DISMISSAL IN THE INTEREST OF JUSTICE

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There are many different substantive and procedural grounds to seek dismissal of an accusatory instrument including: legal insufficiency of evidence underlying an indictment (CPL 210.20[1][b]), defective grand jury proceedings (CPL 210.35), facial insufficiency of an information (CPL 100.15, 110.40, People v Alejandro 70 NY2d 133 [1987]), hearsay pleading defects in an information (People v Casey 95 NY2d 354 [2000], statute of limitations (CPL 30.10), speedy trial violations (CPL 30.30, 30.30), and double jeopardy (CPL 40.20) to name a few.

Aside and apart from attacks aimed at the procedural flaws or substantive shortcomings in a given prosecution, a sometimes made but not often successful motion that is addressed not to the legal merits of the case but to the judge's sense of mercy and fundamental fairness based on extraordinary circumstances that call out for special consideration in the exercise of judicial discretion is one which seeks dismissal in furtherance of justice. (People v Clayton 41 AD2d 204 [2d dep't 1973]).

CPL 210.40 (1), enacted in 1970, states that an indictment or a count thereof may be dismissed in furtherance of justice when, even though there may be NO BASIS TO DISMISS AS A MATTER OF LAW, dismissal is REQUIRED as a MATTER OF JUDICIAL DISCRETION by the existence of some COMPELLING FACTOR, CONSIDERATION OR CIRCUMSTANCE CLEARLY DEMONSTRATING that conviction or prosecution of the defendant upon such indictment (or count thereof) would CONSTITUTE OR RESULT IN INJUSTICE.

With respect to local court prosecutions, CPL 170.30(1)(c) states that after arraignment upon an information, simplified information, prosecutor's information or misdemeanor complaint, the court may, upon motion of the defendant, dismiss such instrument or any count on the ground that dismissal is required in furtherance of justice within the meaning of CPL 170.40.

In determining whether a circumstance compelling dismissal in furtherance of justice exists, the court must consider:

a. the SERIOUSNESS and CIRCUMSTANCES of the offense;
b. the extent of HARM caused by the offense;
c. the EVIDENCE of guilt (whether admissible or not);
d. the HISTORY, CHARACTER and CONDITION of the defendant ;
e. any EXCEPTIONALLY SERIOUS MISCONDUCT of law enforcement in the investigation, arrest or prosecution of the defendant;
f. the PURPOSE and EFFECT of imposing on the defendant a legally authorized SENTENCE;
g. the IMPACT of dismissal on the SAFETY and WELFARE of the community;
h. the IMPACT of dismissal on PUBLIC CONFIDENCE in the Criminal Justice System;
i. any other relevant factor indicating that a judgment of conviction would SERVE NO USEFUL PURPOSE

Another relevant but unwritten consideration (related to factor h) is the potential for public push-back or outcry against a judicial exercise of leniency, especially if the case is high profile and the People take a strong and vocal stance against dismissal.

Case law consistently cautions that discretion to dismiss in the interest of justice (IOJ) should be EXERCISED SPARINGLY (People v Clayton supra, People Crespo 244 AD2d 563 [2d dep't 1997], i.e. in the RARE and UNUSUAL case where it cries out for justice beyond the confines of conventional considerations (People v Caster 2011 NY Slip Op. 21264 [4th dep't 8/2/11], citing People v Insignares 109 AD2d 221 [1st dep't 1983], People v Harmon 181AD2d 34 1st dep't 1992]), and that the court's authority is neither uncontrolled or absolute (People v Wingard 33 NY2d 192 [1973]), People v Burns 194 AD2d 548 [2d dep't 1993]). Consequently, the reasons supporting dismissal must be REAL and COMPELLING. (People v Rickert 58 NY2d 122 [1983]).

So what qualifies as compelling reasons and which ones fall short of the mark (keeping in mind that courts are required to consider the relevant factors both INDIVIDUALLY AND COLLECTIVELY and strike a SENSITIVE BALANCE between the defendant's desire (i.e) need for lenience and society's sense of safety and demand for punishment of wrongdoers. [People v Clayton 41 NY2d at 208, People v Bernus 1 NY3d 535).

DEFENDANT'S SERIOUS HEALTH ISSUES MAY OR MAY NOT CARRY THE DAY:

In People v Herman 83 NY2d 858 (1994), it was held to be no abuse of discretion to dismiss the indictment where the defendant was visibly and seriously debilitated from HIV/AIDS even though no expert medical evidence was presented. (See also People v Camargo 135 Misc 2d 987 [Sup Ct Bronx County 1986]: defendant had six months to live on account of AIDS).

But see People v Sierra 149 Misc2d 588 (Sup Ct Kings County 1990): the fact of defendant's HIV, diagnosed while he was in prison and after which he resumed his long history of illegal drug activities, did not compel dismissal IOJ because it would not inspire public confidence, and allowing him to evade the justice system, while perhaps compassionate, was deemed unacceptable in this case.

The state of the defendant's health, IN COMBINATION WITH OTHER FACTORS, can, however, sometimes tip the scales in favor of dismissal:

In People v Marrow 20 AD3d 682 (3d dep't 2005), the defendant was offered a plea to a felony drug count (after his friend's apartment where he was staying was raided and a large quantity drugs was seized), with a commitment to four months in jail and five years probation. During his plea colloquy, the defendant denied any knowledge of the roommate's operation, whereupon the defendant was indicted upon a Class A-1 felony which carried a 15-life sentence.

The defendant's conviction was reversed after he had served four years in prison. At that point the defendant, age 57, was in very bad health. Nevertheless, upon his OR release, the defendant found employment and enrolled in drug counseling (he admitted to personal use), and performed volunteer community service.

In dismissing the indictment IOJ on remand, the trial court expressed concern over the gaping disparity between the original plea and sentence offer and the defendant's sentence (after the People had described him as a "minor" player), and took notice of the fact that the Drug Laws were undergoing ameliorative changes under the Drug Law Reform Act (DLRA).

Finding that the defendant posed no risk to the community (proof of his knowledge of the co-defendant's drug dealing was considered circumstantial at best), and the defendant always maintained his innocence, the AD held that it was no abuse of discretion to dismiss the indictment.

In contrast, in People v Kinnard 266 AD2d 718 (3d dep't 1999), the defendant's resumption of his criminal ways (arrest for Burglary 2d degree), after being diagnosed with cancer and given a half-year to two years to live, was enough to justify denial of his motion to dismiss the indictment (under which he had pled guilty as a second felony offender to Burglary 3d degree and Criminal possession of a Forged Instrument 2d degree) and justify a sentence of 3-6 years consecutive (as opposed to concurrent as originally promised on the condition of no new arrests).

Considering the nature of the offenses, the defendant's history of violence and theft-related conduct as well as his post-diagnosis perpetuation of criminal behavior, the court was not at all persuaded that his illness constituted a compelling circumstance warranting dismissal. Moreover, since he violated the terms of the court's commitment, there was no basis to disturb the consecutive sentences. (People v Whittaker 257 AD2d 854 3d dep't 1999]).

See also People v Smith 217 AD2d 671 (2d dep't 1995): Defendant's participation in a rehab program did not support dismissal where he was arrested for the same type of criminal activity that got him into trouble (and rehab) in the first place.

Also unpersuasive was the defendant's claim of ill-health in People v Scott 12 AD3d 383 (2d dep't 2004), made 11 years after the defendant pled guilty to Attempted Robbery and absconded before being picked up on a warrant. In the court's view, the defendant's claim was not sufficiently compelling to justify the extraordinary remedy of dismissal.

But see People v Behl 2017 NY Slip Op. 50247[U] (Crim.Ct. Queens County 2017), where the charge of VTL 511-3 was properly dismissed after the defendant suffered a debilitating stroke (and paid off fines that made him license-eligible). In contrast, see People v Tije 2018 NY Slip Op, 51024 (U) (Crim. Ct. City of NY 4/18/18) where the defendant, having ignored a Desk Appearance ticket (resulting in the issuance of a warrant) failed to allege sufficient facts to warrant a hearing on his motion to dismiss IOJ. (Citing People v Schlessel 104 AD2d 501 [2d dep't 1984]).

ABSENCE OF CRIMINAL HISTORY:

While the defendant's criminal history (or lack thereof) is a relevant consideration, that factor, standing alone, is generally not enough to support dismissal IOJ. In People v Crespo 244 AD2d 563 (2d dep't 1997), the court was deemed to have dismissed the indictment in error on the grounds that, prior to the robbery which landed him in trouble, the defendant had no prior criminal history and had been accepted into the Marine Corp. (See also People v Kelly 144 AD2d 761 [2d dep't 2008]).

In People v Reyes 174 AD2d 87 (1st dep't 1992), the defendant, who had no criminal record, was charged along with a co-defendant with possession of drugs, a loaded weapon, drug paraphernalia and cash found in a car in which she was a front seat passenger. (She was observed kicking a bag of cocaine under the front seat while the driver fiddled with his license and registration).

The defendant absconded and was returned on warrant three years later after having gotten married to a NYC resident (city employee) and applied for a green card. If convicted, the defendant was facing likely deportation, thereby leaving her husband with the choice of having to leave the country or lose his wife.

Though describing the People's case as sufficient and the defendant's cause less than compelling, the court nevertheless granted the defendant's motion IOJ because of the impact of prosecution on the defendant's husband ("a hard-working NYC employee"), who was a collateral victim of the defendant's involvement in criminal activity.

The AD reversed, noting that dismissal IOJ is warranted only when there exists some compelling factor, consideration or circumstance clearly demonstrating that prosecution or conviction of the defendant would constitute or result in injustice.

Here, the determining factor relied on by the lower court was the adverse effect of prosecution on the defendant's husband, hardly an uncommon reality inasmuch as family members often suffer hardship when their loved ones get into criminal trouble. In the court's view, neither the defendant's relatively young age (31), or LACK OF PRIOR CRIMINAL HISTORY compelled dismissal which, in the AD'S estimation, would adversely affect public confidence in the criminal justice system.

The court was also unpersuaded by her "wrong place at the wrong time with the wrong person" argument which was belied by her suspicious conduct when the police approached and her dubious claim of unfamiliarity with the activity of the driver with whom she had lived for three months.

A similar conclusion was reached in People v Snowden 2018 NY Slip Op. 02369 (3d dep't 4/5/18), where the defendant, a village code enforcement officer, was charged (along with the village mayor), with bribe receiving, conspiracy and official misconduct for allowing a favored contractor to demolish a building (without taking proper asbestos abatement measures), at a cut rate in exchange for future demolition contracts (without the knowledge of the village board of trustees).

The defendant pointed out that he had no criminal history and that justice was served by the mayor's guilty plea to multiple misdemeanors. The court was unmoved by the defendant's arguments (including that the case against him was not strong), and concluded that allowing a public official to evade prosecution would hardly foster confidence in the justice system.

COOPERATING DEFENDANTS:

Sometimes, courts are moved to grant dismissal where defendant's cooperate with law enforcement in police investigations and prosecutions of other suspects (sometimes at great danger to themselves), only to have the rug pulled out from under them by persnickety prosecutors.

In People v Delaney 80 AD2d 835 92d dep't 1981), the AD upheld the trial grant's dismissal of the charges IOJ where the court found that the defendant, upon a promise of leniency by law enforcement officials, provided valuable (albeit incomplete) information in a pending unrelated investigation and only stopped after receiving threats from the target. In the court's reckoning, the failure to enforce the prosecutor's promise would not not only visit an injustice upon the defendant but also deter future cooperation from other informants who often provide valuable assistance to law enforcement.

In contrast, see People v Reed 184 AD2d 536 (2d dep't 1992) where the defendant moved for dismissal IOJ based on an alleged cooperation agreement with police but failed to establish any compelling circumstances that would justify the exercise of discretionary authority under CPL 210.40.

COMPLIANCE WITH PLEA AGREEMENTS:

Compliance with the conditions of plea agreement (e.g successful completion of the Judicial Diversion Program per CPL 216), can sometimes result in dismissal, if not technically in the interests of justice, then pursuant to the contractual agreement between the People and the defendant (with the court's approval). However, when the measure of satisfaction of the terms of a plea/sentence agreement lies solely within the discretion of the People and the Court, the defendant may find him/herself receiving more of a "judicial jerk-around" (followed by a imprisonment) rather than justice in the form of dismissal.

In People v Jenkins 11 NY3d 282 (2008), the Court of Appeals held that County Court did not abuse its discretion in denying the defendant's motion to dismiss the charge of Criminal Sale of a Controlled Substance (CSCS) 5th degree (upon which he was sentenced as 2FO to 3 and 1/2 to 7 years in prison) because the defendant, in the court's (and DA'S) estimation, did not successfully complete the terms of their agreement (which called for dismissal with the People's consent), if the defendant: completed residential drug treatment, completed vocational training, obtained full-time employment, found suitable employment, kept all court dates and incurred no new arrests. Per the agreement, the determination of the defendant's compliance was within the sole discretion of the DA's Office (Narcotics Office) and the court.

The defendant completed the drug training and received favorable reports from the primary treatment provider with respect to negative drug taxes, employment, opening a bank account, taking responsibility for his conduct and no new arrests.

When the defendant appeared in court and sought dismissal of the charge, the court noted that the treatment provider had expressed concern with some unresolved domestic issues involving the defendant and his girlfriend. It was recommended that they either engage in counseling (which she refused), or live apart which they did not do. (Prior reports had indicated that the defendant was residing with family).

In light of those reservations, the People, (while not contesting the defendant's successful completion of drug treatment), announced that they were not prepared to join in the defendant's motion for dismissal. They also demanded "documentary proof" of the defendant's employment and GED.

After sharing its concerns about the defendant's domestic situation, the court did not rule on whether the defendant had completed the terms of the agreement, but rather, adjourned the proceedings (after defense counsel inexplicably withdrew the motion rather than just put it off). The court urged the defendant to either get into counseling or move away from his girlfriend.

Things went down hill from there. A month later, the defendant was arrested for DV assault (which was later dismissed), lost his job and did not make arrangements for domestic counseling (which the defense argued was NOT part of the original plea agreement).

After the defendant was remanded, the court gave him another chance at dismissal by engaging in counseling an finding new employment. The defendant was terminated from counseling and picked up two more arrests out of state.

The defense renewed its motion for dismissal (arguing that the defendant had met all the required conditions when he appeared in court the first time when the matter of domestic concerns was raised). The People opposed the motion, arguing that they had the right to require domestic counseling . The court denied the motion and sentenced the defendant to 3 and 1/2 to 7 years in prison. The AD affirmed.

The Court of Appeals also affirmed noting, first, that the DA and the court held all the cards in determining whether the defendant met all conditions of the agreement. The People were entitled, in the Court's view, to documentary proof of the defendant's employment and GED (apparently reports from the treatment provider were not enough), and while acknowledging that additional conditions cannot be imposed on a plea agreement after-the-fact, (People v Farrar 52 NY2d 302 [1981]), the Court said that enrollment in domestic counseling (while urged by the lower court) was never a condition of the plea.

The Court also found that the defendant breached the terms of the plea agreement by virtue of the new arrests, subsequent discharge from counseling (after he re-engaged), and failure to return on a given court date.

The dissenting justice (Pigott, J.), took strong issue with the lower court's failure on the first appearance to make an ON-THE-RECORD DETERMINATION whether the defendant had or had not complied with the conditions of the plea agreement which, in the dissenter's view, he had met by completing drug treatment and receiving all favorable reports with respect to attitude, education and employment. (Citing, inter alia, People v Figgins 87 NY2d 840 [1995], and People v Outley 80 NY2d 702 [1993]).

The dissenting justice also took the view that the lower court improperly shifted the burden upon the defendant to prove compliance rather than requiring the People to prove otherwise. The inquiry about the defendant's domestic situation, while hardly unimportant, had nothing to to do, in the dissenter's view, with the conditions of the plea agreement which, according to the treatment provider, the defendant had met.

MOTION PROCEDURE:

Pursuant to CPL 210.40 (3), a motion to dismiss IOJ may be granted on motion of the People or upon motion of the defendant. The court may also consider and grant IOJ dismissal sua sponte (on its own motion) but if so, it must first give the parties ADVANCE NOTICE of its intention to do so, and afford them an opportunity for a hearing. (People v Russ 19 AD3d 746 [3d dep't 2005]). If the motion is granted, the court must SET FORTH ITS REASONS on the record with reference to the factors set forth in subdivision one. (People v Pugh 207 AD2d 503 [2s dep't 1994).

If the defendant's motion is beyond the 45-day requirement of CPL 210.45 (and there is no good cause for late filing), or the defendant fails to raise any compelling factors in his/her motion papers, the court can reject it out of hand. (People v Banks 100 AD3d 548 [3d dep't 2012]). And, if the People's responding papers fail to raise a question of fact on a material issue under the statute, the court may rule on the motion on the papers. (People v Schlessel supra) Otherwise, a hearing should be held.

In People v Clayton supra, the Court of Appeals, after a long and circuitous odyssey through state and federal courts, reversed the lower court's dismissal of the Murder 2d degree indictment (after the original Murder 1st charge resulted in an acquittal) because County Court dismissed the indictment IOJ of its own accord even though the defendant moved on different grounds (failure to comply with a Federal Court mandate that the case be tried within 30 days), and neither the People nor the defendant had any forewarning of the court's intention to rule on such grounds.

The defendant was convicted of Murder 2d degree and sentenced to 30 years to life imprisonments in 1953. He did not appeal (because his lawyer, he claimed, failed to file a timely notice of appeal). Then, after People v Huntley 15 NY2d 72 (1965) was decided, the court conducted a hearing and determined that the defendant's confession (which led to the discovery of other incriminating evidence), had been voluntarily given.

The Court of Appeals affirmed. (The dissenter concluded that the defendant's will had been overborne by 60-hours worth of interrogation without food or rest). The US Supreme Court denied certiorari.

In 1971, the defendant brought a habeas corpus proceeding and the District Court (EDNY) ruled that his confession was involuntary. In early 1972, the Second Circuit Court of Appeals affirmed and ordered the defendant's release on the condition that he be tried within 30 days of the District Court's order (i.e. immediately given the passage of time).

Upon the People's failure to bing him to trial as ordered, the defendant moved in County Court to dismiss the indictment. As noted above, the court, on its own motion, dismissed in the interests of justice inasmuch as the defendant had spent 19 years in prison, was now employed and was once offered a Manslaughter 1st degree plea which then carried a maximum of 20 yers in prison.

After recounting the common law and statutory history underlying CPL 210.40 (and its predecessors, CPL 671 and 672), the Court held that before the trial court took it upon itself to make an interest of justice determination, it should have apprised the parties of its intentions so that each side could present relevant evidence and the court could make a record of its findings and conclusions.

Accordingly the Court remitted the case to the lower court to conduct a hearing upon proper notice to both sides so that they could make a proper record upon which the court could then decide whether the interests of justice compelled the conclusion that the court had already reached in summary fashion.

Unlike a court, the prosecutor does not possess the authority to withdraw or dismiss a count of indictment over the defendant's objection without the court making a ruling (on the People's application) upon an exercise of discretion. Such was the holding in People v Extale 18 NY3d 690 (2012) where the prosecutor, right before the start of the defendant's second trial on charges of Assault 1st degree (a class B violent felony) and Vehicular Assault 1st degree (a class D non-violent felony, stemming from the defendant's hitting a police officer), announced that the People intended to withdraw the second count.

The defendant objected and the prosecutor (apparently unaware that a DA'S unilateral authority to withdraw or dismiss a charged count of an indictment [i.e. nolle prosequi], had been abolished by statute [CPL 672] years ago), exclaimed, "we can decide what charges to prosecute." For its part, the court, rather than exercise its discretion and rule on what should have been a motion to dismiss, went along with the prosecutor and allowed dismissal of the Vehicular Assault charge.

At the conclusion of trial, the defendant was convicted of Reckless Assault 2d degree, a class D violent felony as a lesser included offense of Assault 1st degree. The AD affirmed (78 AD2d 1519 [4th dep't 2010]) but the Court of Appeals reversed and ordered a new trial, ruling that the trial court erred in just acceding to the People's stated intention to remove the second count (presumably as a matter of strategy to deprive the jury of the option of convicting the defendant of a lesser grade non-violent felony charged in the second count rather than a violent felony as charged in count one (or a lesser included violent felony as things turned out).

Noting that defendants normally don't oppose a motion to dismiss a charge, the Court surmised that, in this case, there may well have been a good strategic reason to keep the Vehicular Assault count in the case so that the jury would have had the very option that the People and the court denied him (i.e. the possibility that the jury might show some leniency by convicting of the less serious [and non violent] offense. (People v Leon 7 NY3d 109 [2006]).

The Court reasoned that the opportunity for the jury to consider a lesser charged offense could affect a jury's deliberations (People v Boettcher 69 NY2d 174 [1987]), and if the jury had elected to convict the defendant of that count (instead of the first count), the defendant would have surely benefitted by facing a lesser sentence as a non-violent felony offender.

And, while the court could have considered a motion to dismiss the second count in the interest of justice (or even suggest not submitting it to the jury per CPL 300.40 (6)(g), the court, instead of exercising discretion, just deferred to the People. Consequently, the Court set aside the conviction for Reckless Assault 2d degree and ordered a new trial.

The defendant argued that the charge should be dismissed because he already served his sentence but the Court deemed the matter too serious to let go without prosecution to a conclusion.

While motions to dismiss IOJ are generally a heavy lift with a slim chance of success, counsel should not be deterred from raising the bar and showing the court all the facts and circumstances about the client and the case that would render prosecution or conviction an injustice. The determinations are always fact sensitive and case-specific, and while one factor alone may not persuade the court, sometimes several considerations (eg People v Marrow supra), can coalesce to create a favorable outcome.

Even if the motion is unsuccessful, counsel will have had the opportunity to expose the court to the client's qualities, mitigating factors, possible flaws in the People's case or other extenuating circumstances (e.g. police misconduct not warranting outright dismissal), that could have a favorable effect at a subsequent trial or soften the sentence inclinations in the event of a conviction.