,
Second Department, New York
2016-05422, 3167/14
May 8, 2019

CITE TITLE AS: People v Webb

HEADNOTES

Crimes
Indictment
Jurisdictional Defect—Exceptions Outside of Statute

Crimes
Fair Trial
Harmless Error

Crimes
Right to Counsel
Waiver

Paul Skip Laisure, New York, NY (Rebecca J. Gannon of counsel), for appellant.
Eric Gonzalez, District Attorney, Brooklyn, NY (Leonard Joblove, Seth M. Lieberman, and Y. Carson Zhou of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Suzanne M. Mondo, J.), rendered April 22, 2016, convicting him of criminal possession of a weapon in the third degree, criminal possession of a firearm, and unlawful possession of marijuana, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant contends that his indictment was jurisdictionally defective with respect to the count of criminal possession of a weapon in the third degree (*see* Penal Law § 265.02 [7]) because, while the indictment specified that the weapon in question was an assault rifle, it failed to also state that the rifle did not fall into one of the categories of excepted weapons set forth in Penal Law § 265.00 (22) (g). The defendant's contention ***921** is without merit. "If the defining statute contains an exception, the indictment must allege that the crime is not within the exception. But when the exception is found outside the statute, the exception generally is a matter for the defendant to raise in defense, either under the general issue or by affirmative defense" (*People v Kohut*, 30 NY2d 183, 187 [1972]). Where, as here, the statute defining the defendant's crime contained no exception (*see* Penal Law § 265.02 [7]), the indictment was not jurisdictionally defective for failing to include exceptions found outside the statute (*see* *People v Kohut*, 30 NY2d at 187; *see generally* *People v D'Angelo*, 98 NY2d 733, 735 [2002]).

The defendant contends that he was deprived of a fair trial by the admission into evidence of a bulletproof vest found in his possession during the execution of a search warrant and police testimony about the execution of the search warrant, as well as the prosecutor's comments during summation about the search warrant. These contentions are unpreserved for appellate review, as the defendant failed to object to the admission of the evidence or the remarks at issue (*see* CPL 470.05). In any event, as "the offense of criminal possession of a weapon in the third degree . . . requires only that defendant's possession be knowing" (*People v Ford*, 66 NY2d 428, 440 [1985]), admission of the bulletproof vest was both relevant and necessary in this case (*see People v James*, 262 AD2d 500, 501 [1999]) given the " 'inherent linkage between a [bulletproof] vest and possession of a firearm' " (*People v Carvey*, 89 NY2d 707, 712 [1997], quoting *People v Batista*, 88 NY2d 650, 655 [1996]). Additionally, any error in the admission of the search warrant evidence did not deprive the defendant of a fair trial, and any other error in this regard was harmless, as there was overwhelming evidence of the defendant's guilt and no significant probability that any error contributed to his convictions (*see* *People v Crimmins*, 36 NY2d 230, 237, 242 [1975]; *People v Spigner*, 153 AD3d 1289, 1290 [2017]).

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The defendant made an effective waiver of his right to counsel. Before proceeding pro se, a defendant must make a knowing, voluntary, and intelligent waiver of the right to counsel (*see* *People v Arroyo*, 98 NY2d 101, 103 [2002]). Here, the defendant's request to represent himself was unequivocal, the Supreme Court engaged in the requisite searching inquiry to ensure that his waiver of the right to counsel was knowing, voluntary, and intelligent, and the colloquy was sufficient to ensure that the defendant was aware of the drawbacks of self-representation (*see People v Vivenzio*, 62 NY2d 775, 776 [1984]; ***922** *People v Morrow*, 143 AD3d 919, 919 [2016]). The defendant also had the benefit of standby counsel throughout the proceedings and proceeded at his own peril, fully aware of the consequences of his chosen course (*see People v Morrow*, 143 AD3d at 919).

Rivera, J.P., Chambers, Cohen and Iannacci, JJ., concur.

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210 A.D.3d 1007, 179 N.Y.S.3d 145, 2022 N.Y. Slip Op. 06716

****1** The People of the State of New York, Appellant,

v

Saquan Holloway, Respondent.

Supreme Court, Appellate Division,
Second Department, New York
2021-08252, 695/20
November 23, 2022

CITE TITLE AS: People v Holloway

HEADNOTES

Crimes
Indictment
Sufficiency of Evidence before Grand Jury—Constructive Possession of Firearm Found in Unoccupied Vehicle Parked Outside House Where Defendant was Arrested

Crimes
Possession of Weapon
Constructive Possession—Insufficient Evidence of Dominion or Control over Firearm

Melinda Katz, District Attorney, Kew Gardens, NY (Johnnette Traill, Nancy Fitzpatrick Talcott, Emily Aguggia, and Mariana Zelig of counsel), for appellant.
Steven Goldenberg, Chappaqua, NY, for respondent.

Appeal by the People from an order of the Supreme Court, Queens County (Stephanie Zaro, J.), dated May 21, 2021. The order, insofar as appealed from, granted that branch of the defendant's omnibus motion which was to dismiss the two counts of the indictment charging him with criminal possession of a weapon in the second degree on the ground that the evidence presented to the grand jury was legally insufficient.

Ordered that the order is affirmed insofar as appealed from.

On May 18, 2020, at approximately 6:20 a.m., police officers executed a warrant to search a house in Queens where the defendant and two other adults were present. Pursuant to a separate search warrant, the police recovered a loaded .38-caliber revolver from a Volkswagen Touareg (hereinafter the vehicle) parked behind the house. The defendant was arrested and charged by a grand jury indictment with, among other things, two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]). By order dated May 21, 2021, the Supreme Court, inter alia, granted that branch of the defendant's omnibus motion which was to dismiss the two weapons possession charges against him on the ground that the evidence presented to the grand jury was legally insufficient to sustain those charges. The People appeal.

A court reviewing the legal sufficiency of an indictment must view the evidence in the light most favorable to the People and determine whether the evidence, if unexplained and uncontradicted, would be legally sufficient to support a verdict of guilt after trial (*see* *People v Mills*, 1 NY3d 269, 274-275 [2003]; *People v Castro*, 202 AD3d 815, 816 [2022]). Legally sufficient evidence is "competent evidence which, if accepted as true, would establish every element of an offense charged" (CPL 70.10 [1]; *see* *People v Mills*, 1 NY3d at 274; ***1008** *People v Castro*, 202 AD3d at 816). "In the context of grand jury proceedings, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt" (*People v Mills*, 1 NY3d at 274 [internal quotation marks omitted]; *see* *People v Bello*, 92 NY2d 523, 526 [1998]; *People v Castro*, 202 AD3d at 816). This Court's inquiry is limited to assessing whether the facts, if proven, and the logical inferences flowing therefrom, supply proof of each element of the charged crimes (*see* *People v Bello*, 92 NY2d at 526; *People v Castro*, 202 AD3d at 816).

****2** A person is guilty of criminal possession of a weapon in the second degree under Penal Law § 265.03 (1) (b) when "with intent to use the same unlawfully against another, such person . . . possesses a loaded firearm." A person is guilty of criminal possession of a weapon in the second degree under Penal Law § 265.03 (3) when a "person possesses any loaded firearm," inter alia, outside of his or her home or place of business. A defendant may be found to possess a firearm through actual, physical possession, or through constructive possession (*see People v Donigan*, 201 AD3d 731, 732 [2022]). To establish constructive possession, "the People must show that [such person] exercised dominion or control over the [firearm] by a sufficient level of control over

the area in which the [firearm] is found or over the person from whom the [firearm] is seized" (*People v Manini*, 79 NY2d 561, 573 [1992] [internal quotation marks omitted]; *see People v Rodriguez*, 98 AD3d 530, 533 [2012]).

Here, viewed in the light most favorable to the People, the evidence was legally insufficient to establish the defendant's constructive possession of the firearm found in the vehicle, which was unoccupied and parked outside the house where the defendant was arrested. Contrary to the People's contention, they did not present prima facie proof that the defendant owned, rented, had control over, or had a possessory interest in the vehicle at the time the police found the firearm therein (*see People v Manini*, 79 NY2d at 573; *People v Pearson*, 75 NY2d 1001, 1002 [1990]).

The People's remaining contentions are without merit.

Accordingly, the Supreme Court properly dismissed the two counts of the indictment charging the defendant with criminal possession of a weapon in the second degree. Rivera, J.P., Maltese, Ford and Taylor, JJ., concur.

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New York
Official Reports

79 A.D.3d 940, 912 N.Y.S.2d 888 (Mem), 2010 N.Y. Slip Op. 09368

**1 In the Matter of Divine D., a Person Alleged to be a Juvenile Delinquent, Appellant.

Supreme Court, Appellate Division, Second Department, New York
December 17, 2010

CITE TITLE AS: Matter of Divine D.

HEADNOTE

Infants
Juvenile Delinquents
Facial Sufficiency of Petition

Steven Banks, New York, N.Y. (Tamara A. Steckler and John Newbery of counsel), for appellant.
Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Edward F.X. Hart and Jane L. Gordon of counsel), for respondent.
In a juvenile delinquency proceeding pursuant to Family Court Act article 3, Divine D. appeals from an order of disposition of the Family Court, Kings County (Weinstein, J.), dated ***941** April 15, 2010, which, upon a fact-finding order of the same court dated March 3, 2010, made after a hearing, inter alia, finding that he committed an act which constituted the crime of unlawful possession of weapons by persons under the age of 16, adjudged him to be a juvenile delinquent and placed him on probation for a period of 12 months.

Ordered that the order of disposition is reversed, on the law, without costs or disbursements, the fact-finding order dated March 3, 2010, is modified by deleting the provision thereof finding that the appellant committed an act which constituted the crime of unlawful possession of weapons by persons under the age of 16, and substituting therefor a provision dismissing that count of the petition, and the petition is dismissed.

A juvenile delinquency petition is legally sufficient on its face when "non-hearsay allegations of the factual part of the petition or of any supporting depositions establish, if true, every element of each crime charged" (Family Ct Act § 311.2 [3]; *see* *Matter of Jahron S.*, 79 NY2d 632, 635-636 [1992]). The failure to set forth such nonhearsay allegations as to every element of the charged act in accordance with Family Court Act § 311.2 (3) is a nonwaivable jurisdictional defect, which requires dismissal of the petition (*see* *Matter of Jahron S.*, 79 NY2d at 637; *Matter of Michael M.*, 3 NY3d 441, 448 [2004]; *Matter of Matthew W.*, 48 AD3d 587 [2008]; *Matter of Jamel E.*, 33 AD3d 797 [2006]). Here, neither the petition nor the supporting depositions provided sworn, nonhearsay allegations as to the appellant's age, which is an element of the criminal act of unlawful possession of weapons by persons under the age of 16. Consequently, as conceded by the presentment agency, the petition was jurisdictionally defective as to that count, which was the only remaining count in the petition, and the petition must, therefore, be dismissed. Fisher, J.P., Angiolillo, Belen and Austin, JJ., concur.

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3rd DEPARTMENT

205 A.D.3d 1212, 169 N.Y.S.3d 366, 2022 N.Y. Slip Op. 03279

**1 The People of the State of New York, Respondent,
v
Keith Gillespie, Appellant.

Supreme Court, Appellate Division,
Third Department, New York
110886, 112328
May 19, 2022

CITE TITLE AS: People v Gillespie

HEADNOTES

Crimes
Appeal
Preservation of Issue for Review—Sufficiency of Evidence for Endangering Welfare of Child

Crimes
Possession of Weapon
Sufficiency and Weight of Evidence

Crimes
Indictment
Certificate of Voted Indictment Properly Filed

Crimes
Indictment
Amendment to Correct Typographical Errors

Crimes
Search Warrant
Application Not Defective

Crimes
Appeal
Preservation of Issue for Review—Search Warrant's Technical Defects

Crimes
Vacatur of Judgment of Conviction
Motion Denied without Hearing

Carolyn B. George, Albany, for appellant.
P. David Soares, District Attorney, Albany (Erin LaValley of counsel), for respondent.

Garry, P.J. Appeals (1) from a judgment of the Supreme Court (McDonough, J.), rendered November 30, 2018 in Albany County, convicting defendant following a nonjury trial of the crimes of criminal possession of a weapon in the second degree (three counts) and endangering the welfare of a child, and (2) by permission, from an order of said court, entered April 23, 2020 in Albany County, which denied defendant's motion pursuant to CPL 440.10 to vacate the judgment of conviction, without a hearing.

An argument ensued when a child's father and grandfather retrieved the child from the mother. As the child sat in a car nearby, defendant emerged from the mother's apartment, brandished a handgun and fired shots in the air. Defendant was then charged by indictment with three counts of criminal possession of a weapon in the second degree and one count of endangering the welfare of a child. After Supreme Court denied defendant's suppression motion, he proceeded to a bench trial and was convicted on all counts. The court sentenced him to concurrent prison terms of 10 years, with five years of postrelease supervision, for each of his convictions of criminal possession of a weapon, and to a lesser concurrent term on the remaining conviction. Supreme Court denied defendant's subsequent CPL 440.10 motion, without a hearing. Defendant ***1213** appeals the judgment of conviction and, by permission, the order denying his CPL article 440 motion.

Defendant's challenge to the legal sufficiency of the evidence supporting the conviction of endangering the welfare of a child is unpreserved for review as he failed to specifically address that count in his motion to dismiss at the close of the People's evidence (*see People v Farnham*, 136 AD3d 1215, 1215 [2016], *lv denied* 28 NY3d 929 [2016]). On appeal, he does not argue that the conviction on that count was against the weight of the evidence.

Addressing defendant's challenge to the legal sufficiency of the evidence on the convictions for criminal possession of a weapon in the second degree, this Court must evaluate "whether the evidence, viewed in the light most favorable

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to the People, provides any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial and as a matter of law satisfy the proof and burden requirements for every element of the crimes charged" (*People v Sanon*, 179 AD3d 1151, 1152 [2020] [internal quotation marks, brackets and citation omitted], *lv denied* 35 NY3d 973 [2020]). "A weight of the evidence review requires this Court to first determine whether, based on all the credible evidence, a different finding would not have been unreasonable. Where a different finding would not have been unreasonable, this Court must weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony to determine if the verdict is supported **2 by the weight of the evidence" (*People v Forney*, 183 AD3d 1113, 1113-1114 [2020] [internal quotation marks and citations omitted], *lv denied* 35 NY3d 1065 [2020]). For the three counts at issue, the People were required to prove that defendant possessed a loaded firearm in a place other than his home or business (*see* Penal Law § 265.03 [3]; *People v Cooper*, 199 AD3d 1061, 1063 [2021], *lv denied* 38 NY3d 926 [2022]) and that he possessed a loaded firearm with intent to use it unlawfully against the child's father and grandfather (*see* Penal Law § 265.03 [1] [b]). The definition of firearm includes "any pistol or revolver" (Penal Law § 265.00 [3] [a]), and "[t]he weapon must be operable to satisfy the definition of 'loaded firearm' " (*People v Burden*, 108 AD3d 859, 860 [2013], *lv denied* 22 NY3d 1197 [2014]; *see People v Cavines*, 70 NY2d 882, 883 [1987]).

The father and the grandfather each testified that they saw defendant on the sidewalk holding a handgun and that he shot *1214 into the air one or two times. The father also testified that defendant pointed the gun at him and the grandfather before shooting into the air. This testimony was corroborated by video from nearby cameras, and still photographs from the video, that captured the argument as described and shows defendant holding what appears to be a gun. This evidence was legally sufficient to establish the elements of all three counts: that defendant possessed a firearm outside his home or business; he intended to use it unlawfully against the father and the grandfather when he pointed it at them; and it was loaded and operable because it actually fired shots (*see* Penal Law § 265.03 [1] [b]; [3]; *People v Smith*, 173 AD3d 1441, 1443 [2019], *lv denied* 34 NY3d 954 [2019]; *People v Burden*, 108 AD3d at 860; *compare People v Melhado*, 53 NY2d 984, 985 [1981]). As a different verdict would have been unreasonable, when considering all the proof, the verdict was not against the weight of the evidence.

Pursuant to CPL 180.80, a defendant who has a pending felony complaint and has been in custody longer than the period of time specified in the statute without a preliminary hearing having been commenced thereon may apply to be released on his or her own recognizance unless, among other things, "[t]he district attorney files . . . a written certification that an indictment has been voted" (CPL 180.80 [2] [a]). "The purpose of [the statute] is to ensure that [a] defendant is not detained beyond the prescribed period of time without a finding of probable cause" (*People ex rel. Goldberg v Sielaff*, 178 AD2d 170, 171 [1991], *lv denied* 79 NY2d 759 [1992]); "courts are not required to consider the validity of the underlying indictment in assessing whether [the statute] has been violated" (*People ex rel. Heinrich v Sielaff*, 176 AD2d 978, 980 [1991]). Here, contrary to defendant's assertion, the People filed a certificate in compliance with the statute. At the time of this filing, the indictment remained **3 sealed; the certificate listed defendant's arrest date and the charges contained in the criminal complaints that were pending against him. The local criminal court was thus duly advised as to which incident was at issue and that defendant was not entitled to either release or a hearing on the related complaints (*see* CPL 180.80).

Two counts of the indictment originally cited an incorrect paragraph under the same subdivision of the Penal Law provision for criminal possession of a weapon in the second degree—Penal Law § 265.03 (1) (a), prohibiting possession of a machine-gun with intent to use it unlawfully against another, instead of paragraph (1) (b), prohibiting possession of a loaded firearm *1215 with the same intent. However, the indictment correctly listed the name of the charged crime and stated all the elements of the intended crime (i.e., possessing a loaded firearm). Supreme Court granted the People's motion to amend the indictment, thereby rendering it consistent with the evidence and charges presented to the grand jury, which did not mention a machine-gun. "In these circumstances, the typographical errors amounted to mere technical defects that neither changed the theory of the People's case nor constituted jurisdictional impediments requiring reversal" (*People v Johnson*, 197 AD3d 61, 66 [2021] [citations omitted]). As the amendment occurred early in the case and there was no prejudice to defendant, Supreme Court did not err in permitting the People to amend the indictment to correct those typographical errors (*see* CPL

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200.70; *People v Baber*, 182 AD3d 794, 800 [2020], *lv denied* 35 NY3d 1064 [2020]).

"To establish probable cause for the issuance of a search warrant, the warrant application must demonstrate that there is sufficient information to support a reasonable belief that evidence of a crime may be found in a certain place" (*People v Cazeau*, 192 AD3d 1388, 1388 [2021] [internal quotation marks and citations omitted], *lv denied* 37 NY3d 963 [2021]; *accord People v Patterson*, 199 AD3d 1072, 1073 [2021], *lv denied* 37 NY3d 1163 [2022]). To that end, the application must contain factual allegations that support the existence of probable cause based on either personal knowledge of the applicant, upon information and belief from specified sources or through submitted supporting depositions (*see* CPL 690.35 [3] [c]). At the suppression hearing, the detective who submitted the search warrant application testified that he based his factual allegations on his personal review of the surveillance camera video, information he obtained from police interviews of named witnesses at the scene and sworn witness statements—all submitted as attachments to the application—from the father, the grandfather and a neighbor. The allegations in the warrant indicated that a man retreated into the mother's apartment after he shot a gun, providing probable cause to believe that the shooter, his clothing and identifying documents, a gun and ammunition may ****4** be found during a search of the apartment and its curtilage. Accordingly, Supreme Court properly denied defendant's suppression motion because the search warrant application was not defective (*see* CPL 690.35 [3]; *People v Cazeau*, 192 AD3d at 1388). Defendant failed to preserve his challenge to alleged technical defects in the search warrant as the issue was not raised in his omnibus motion or during the suppression hearing (*see People v McLeod*, 189 AD3d 1967, 1968 [2020]; ***1216** *People v Elder*, 173 AD3d 1344, 1345 [2019], *lv denied* 34 NY3d 930 [2019]).

Turning to defendant's CPL 440.10 motion, "a hearing is only required if the submissions show that the nonrecord facts sought to be established are material and would entitle the defendant to relief" (*People v Brandon*, 133 AD3d 901, 903 [2015] [internal quotation marks, brackets and citation omitted], *lv denied* 27 NY3d 1000 [2016]). His arguments regarding alleged defects in the form of the indictment and the alleged failure to file the indictment with the Albany County Clerk cannot be advanced in a CPL article 440 motion because they can be determined on the record and were reviewable on direct appeal (*see* CPL 440.10 [2] [b]; *People v Simpson*, 196 AD3d 996, 998 [2021], *lv denied* 37 NY3d 1029 [2021]; *People v Durham*, 195 AD3d 1318, 1321 [2021], *lv denied* 37 NY3d 1160 [2022]). His argument that he was deprived of his right to appear before the grand jury could have been raised on direct appeal and, in any event, is waived based on his failure to assert that contention within five days after arraignment upon the indictment (*see* CPL 190.50 [5] [c]). To the extent that his ineffective assistance of counsel argument is premised on counsel's failure to protect defendant's right to testify before the grand jury, his submissions fail to raise a question of material fact. Defendant submitted with his motion a letter from prior counsel stating that his counsel was provided notice of the grand jury presentment, consulted with defendant and defendant elected not to testify. Defendant does not refute all these assertions in his affidavit or elsewhere in his motion papers, nor does he demonstrate how his testimony before the grand jury would have resulted in a different outcome (*see People v Graham*, 185 AD3d 1221, 1223 [2020], *lv denied* 36 NY3d 929 [2020]). As the other allegations of ineffective assistance are "based on . . . defendant's self-serving claims that are contradicted by the record or unsupported by any other evidence," no hearing was required on the motion (*People v Beverly*, 196 AD3d 864, 865 [2021] [internal quotation marks and citations omitted], *lv denied* 37 NY3d 1058 [2021]).

Egan Jr., Pritzker, Colangelo and Ceresia, JJ., concur. Ordered that the judgment and order are affirmed.

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189 A.D.2d 420, 596 N.Y.S.2d 219

In the Matter of Shannon FF., a Person Alleged to be a Juvenile Delinquent, Respondent. Tompkins County Attorney, Appellant.

Supreme Court, Appellate Division, Third Department, New York
66253
April 15, 1993

CITE TITLE AS: Matter of Shannon FF.

SUMMARY

Appeal from an order of the Family Court of Tompkins County (William C. Barrett, J.), entered April 24, 1992, which dismissed petitioner's application, in a proceeding pursuant to Family Court Act article 3, to adjudicate respondent a juvenile delinquent.

HEADNOTES

Infants
Juvenile Delinquents
Timeliness of Fact-Finding Hearing--Filing of Replacement Petition

(1) Where a juvenile delinquency petition is dismissed for facial insufficiency and a second petition is then filed, the 60-day deadline within which to hold a fact-finding hearing "after the conclusion of [the juvenile's] initial appearance" (Family Ct Act § 340.1 [2]) runs from the time of the juvenile's initial appearance on the first petition. The speedy hearing requirements, which were meant to "assure swift and certain adjudication at all phases of the delinquency proceeding", must be "strictly construed". As in a criminal action, there can be only one delinquency petition for each set of charges and the presentment agency's statutory obligation to hold a fact-finding hearing cannot be postponed when the initial petition is dismissed, and replaced by a second one. Accordingly, since no fact-finding hearing had been commenced within 60 days after respondent's appearance on the initial petition, Family Court properly dismissed the second petition.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

47 Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children, §§ 44, 46.

Family Ct Act §340.1 (2).

NY Jur 2d, Domestic Relations, §§1690, 1692.

ANNOTATION REFERENCES

See ALR Index under Juvenile Courts and Delinquent Children.

APPEARANCES OF COUNSEL

Robert C. Mulvey, Ithaca *(Jonathan Wood* of counsel), for appellant. ***421**
Carol Grumbach, Law Guardian, Ithaca, for respondent.

OPINION OF THE COURT

Casey, J.

Family Court Act § 340.1 (2) provides that the fact-finding hearing in a juvenile delinquency proceeding "shall commence not more than sixty days after the conclusion of the [juvenile's] initial appearance". At issue in this case is whether, in a situation where a juvenile delinquency petition is dismissed for facial insufficiency and a second petition is filed, the 60-day deadline runs from the time of the juvenile's initial appearance on the first petition. In our view, Family Court correctly determined that the time period in issue began to run from the date of the initial appearance on the first petition. Accordingly, because no fact- finding hearing had been commenced within 60 days after respondent's appearance on the initial petition, the court properly dismissed the second petition.

As the Court of Appeals has observed, the Family Court Act's speedy hearing provisions were meant to "assure swift and certain adjudication at all phases of the delinquency proceeding" *(Matter of Frank C.,* 70 NY2d 408, 413). The speedy hearing requirements are "to be strictly construed" *(Matter of Erik N.,* 185 AD2d 433, 435; *see, Matter of Randy K.,* 77 NY2d 398). We also find it proper, as did the Second Department in a recent case on strikingly similar facts, to look at the Court of Appeals interpretations of criminal statutory speedy trial provisions *(see, Matter of Tommy C.,*

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182 AD2d 312). In *People v Osgood* (52 NY2d 37, 43), the Court of Appeals noted that there can only be one criminal action for each set of charges and ruled that the prosecutor's statutory obligation under CPL 30.30 to be ready for trial within six months after the filing of a felony complaint could not be postponed when the initial accusatory instrument was dismissed and was replaced by a second one *(see, People v Lomax,* 50 NY2d 351). We reject petitioner's assertion that because the first petition was not dismissed on speedy trial grounds, the principles set forth in *Osgood* do not apply.

Petitioner also contends that if a respondent waits for 30 days after the initial appearance before moving to dismiss the petition for legal insufficiency *(see,* Family Ct Act § 332.2 [1]) and the court does not immediately decide the motion, the presenting agency will effectively be foreclosed from filing a new petition if the motion is ultimately granted. Here, however, ***422** respondent orally moved to dismiss the petition at the initial appearance and Family Court granted the motion at that time. Although the order of dismissal was not filed for several weeks, petitioner clearly had ample time and opportunity to prepare and file a new petition before the 60-day period expired. Accordingly, we need not address petitioner's concern in the event of a delay in making or deciding the motion.

Mikoll, J. P., Levine, Crew III and Harvey, JJ., concur. Ordered that the order is affirmed, without costs. ***423**

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4TH DEPARTMENT

153 A.D.3d 1608, 61 N.Y.S.3d 431, 2017 N.Y. Slip Op. 06769

**1 The People of the State of New York, Respondent,
v
Tyreik A. Boyd, Appellant.

Supreme Court, Appellate Division,
Fourth Department, New York
12-00373, 992
September 29, 2017

CITE TITLE AS: People v Boyd

HEADNOTE

Crimes
Possession of Weapon
Sufficiency and Weight of Evidence

Bridget L. Field, Rochester, for defendant-appellant.
Sandra Doorley, District Attorney, Rochester (Scott Myles of counsel), for respondent.

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered November 18, 2011. The judgment convicted defendant, upon a jury verdict, of attempted criminal possession of a weapon in the second degree and attempted criminal possession of a weapon in the third degree.

It is hereby ordered that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him following a jury trial of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]) and attempted criminal possession of a weapon in the third degree (§§ 110.00, 265.02 [3]), defendant contends that the evidence is legally insufficient to support the conviction. We reject that contention. The evidence established that defendant was the front seat passenger in a vehicle that was stopped by the police. He appeared anxious and nervous when he first observed the officers, and he acted in a suspicious manner when asked for the vehicle's registration. Instead of looking at the documents he pulled from the glove box, defendant let them fall to the ground and began moving them with his feet. When asked to identify himself, defendant refused to provide anything other than his first name. Given the suspicious nature of defendant's behavior, the officers asked him to exit the vehicle. As soon as the passenger door opened, the officers observed the handle of the firearm "sticking out from underneath the seat" between the seat and the door. Defendant thereafter "tried to pull away" when he was handcuffed by the police officers.

Contrary to defendant's contention, the evidence is legally sufficient to establish that defendant constructively possessed the firearm, i.e., that he exercised " 'dominion and control over the area in which [the firearm was] found' " (***1609** *People v Ward*, 104 AD3d 1323, 1324 [2013], *lv denied* 21 NY3d 1011 [2013]). Based on the location and position of the firearm, which was visible as it protruded from under the right side of the passenger seat (*see People v Lynch*, 116 AD2d 56, 61 [1986], citing *People v Lemmons*, 40 NY2d 505, 509-510 [1976]), and the fact that defendant was seated in that passenger seat, we conclude that "the jury was . . . entitled to accept or reject the permissible inference that defendant possessed the weapon" (*People v Carter*, 60 AD3d 1103, 1106 [2009], *lv denied* 12 NY3d 924 [2009]). The fact that a defense witness testified that the firearm belonged to him "presented an issue of credibility for the jury to resolve" (*id.* at 1107).

Contrary to defendant's further contention, although there is no dispute that the firearm at issue was not operable, it is well settled that a defendant may be convicted of attempted criminal possession of a weapon when he or she believes that the firearm is operable (*see Matter of Lavar D.*, 90 NY2d 963, 965 [1997]; *People v Saunders*, 85 NY2d 339, 342 [1995]; *Matter of David H.*, 255 AD2d 264, 264 [1998]). Here, the evidence establishing that the firearm was loaded, that defendant appeared to be nervous and anxious when he was seen and stopped by the police and that defendant attempted to flee is sufficient "to support the inference that [defendant] believed and intended the firearm to be operable" (*Lavar D.*, 90 NY2d at 963).

Defendant also contends that his conviction of attempted criminal possession of a weapon in the third degree is not supported by legally sufficient evidence because there is no evidence that the firearm was "defaced for the purpose of the concealment or prevention of the detection of a crime or

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misrepresenting the identity of such . . . firearm" (Penal Law § 265.02 [3]). That contention is not preserved for our review inasmuch as defendant's motion for a trial order of dismissal was not " 'specifically directed' at [that] alleged" deficiency in the proof (*People v Gray*, 86 NY2d 10, 19 [1995]). In any event, defendant's contention lacks merit. The evidence at trial established that the firearm was defaced intentionally, and that the destruction of the serial number was "open and obvious" (*People v Ridore*, 273 AD2d 154, 154 [2000], *lv denied* 95 NY2d 907 [2000]). Viewing the evidence in the light most favorable to the People (*see* *People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion" that the firearm was defaced for illicit purposes (*People v Bleakley*, 69 NY2d 490, 495 [1987]). ***1610**

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see* *People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is contrary to the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although an acquittal would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally* *Danielson*, 9 NY3d at 348; *Bleakley*, 69 NY2d at 495).

We have reviewed defendant's remaining contention and conclude that it does not warrant reversal or modification of the judgment. Present—Whalen, P.J., Peradotto, Lindley, NeMoyer and Curran, JJ.

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192 A.D.3d 1489, 145 N.Y.S.3d 218, 2021 N.Y. Slip Op. 01598

****1** The People of the State of New York, Respondent,

v

Clifford Graham, Appellant.

Supreme Court, Appellate Division, Fourth Department, New York
17-01967, 233
March 19, 2021

CITE TITLE AS: People v Graham

HEADNOTES

Grand Jury
Defective Proceeding
Proceedings were Not Defective

Crimes
Appeal
Weight of Evidence—Element-Based Review

Crimes
Verdict
Weight of Evidence

***1490**

Crimes
Jurors
Response to Request for Information was Not Abuse of Discretion

Frank H. Hiscock Legal Aid Society, Syracuse (Philip Rothschild of counsel), for defendant-appellant.
William J. Fitzpatrick, District Attorney, Syracuse (Bradley W. Oastler of counsel), for respondent.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered September 8, 2017. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree.

It is hereby ordered that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant was previously convicted of criminal possession of a weapon in the second degree and endangering the welfare of a child, arising from the same incident, but this Court reversed that judgment and dismissed the indictment on the grounds that neither the grand jury nor the petit jury was instructed on the defense of temporary innocent possession (*People v Graham*, 148 AD3d 1517 [4th Dept 2017]).

We reject defendant's contention that the grand jury proceedings resulting in the new indictment were defective. Although defendant was restrained when he testified before the grand jury, the prosecutor twice instructed the grand jury not to draw any negative inference from the restraints, and we conclude that those instructions were "sufficient to dispel any potential prejudice to defendant" (*People v Barnes*, 139 AD3d 1371, 1373 [4th Dept 2016], *lv denied* 28 NY3d 926 [2016] [internal quotation marks omitted]; *see People v Griggs*, 117 AD3d 1523, 1523 [4th Dept 2014], *affd* 27 NY3d 602 [2016], *rearg denied* 28 NY3d 957 [2016]; *People v Cotton*, 120 AD3d 1564, 1565 [4th Dept 2014], *lv denied* 27 NY3d 963 [2016]). We further conclude that "defendant has not established a possibility of prejudice justifying the exceptional remedy of dismissal of the indictment" based on the prosecutor's instruction to the grand jury on constructive possession (*People v Wisdom*, 23 NY3d 970, 973 [2014]). Additionally, although we agree with defendant that the prosecutor erred in presenting to the grand jury testimony from the victim contradicting evidentiary facts that were resolved in defendant's favor at the first trial (*see People v O'Toole*, 22 NY3d 335, 338 [2013]; *see also People v Williams*, 163 AD3d 1418, 1420 [4th Dept 2018]), we conclude that the submission of that testimony involved "the erroneous handling of evidentiary matters, [which does] not merit invalidation of the indictment" where, as here, the remaining evidence is sufficient to establish the charge for which defendant was indicted (*People v Thompson*, 22 NY3d 687, 699 [2014], *rearg denied* ***1491** 23 NY3d 948 [2014]; *see Wisdom*, 23 NY3d at 972; *People v Huston*, 88 NY2d 400, 409 [1996]).

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Defendant further contends that the evidence is legally insufficient to establish that the firearm recovered was "loaded with live ammunition" (*People v Redmond*, 182 AD3d 1020, 1022 [4th Dept 2020], *lv denied* 35 NY3d 1048 [2020]; *see* Penal Law § 265.03 [3]). We reject that contention. The firearms examiner testified that she successfully test fired one of the three rounds submitted to her, and the officer who discovered the firearm testified that those three rounds were recovered from the firearm. Thus, viewing the evidence in the light most favorable **2 to the People (*see* *People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a valid line of reasoning and permissible inferences from which a rational jury could have found that element of the crime proved beyond a reasonable doubt (*see generally* *People v Danielson*, 9 NY3d 342, 349 [2007]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see* *Danielson*, 9 NY3d at 349), we likewise reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although a different verdict would not have been unreasonable (*see Danielson*, 9 NY3d at 348), the jury did not "fail[ ] to give the evidence the weight it should be accorded" (*Bleakley*, 69 NY2d at 495).

Contrary to defendant's contention, Supreme Court did not abuse its discretion in responding to the jury's request for information by declining to reread the definition of temporary innocent possession inasmuch as the jury did not request a rereading of that definition (*see* *People v Almodovar*, 62 NY2d 126, 131-132 [1984]; *People v Sanchez*, 160 AD3d 903, 903 [2d Dept 2018], *lv denied* 31 NY3d 1121 [2018]; *People v Martinez*, 8 AD3d 8, 9 [1st Dept 2004], *lv denied* 3 NY3d 677 [2004]).

Finally, the sentence is not unduly harsh or severe. Present—Centra, J.P., Carni, NeMoyer, Winslow and Bannister, JJ.

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KINGS COUNTY
SUPREME COURT

42 Misc.3d 428, 975 N.Y.S.2d 644, 2013 N.Y. Slip Op. 23392

****1** The People of the State of New York, Plaintiff

v

Barsheen Wright, Defendant.

Supreme Court, Kings County
November 22, 2013

CITE TITLE AS: People v Wright

HEADNOTES

Crimes
Indictment
Jurisdictional Defect in Factual Recitation—Criminal Possession of Weapon, Second Degree—Failure to Allege Possession Not in Home or Business

(1) A count of an indictment charging criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) was jurisdictionally defective because it failed to allege that defendant's possession of a pistol was not in his home or place of business. If an exception to an offense is contained within the statute defining the offense, an indictment must allege that the crime is not within the exception. Penal Law § 265.03 (3) excepts possessing a weapon in one's home or place of business from the crime. Thus, the indictment omitted a material element of the crime, which was not curable by amendment.

Crimes
Indictment
Sufficiency of Evidence before Grand Jury—Criminal Possession of Weapon on School Grounds

(2) The definition of "school grounds" in Penal Law § 220.00 (14), which includes any area within 1,000 feet of a school boundary, did not apply to the crime of criminal possession of a weapon on school grounds (Penal Law § 265.01-a). Accordingly, the evidence presented to a grand jury in support of that charge against defendant was legally insufficient, as it established only that defendant possessed a pistol on a public street, not inside a school. When construing a Penal Law statute, a court should not rely upon a definition of a term in another Penal Law statute absent legislative authority for doing so. An indication of such authority was lacking here. Criminal possession of a weapon on school grounds had been enacted long before the enactment of Penal Law § 220.00 (14); it does not contain an express reference to Penal Law § 220.00 (14), unlike other statutes to which its definition applies; and, in contrast to certain controlled substances offenses that expressly refer to Penal Law § 220.00 (14) and are aimed at curtailing drug dealers from congregating outside of schools to sell drugs to students, the plain language of Penal Law § 265.01-a indicates that the legislature's intent was to control the possession of weapons inside school premises.

RESEARCH REFERENCES

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 56, 57; Am Jur 2d, Schools § 332; Am Jur 2d, Weapons and Firearms §§ 8–10, 29, 30.

Carmody-Wait 2d, Commencing the Prosecution; Grand Jury §§ 178:301, 178:337; Carmody-Wait 2d, Pretrial Motions § 189:118.

LaFave, et al., Criminal Procedure (3d ed) § 19.3.

McKinney's, Penal Law §§ 220.00 (14); 265.01-a, 265.03.

***429** NY Jur 2d, Criminal Law: Procedure § 1268; NY Jur 2d, Criminal Law: Substantive Principles and Offenses §§ 1676, 1877, 1878, 1880–1882, 1885.

ANNOTATION REFERENCE

See ALR Index under Grand Jury; Indictments and Informations; Schools and Education; Weapons and Firearms.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: weapon /s possession /s second & indictment /s defect! /p home business

APPEARANCES OF COUNSEL

Charles J. Hynes, District Attorney (*Akosua Goode* of counsel), for plaintiff. *Legal Aid Society* (*Frederic Pratt* of counsel) for defendant.

OPINION OF THE COURT

Sheryl L. Parker, J.

The grand jury minutes have been inspected in camera.

The defendant was indicted for five counts listed on the indictment as follows: criminal possession of a weapon in the second degree (Penal Law § 265.03) (count 1), criminal possession of a weapon on school grounds (Penal Law § 265.01-a) (count 2), criminal possession of a firearm (Penal Law § 265.01-b [1]) (count 3), resisting arrest (Penal Law § 205.30) (count 4) and unlawful possession of marijuana (Penal Law § 221.05) (count 5). The grand jury was presented with evidence that the possession of the loaded firearm was within 1,000 feet of a school on a public street and was charged accordingly.

Count 1 alleges "criminal possession of a weapon in the second degree (P.L. 265.03)" as follows: "The defendant, on or about July 28, 2013, in the County of Kings, knowingly and unlawfully possessed a loaded firearm, namely: a pistol, and such possession was within one thousand feet of school grounds." Although the indictment fails to allege the specific subdivision of Penal Law § 265.03, the prosecutor charged the grand jury on subdivision (3) which provides that "[a] person is guilty of criminal possession of a weapon in the second degree when . . . such person possesses any loaded firearm. Such possession shall not . . . constitute a violation of this subdivision if such possession takes place in such person's home or place of ***430** business." This statute contains an exception for possession in one's home or place of business, which was not included in count 1.

An indictment must contain a factual allegation of every element of the offense charged (CPL 200.50 [7] [a]; *People v Iannone*, 45 NY2d 589 [1978]). The elements of the offense are generally determined by the statute defining the offense (*People v Kohut*, 30 NY2d 183 [1972]). If an exception to the offense is contained within the statute, "the indictment must allege that the crime is not within the exception" (*id.* at 187; *People v Bradford*, 227 NY 45 [1919]; *People v Newell*, 95 AD2d 815 [2d Dept 1983]).

(1)Although subdivision (3) of Penal Law § 265.03 was properly charged to the grand jury, count 1 is defective in that it fails to allege that possession was other than in the defendant's home or place of business. The first count of the indictment is therefore jurisdictionally defective (*see People v Best*, 132 AD2d 773 [3d Dept 1987]). This omission of a material element is not curable by amendment (*People v Chata*, 8 AD3d 674 [2d Dept 2004]).

Count 2 of the indictment alleges "criminal possession of a firearm (P.L. 265.01-A(1))." The correct title of the offense is "[c]riminal possession of a weapon on school grounds" and the correct section number is "Penal Law § 265.01-a." This section provides that

> "[a] person is guilty of criminal possession of a weapon on school grounds when he or she knowingly has in his or her possession a rifle, shotgun, or firearm in or upon a building or grounds, used for educational purposes, of any school, college, or university, except the forestry lands, wherever located, owned and maintained by the State University of New York college of environmental science and forestry, or upon a school bus . . . , without the written authorization of such educational institution."

Based on the facts and the People's charge to the grand jury, it is the People's position that Penal Law § 265.01-a applies when a firearm is possessed, not on the premises of a school, but within 1,000 feet of the boundary of a school. The People use the definition of "school grounds" as appears in Penal Law § 220.00 (14) which includes any area within 1,000 feet of the school boundary. This construction of the law is incorrect for ***431** two reasons. First, Penal Law § 265.01-a was originally enacted in 1974 as Penal Law § 265.01 (3), an A misdemeanor. The statute as enacted in 1974 reflected the exception for the State University. In 1986, the legislature enacted Penal Law §§ 220.00 (14) (which defined "school grounds") and 220.44 (prohibiting the sale of controlled substances in or near school grounds). Chapter 1 of the Laws of 2013 changed Penal Law § 265.01 (3) to a new section number, Penal Law § 265.01-a, and raised the offense to an E felony. Otherwise, the language of the new section repeated Penal Law § 265.01 (3) verbatim. It is clear that if the legislature wanted the Penal Law § 220.00 (14) definition of school grounds to apply to Penal Law § 265.01-a, it would have incorporated it in the section. Since

it did not, the legislative intent was, therefore, not to adopt the Penal Law § 220.00 (14) definition. This is particularly evident when one considers another Penal Law provision which specifically references the Penal Law § 220.00 (14) definition (*see* Penal Law § 120.05 [10] [assault in the second degree, causing physical injury on school grounds]). The Court of Appeals has cautioned against reliance upon a definition of a term in another Penal Law statute absent legislative authority for doing so (*see* *People v Hernandez*, 98 NY2d 175 [2002]; *see also People v Saxton*, 20 Misc 3d 203 [Crim Ct, NY County 2008]).

Second, the legislative intent of a statute is to be "ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction" (McKinney's Cons Laws of NY, Book 1, Statutes § 94). The legislative intent of the Penal Law § 220.00 (14) definition provision can be garnered from its use in the statute enacted the same day, viz., Penal Law § 220.44, which relates to the sale of controlled substances. This provision is aimed at curtailing drug dealers from congregating *outside* of schools to sell drugs to students. The legislative intent of Penal Law § 265.01-a is to control the possession of weapons *inside* the school premises, as evidenced by the provision that such possession would be impermissible "without the written authorization of such educational institution."

(2) Since the evidence before the grand jury established that the gun possession was on a public street, not inside a school, the evidence is legally insufficient to establish the second count.

Accordingly, count 1 (criminal possession of a weapon in the second degree [Penal Law § 265.03 (3)]) and count 2 (criminal ***432** possession of a weapon on school grounds [Penal Law § 265.01-a])are dismissed. The People are granted leave to re-present count 1 (criminal possession of a weapon in the second degree [Penal Law § 265.03 (3)]). As to the remaining charges, the evidence adduced before the grand jury was legally sufficient (*People v Pelchat*, 62 NY2d 97 [1984]; *People v Calbud, Inc.*, 49 NY2d 389 [1980]) and the prosecutor correctly charged the grand jury with respect to the applicable law.

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73 Misc.3d 1167, 157 N.Y.S.3d 902, 2021 N.Y. Slip Op. 21324

**1 The People of the State of New York, Plaintiff,

v

Yolanda Matos, Defendant.

Supreme Court, Kings County
72376-2021
December 2, 2021

CITE TITLE AS: People v Matos

HEADNOTES

Crimes
Possession of Weapon
Exemption from Prosecution Based on Federal Law Enforcement Officers Safety Act—Defense for Trial Not Ground to Dismiss Indictment

(1) In a prosecution for criminal possession of a firearm, defendant, a federal correctional officer, was not entitled to dismissal of the indictment on the ground that she was authorized to possess a firearm pursuant to the Law Enforcement Officers Safety Act (LEOSA) (*see* 18 USC § 926B) and therefore was exempt from prosecution under Penal Law § 265.20 (a) (1) (d). The exemption from prosecution under Penal Law § 265.20 (a) (1) (d) applies to a person in the service of the United States and duly authorized by federal law to possess a firearm. The LEOSA allows a "qualified law enforcement officer" who is carrying the necessary identification to possess a concealed firearm notwithstanding any state law to the contrary (18 USC § 926B [a], [c], [d]). The exemptions under Penal Law § 265.20 are in the nature of a defense that the defendant is required to raise before the government is required to disprove it beyond a reasonable doubt. The issue of whether the LEOSA applied involved questions of fact that could not be resolved on the current record. Defendant could have raised this defense at the grand jury by testifying or requesting the grand jury to cause designated persons to be called as witnesses (*see* CPL 190.50 [5] [a]; [6]), but evidently elected not to do so. In such a situation, the claimed exemption provided a defense to be raised and litigated at trial rather than a ground to dismiss the indictment.

Crimes
Evidence
Surveillance Video—Authentication by Police Officer Who Obtained Video from Custodian

(2) In a prosecution based on the allegation that defendant discharged a firearm on a street, a surveillance video presented to the grand jury was properly authenticated through the testimony of the police detective who obtained the video from the building owner, the custodian of the video surveillance system. Authenticity is established by proof that the offered evidence is genuine and that there has been no tampering with it, and the foundation necessary to establish these elements may differ according to the nature of the evidence sought to be admitted. One way to authenticate a surveillance video is through the testimony of the police officer who obtained the video. Although the testifying officer did not personally copy the video directly from the video system, he received a copy of the video by email from the owner, the custodian of the video, and the officer testified that the video received by email was the same video that he had viewed on the owner's cell phone inside the owner's building. This testimony was sufficient to establish that the video received by the officer came from the video recording system, the same as if the officer had personally copied the video at the location directly from the video system. The officer also established that the video at the grand jury was in an unaltered condition by testifying that the video on the disc was a fair and accurate representation of the video that he had viewed in the app on the cell phone. The remaining foundational requirements were satisfied by the officer's testimony that the video recording system appeared ***1168** to be working properly and recording events contemporaneously, that he directed the owner to the date and time of the alleged shooting, and that the owner controlled the surveillance video through the app. Any alleged discrepancy between the date and time of the crime and the date and time stamp on the video recording went to the weight of the evidence, not its admissibility.

Crimes
Possession of Weapon

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Video Presented to Grand Jury—Sufficient Evidence of Possession of Operable Weapon

(3) In a prosecution based on the allegation that defendant discharged a firearm on a street, a surveillance video presented to the grand jury constituted sufficient evidence to support the indictment for criminal possession of a firearm. Legally sufficient evidence at the grand jury means prima facie proof of the crimes charged, not proof beyond a reasonable doubt. The grand jury could reasonably infer that the item in defendant's hand in the video was an operable firearm based on her arm movements, the three apparent muzzle flashes emanating from her extended arm, and the shattering of the rear windshield of a parked car after the final apparent muzzle flash. The District Attorney was not required to present additional independent evidence, such as ballistic evidence, to verify the content of the video.

Grand Jury
Defective Proceeding
Allegedly Inaccurate Testimony About Potential Defense

(4) In a prosecution based on the allegation that defendant discharged a firearm on a street, the claim that a Bureau of Prisons Special Investigator Agent gave false testimony about defendant's rights as a federal correctional officer did not warrant dismissal of the indictment for criminal possession of a firearm because the record did not establish that the agent testified inaccurately and even if inaccurate, the agent's testimony did not make the grand jury proceeding defective within the meaning of CPL 210.35 (5). In defendant's view, she was authorized to possess a firearm under the Law Enforcement Officers Safety Act (LEOSA) (*see* 18 USC § 926B) and therefore was exempt from prosecution under Penal Law § 265.20 (a) (1) (d). The agent, who worked at the same correctional facility as defendant, testified that defendant was "authorized" to carry a firearm "only at work . . . if the post was armed" but not outside of the correctional facility. The factual record, however, was not sufficiently developed to establish that the agent lied or was ignorant of the law. Moreover, the alleged right of defendant to possess a firearm as a federal correctional officer was a potential defense to be raised at trial, not an issue before the grand jury. Any allegedly inaccurate testimony did not impair the integrity of the grand jury proceeding, the purpose of which was to determine whether there was sufficient evidence to warrant such a trial in the first instance.

RESEARCH REFERENCES

Am Jur 2d Evidence §§ 954, 974, 977; Am Jur 2d Grand Jury § 38; Am Jur 2d Indictments and Informations §§ 279, 280; Am Jur 2d Weapons and Firearms §§ 13, 22, 23.

Carmody-Wait 2d Commencing the Prosecution; Grand Jury §§ 178:202–178:205; Carmody-Wait 2d Pretrial Motions §§ 189:90, 189:137, 189:152–189:154; Carmody-Wait 2d Particular Types of Evidence § 194:70.

***1169** LaFave, et al., Criminal Procedure (4th ed) §§ 15.5, 15.6, 24.4.

McKinney's, CPL 210.35 (5); 265.20 (a) (1) (d).

NY Jur 2d Criminal Law: Procedure §§ 1196, 1609, 1611, 2208, 2216, 2217; NY Jur 2d Criminal Law: Substantive Principles and Offenses § 1889.

18 USCA § 926B.

ANNOTATION REFERENCE

See ALR Index under Grand Jury; Indictments and Informations; Prison Guards or Officials; Surveillance; Verification or Authentication; Videotapes; Weapons and Firearms.

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APPEARANCES OF COUNSEL

Justin C. Bonus, Forest Hills, for defendant.
Eric Gonzalez, *District Attorney*, Brooklyn (*Chelsea Toder* of counsel), for plaintiff.

OPINION OF THE COURT

Heidi C. Cesare, J.

Defendant moves to renew and reargue her motion for the court to inspect the grand jury minutes and dismiss the indictment. The motion to renew and reargue is granted because this court was unaware that defendant apparently

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made a prior oral motion to another Justice that raised the same issues that defendant is seeking to raise in the present motion. The District Attorney does not dispute that defendant made such a prior oral motion. This court will, therefore, review this motion on the merits.

Defendant is a federal correctional officer charged with criminally possessing a firearm (Penal Law §§ 265.03 [1] [b]; [3]; 265.01 [1]; 265.01-b [1]). The charges are based on the allegation that defendant discharged a firearm on a Brooklyn street. To prove those charges at the grand jury, the District Attorney relied upon surveillance video depicting a person allegedly discharging a firearm. For the purpose of this motion, defendant does not dispute that she is the person depicted on the ***1170** video (*see* Bonus affirmation in support of mot ¶ 4 n 2).[1] The images on the video are the only evidence offered to prove that the item defendant possessed was an operable firearm.

Defendant's motion raises four claims. The first is that her occupation as a federal correctional officer entitles her to exemption from prosecution. The second is that the surveillance video was not properly authenticated at the grand jury. The third is that the video, even if authentic, is insufficient to establish that she possessed an operable firearm. The fourth is ****2** that a Bureau of Prisons Special Investigator Agent gave false testimony. This court addresses each claim below.

Defendant argues first that she is exempt from prosecution under the Penal Law § 265.20 exemption that applies to a person in the service of the United States and duly authorized by federal law to possess a firearm (*see* Penal Law § 265.20 [a] [1] [d]). In defendant's view, she is authorized to possess a firearm under the Law Enforcement Officers Safety Act (LEOSA) (*see* 18 USC § 926B). This federal law allows a "qualified law enforcement officer" who is carrying the necessary identification to possess a concealed firearm notwithstanding any state law to the contrary (18 USC § 926B [a], [c], [d]).

Under the LEOSA, a "qualified law enforcement officer" is

> "an employee of a governmental agency who—
>
> "(1) is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers of arrest or apprehension under section 807(b) of title 10, United States Code (article 7(b) of the Uniform Code of Military Justice);
>
> "(2) is authorized by the agency to carry a firearm;
>
> "(3) is not the subject of any disciplinary action by the agency which could result in suspension or loss of police powers;
>
> "(4) meets standards, if any, established by the agency which require the employee to regularly qualify in the use of a firearm;
>
> "(5) is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and
>
> ***1171** "(6) is not prohibited by Federal law from receiving a firearm" (18 USC § 926B [c]).

(1) Defendant's argument that she is exempt from prosecution under Penal Law § 265.20 (a) (1) (d) based on the LEOSA provides no basis to dismiss the indictment. The exemptions under Penal Law § 265.20 "are in the nature of a defense" that "the defendant is required to raise . . . before the government is required to disprove it beyond a reasonable doubt" (William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Penal Law § 265.20, Introduction [online version, last accessed Nov. 29, 2021]). Indeed, the issue of whether the LEOSA applies in this case involves questions of fact that cannot be resolved on the current record. Defendant could have raised this defense at the grand jury by testifying or requesting the grand jury to cause designated persons to be called as witnesses (*see* CPL 190.50 [5] [a]; [6]), but evidently elected not to do so. In such a situation, the claimed exemption provides a defense to be raised and litigated at trial rather than a ground to dismiss the indictment (*see People v LaPierre*, 189 AD3d 1813, 1816-1817 [3d Dept 2020]; *People v Washington*, 209 AD2d 162, 163 [1st Dept 1994], *affd* 86 NY2d 853 [1995]).[2]

Defendant's next claim is that the District Attorney failed to authenticate the surveillance video at the grand jury. The District Attorney did not call the custodian of the video as a witness ****3** at the grand jury. Instead, the District Attorney sought to authenticate the video through the testimony of the

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police detective who obtained the video from the custodian. That detective's testimony is summarized below.

On May 4, 2020, Detective David Lambert of the 79th Precinct Detective Squad was assigned as lead detective to investigate a "shots fired job" that occurred on May 2, 2020, outside of 515 Lafayette Avenue in Brooklyn, N.Y. On May 4, 2020, Lambert went to 511 Lafayette Avenue and met with the owner of the building. The owner was the custodian of the video surveillance system at the building.

During the meeting with the building owner, Lambert "directed him to the date and time" of the shooting and "asked to view the cameras." The owner "controlled" the video surveillance from an app on his cell phone, and Lambert viewed the ***1172** video inside the building in the app on the cell phone. Lambert testified that the cameras appeared to be "recording contemporaneously with what was happening," that the cameras were "recording the events as they were occurring," and that "the camera system" was "working accurately."

After Lambert viewed the video, the owner "collected it on his cell phone and emailed it" to Lambert. The surveillance video was "placed on a disc" that Lambert viewed before appearing at the grand jury. Lambert testified that the video on the disc was the same video that he had viewed on the owner's cell phone. He testified that the contents of the disc "fairly and accurately represent[ed] . . . the video surveillance clips that [he] watched on [the owner's] phone." When the District Attorney played one of the two admitted surveillance videos at the grand jury, Lambert testified that the date on the video was correct but that the time stamp was about one hour behind.

In the motion, defendant argues that the District Attorney did not establish a sufficient foundation for admitting the surveillance video. In defendant's view, the video was "nothing more than hearsay and unverified based upon a lack of chain of custody" (Bonus reply affirmation ¶ 7). She further argues that the video could not be admitted at the grand jury without testimony from the custodian of the video. The District Attorney responds that the surveillance video evidence "*was* legally proper" (Toder affirmation in opp at 6 ¶ 8).

To be admissible at the grand jury, the video must be authentic (*see People v Patterson*, 93 NY2d 80, 84 [1999]). "Authenticity is established by proof that the offered evidence is genuine and that there has been no tampering with it, and the foundation necessary to establish these elements may differ according to the nature of the evidence sought to be admitted" (*People v Robinson*, 187 AD3d 1216, 1217 [2d Dept 2020] [internal quotation marks and brackets omitted], quoting *People v McGee*, 49 NY2d 48, 59 [1979], and citing *People v Price*, 29 NY3d 472, 476 [2017]).

A video can be authenticated in more than one way. A video can be "authenticated by the testimony of a witness to the recorded events or of an operator or installer or maintainer of the equipment that the videotape accurately represents the subject matter depicted" (*People v Patterson*, 93 NY2d at 84). Other testimony, "expert or otherwise, may also establish that a videotape truly and accurately represents what was before the camera" (*id.* [internal quotation marks and citation omitted]).

***1173** One way to authenticate a surveillance video is through the testimony of the police officer who obtained the video. The officer can do that by testifying that the officer personally copied the video from the surveillance video recording system onto a disc or flash drive and verified ****4** that the video system was in working order; that the date and time on the video appeared to be accurate; and that the video was in an unaltered condition (*see People v Robinson*, 187 AD3d at 1217; *People v Grant*, 170 AD3d 888, 890 [2d Dept 2019]).

(2) In this case, the District Attorney properly authenticated the surveillance video at the grand jury through the testimony of Detective Lambert. Although Lambert did not personally copy the video directly from the video system, he received a copy of the video by email from the owner, the custodian of the video, and Lambert testified that the video received by email was the same video that he had viewed on the owner's cell phone inside 511 Lafayette Avenue. This testimony was sufficient to establish that the video received by Lambert came from the video recording system, the same as if Lambert had personally copied the video at the location directly from the video system. Lambert also established that the video at the grand jury was in an unaltered condition by testifying that the video on the disc was a fair and accurate representation of the video that he had viewed in the app on the cell phone.

The remaining foundational requirements also were satisfied by Lambert's testimony. He testified that the video recording system appeared to be working properly and recording events contemporaneously. His testimony that he directed the owner

to the date and time of the alleged shooting, and that the owner controlled the surveillance video through the app, established that the date and time on the video appeared to be accurate, with the caveat that the time stamp was one hour behind real time (*see Commonwealth v Gonzalez*, 99 Mass App Ct 161, 170-171, 162 NE3d 1263, 1272 [2021] [police officer authenticated hotel surveillance video by testifying that he met with the hotel manager, went to where the surveillance system was located, searched the system with the hotel manager for particular files, and copied them to a flash drive]). Any alleged discrepancy between the date and time of the crime and the date and time stamp on the video recording goes "to the weight of the evidence, not its admissibility" (*People v Costello*, 128 AD3d 848, 848 [2d Dept 2015]).

(3) Next, defendant argues that the surveillance video cannot by itself establish that the item in her hand was a firearm, ***1174** let alone an operable firearm. Contrary to this argument, however, the grand jury could reasonably infer that the item in her hand was an operable firearm based on her arm movements, the three apparent muzzle flashes emanating from her extended arm, and the shattering of the rear windshield of a parked car after the final apparent muzzle flash. This court disagrees with the argument that the District Attorney needed to present additional independent evidence, such as ballistic evidence, to verify the content of the video. This argument overlooks that legally sufficient evidence at the grand jury "means prima facie proof of the crimes charged, not proof beyond a reasonable doubt" (*People v Gaworecki*, 37 NY3d 225, 230 [2021]).

(4) Lastly, defendant claims that Bureau of Prisons Special Investigator Agent Sondra Miller testified falsely and misled the grand jury about defendant's "rights as a federal correction officer" (Bonus reply affirmation ¶ 5; *see* notice of mot ¶ 3; Bonus affirmation in support of mot ¶ 8). Miller worked at the same correctional facility as defendant and testified that defendant was "authorized" to carry a firearm "only at work . . . if the post was armed" but not outside of the correctional facility.[3] The factual record, however, is not sufficiently developed to establish that Miller lied or was ignorant of the law. This court is, therefore, not convinced that ****5** Miller testified inaccurately when she stated that defendant was not authorized to carry a firearm outside of the correctional facility.

In any event, even if inaccurate, Miller's testimony did not make the grand jury proceeding defective within the meaning of Criminal Procedure Law § 210.35 (5) (*see People v Huston*, 88 NY2d 400, 407 [1996]). The alleged right of defendant to possess a firearm as a federal correctional officer was not an issue before the grand jury. Moreover, any allegedly inaccurate testimony about a potential defense to raise at trial did not impair the integrity of the grand jury proceeding, the purpose of which was to determine whether there was sufficient evidence to warrant such a trial in the first instance (*see People v Calbud, Inc.*, 49 NY2d 389, 394 [1980] ["The primary function of the Grand Jury in our system is to investigate crimes and determine whether sufficient evidence exists to accuse a citizen of a crime and subject him or her to criminal prosecution"]).

***1175** For the reasons stated above, the motion to renew and reargue is granted but this court adheres to its previous decision denying the motion to dismiss the indictment.

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Footnotes

1 This court is satisfied that the evidence at the grand jury is sufficient to establish that she is the person on the video.

2 Because the exemption is a defense for trial, the District Attorney was not required to instruct the grand jury on the federal and state laws that allegedly exempted defendant from prosecution (*see* notice of mot ¶ 3; Bonus affirmation in support of mot ¶ 7).

3 Miller also testified that she identified defendant to the New York City Police Department in a still photograph taken from surveillance video.

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