FACIAL (IN)SUFFICIENCY OF MISDEMEANOR ACCUSATORY INSTRUMENTS

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Criminal defense attorneys read accusatory instruments, in the first instance, to find out what crime(s) their client is charged with and to acquaint themselves with the underlying factual allegations set forth in support thereof. After the initial "informational" review, counsel is well advised to re-read the instrument with a more discerning eye in order to assess it for legal sufficiency (or the lack thereof).

As noted by the Court of Appeals in People v Alejandro 70 NY2d 133 (1987), a legally sufficient accusatory instrument is a fundamental, non-waivable, jurisdictional pre-requisite to a sustainable criminal prosecution. Put another way, legal sufficiency provides the legal basis for the People's ability to commence and prosecute a criminal action and for the court's authority to preside over and adjudicate the charges. (See also People v Case 42 NY2d 98 [1977]). So, if the instrument is insufficient, (assuming counsel identifies and points out the fatal flaws), it should be dismissed. (CPL 170.30; See also People v Shawn L 2013 NY Slip Op. 51473 (U) (Town of Hyde Park Justice Court, Dutchess County).

By moving to dismiss as soon as possible, counsel, if successful, may be able to stop with the prosecution altogether at the starting gate without further need for discovery, motion practice, hearings, plea negotiation and/or trial (assuming the flaw is unfixable by amendment, supporting deposition or a new accusatory instrument [e.g. as when the conduct, as alleged, fails to make out a crime in the first place and there are no other facts that could be alleged to make it so]).

Such might be the case, for example, where an accusatory instrument charging the defendant with Obstructing Governmental Administration (PL195.05), alleges only that the defendant fled from officers who were conducting a drug investigation with no claim that he used physical force, interference, intimidation or engaged in an independently unlawful act as required by the statute. (People v Tillman 184 Misc 2d 20 [Auburn City Ct 2000]). In contrast, see Matter of Davan L 91 NY2d 88 [1971]), where the court held that allegations that the defendant was riding his bike around in circles in the midst of an undercover drug investigation despite commands to leave, and then proceeded to warn the suspects that the cops were coming, were legally sufficient to support the obstructing charge.

See also People v Lawrence 59 Misc 3d 216 [Crim Ct Kings County 2018) where allegations that the defendant approached a police offer who was serving a summons on a third party and instructed him not to give the officer his name, and then took a close-up, cell-phone video and slapped the officer's hand, were deemed facially sufficient to establish an attempt to prevent an officer from performing an official function by means of intimidation, physical force or interference even though the information did not set forth facts indicating the underlying legal basis for the summons directed at the third party.

All that was necessary, in the courts view, was that the information set forth facts indicating that the officer was performing an official (i.e. legally authorized) function, in this case, service of a summons.

However, where, as noted above, the information fails to allege facts in support of a material element of the crime (as in People v Alejandro supra where the information charging Resisting Arrest failed to allege that the arrest of the defendant was legally authorized), it will be deemed jurisdictionally defective. See also People v Jones 9 NY3d 259 (2009) where the Court found the failure to allege that the defendant intended to create or recklessly created a risk of public annoyance fatal to the information charging Disorderly Conduct.

The roadmap to evaluating accusatory instruments for legal sufficiency begins with CPL sections 100.10, 100.15 and 100.40.

An information is defined in CPL 100.10(1) as a verified written accusation by a person (whether police officer or civilian), filed with a local court charging one or more persons with one or more offenses (misdemeanor or violation), none of which is a felony. It may serve as a basis to commence a criminal action (i.e. charge and arraign the accused), and for the prosecution thereof (adjudication by plea or trial).

An information is distinguishable from a misdemeanor complaint (defined in CPL 100.10[4]) which is a verified written accusation charging a misdemeanor and which serves as a basis to commence a criminal action but not to prosecute it unless the defendant knowingly and intelligently waives prosecution by information pursuant to CPL 170.65(3). (See People v Weinberg 34 NY2d 429 (1974). If a defendant does not so waive, the People must convert the complaint (typically a hearsay-based document), to an information by supplementing it with a supporting deposition (based on personal knowledge), a certified lab report (in the case of a drug possession charge) or other sworn document that satisfies the non-hearsay pleading requirements of CPL 100.15 (3). This latter component can be satisfied by admissible hearsay such as an excited utterance (see for example, People v Vickers 2007 NY Slip Op 51947(U) [2007] or an admission by the defendant.

Failure to timely convert a misdemeanor complaint to an information can result in release on recognizance after five days in custody (CPL 170.70), inability of the People to proceed to trial (assuming no waiver of prosecution by information), possible speedy trial complications for the prosecutioon and dismissal for facial insufficiency. However, where a defendant specifically waives prosecution by information and enters a guilty plea upon a misdemeanor complaint, he will not later be heard to complain that the accusatory instrument was facially insufficient. (See People v DuMay 23 NY3d 518 [2014]).

THE RELEVANT STATUTES

CPL 100.15(1) states that an information or misdemeanor complaint must specify the name of the court, the title of the action and be subscribed by a complainant who has personal or second-hand knowledge of the offense(s) charged and verifies the factual allegations contained therein. The accusatory part, as

per CPL 100.15(2) must designate the offenses charged and the factual part (CPL 100.15[3]), must contain a statement of the complainant ALLEGING FACTS OF AN EVIDENTIARY CHARACTER supporting or tending to support the charges. The factual allegations of may be based upon the complainant's personal knowledge or upon information and belief.

BOTH misdemeanor complaints and informations MUST allege sufficient facts (of an evidentiary character) to provide REASONABLE CAUSE to believe that that the defendant committed the offense(s) charged in the accusatory part of the instrument. REASONABLE CAUSE, as defined in PL 70.10(2), exists when apparently reliable evidence or information discloses facts or circumstances which are collectively of such weight and persuasiveness to convince an ordinary person that the offense alleged was committed by the person so accused. To meet this standard, the allegations must be factual rather than conclusory in nature. (People v Dumas 68 NY2d 729 [1986]).

WHAT DISTINGUISHES an INFORMATION from a MISDEMEANOR COMPLAINT is that the former, in order to be sufficient, must set forth NON-HEARSAY allegations of fact to support every element of the offense charged and the defendant's commission thereof. (CPL 100.15 [4]). This is so because a misdemeanor complaint only serves to commence a prosecution (unless the defendant waives prosecution by information), and an information serves as the accusatory vehicle upon which the defendant is brought to trial. And, unlike indictments or prosecutor's informations which are supported by sworn testimony before a grand jury, an information rises or falls upon the sworn allegations of fact contained therein. (People v Thomas 4 NY3d 143 [2005]). So, if an information fails to make out a prima facie case (i.e. the material elements of the crime are not supported by non-hearsay allegations of fact), it is subject to dismissal. (See People v Kalin 12 NY3d 225 [2009], People v Suber 19 NY3d 247 [2012].

The bottom line objective of an accusatory instrument is to provide the accused with sufficient notice to prepare a defense and enough detail to avoid being tried more than once for the same offense. Courts, it should be noted, require a fair but not overly technical reading (People v Konieczny 2 NY3d 569 [2004]), but that should not discourage counsel from reviewing these documents with a fine-toothed comb, (and making appropriate motions and objections), lest charges worthy of dismissal go forward and certain non-jurisdictional issues (e.g. hearsay pleading defects), be considered unpreserved for appellate review. (See People v Casey 95 NY2d 354 [2000]).

In Casey, the Court of Appeals held that the failure to attach an order of protection to an information charging the defendant with Criminal Contempt did not render the information defective because a fair reading of the detective's averments coupled with the complainant's supporting deposition (stating that a temporary non-offensive contact order of protection was issued on a designated date and that the defendant harassed her in violation thereof), indicated that the allegations were based upon personal knowledge. Further, even though it was not readily discernable from the accusatory instrument that the defendant's claimed awareness of the order was based on anyone's personal knowledge, the court noted (based on the suppression hearing and trial testimony), that any such defendant would have been readily curable. More to the point, in the Court's estimation, this was a hearsay pleading defect rather than a jurisdictional matter, and since the defendant had not moved to dismiss the information or objected at trial, it was not preserved for appellate consideration.

In People v Konieczny supra, the Court of Appeals held that where an accusatory instrument charging Criminal Contempt (and which included the order of protection) appeared sufficient on its face, the defendant's claim on appeal that his conviction (for Attempted Criminal Contempt) should be overturned because the order of protection underlying the charge was null and void (because the protected party was not a victim or witness in a pending prosecution pursuant to CPL 530.13), was forfeited by his guilty plea.

In that case, the defendant pled guilty in the local court to Disorderly Conduct to resolve a Bad Check charge and was sentenced to a conditional discharge with restitution. A week later, the court summoned the defendant back to sign a temporary order of protection in relation to someone with whom he was suspected (based on DSS reports) of carrying on an inappropriate relationship. Although counsel vaguely questioned the propriety of the order, the defendant signed it. (The record was murky at best as to whether this individual had anything whatsoever to do with the Bad Check prosecution). A month later, the defendant was charged with Criminal Contempt for violating the order when police executed a search warrant at the home of the protected party and found the defendant there. He later pled guilty to Attempted Criminal Contempt and signed a final order of protection.

While the Court of Appeals was troubled by the apparent bootstrapping of an order of protection in favor of someone who appeared to have no connection to the case in which it issued, the Court saw no basis to look beyond the four corners of the accusatory instrument which it deemed sufficient on its face. And having pled guilty on a facially valid accusatory instrument, the defendant thereby conceded every element of the offense, including the lawfulness of the order of protection.

As noted above, the prima facie case requirement of non-hearsay allegations to support every element of the crimes charged (CPL 100.15[4]) can be satisfied by admissible hearsay (i.e. hearsay statements that meet some hearsay exception and would be admissible at a trial. See People v Alvarez 141 Misc2d 686 [Crim Ct NY County 1988]). In People v Vickers, 2007 NY Slip Op 5197(U) (Crim Court Kings County), the court found the information sufficient wherein the detective alleged that he was flagged down by a visibly injured and upset complaint who exclaimed that her boyfriend had choked and punched her. The court was satisfied from her appearance and demeanor as described in the information, as well as the stated time of the crime vis-a-vis the officer's arrival, that she was speaking under the stress and excitement of a recent traumatic event sufficient to bring her statement into the realm of an excited utterance. (See also People v Johnson 1 NY3d 302 [2003], where the officer arrived within five minutes of a 911 call of domestic abuse and found the complaint crying and shaking while she described the attack).

Where an information charges a defendant with possession of a controlled substance (e.g. cocaine or heroin), while it is not necessary to append a certified laboratory report attesting to the illegal nature of the substance, mere conclusory allegations without factual averments (e.g. outlining the detective's training and experience recognizing and identifying drugs, describing the substance and any tell-tale packaging or other paraphernalia indicative of illegal drug activity), will not be enough to withstand a challenge for legal insufficiency. (See People v Kalin supra.) The same holds true where the information

charges illegal possession of a weapon. (People v Parilla 27 NY3d 400 [2016], factual basis for claim of operability must be set forth).

Non-hearsay allegations of fact to support every element of the crime charged and the defendant's commission thereof are, as previously noted, necessary ingredients to legally sufficient information. In People v Shawn L supra, the failure to provide non-hearsay support for the officer's sworn, second-hand allegations that the defendant endangered his 11-year-old step son by showing him how to use bondage equipment (and that the child was of the designated age), doomed the information to fatal insufficiency. And, contrary to the People's claim, even though the defendant reportedly made inculpatory admissions to the officer (which would have qualified as admissible hearsay without the need for corroboration at the pleading stage), they were not incorporated in the accusatory instrument.

While the failure to object to a hearsay deficiency in an information can be waived by a guilty plea (or failure to object before the lower court), such is NOT the case with jurisdictional defects (e.g. failure to plead a necessary element or to allege facts in support thereof, constitutional violations, mode of proceedings errors), which maybe raised for the first time on appeal. (See People v Alejandro supra, People v Taylor 65 NY2d 1 [1985]). Moving to dismiss or objecting, as the situation requires, is undoubtedly the better practice because relying on a court to look, unprompted, for jurisdictional defects is, at best, a hit-and miss proposition. That's why it is so important to read accusatory instruments through the lawyer's lense of close and careful scrutiny.