

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: PART AP-1

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THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER

-against-

CURTIS GREEN,
Defendant

Docket Number: 2015QN000650

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HART, ERNEST F., J.:

The defendant is charged with violating Administrative Code 19-190 [a] [b], (hereinafter “AC 19-190 [a][b]”).

Defendant moves (1) for Dismissal of the Information on Various Grounds and (2) Reservation of Rights.

The People filed a response to the defense motion. The defendant filed a reply and the People filed a sur-reply.

The defendant’s omnibus motion is decided as follows:

DISMISSAL OF THE INFORMATION

Under AC 19-190 [a], a driver of a motor vehicle who fails to yield to a pedestrian or bicyclist who has the right of way shall be guilty of a traffic infraction. Under AC 19-190 [b], if the driver violates AC 19-190 [a], and also makes contact with the pedestrian or bicyclist causing “physical injury,” as that term is defined in the Penal Law, he or she shall be guilty of a misdemeanor. Under AC 19-190 [c], however, a violation of this section **will not be found** if the failure to yield and/or physical injury was not caused by the driver’s failure to exercise **due care**.

The information provides, in relevant part,

Deponent states that at the above mentioned date, time and place of occurrence, he

responded to the scene of a motor vehicle accident.

Deponent further states that he viewed video surveillance of the above mentioned location which shows the complainant, Edward Cohen, standing on the sidewalk waiting to cross the above mentioned intersection.

Deponent further states that the above mentioned video surveillance depicts an MTA bus making a right turn at said intersection and hit the complainant when the complainant was already in the middle of said intersection.

Deponent further states that the defendant, Curtis E. Green, admitted in sum and substance that he had the green light and started to make a right turn onto Northern Boulevard when he heard screaming, looked in his side view mirrors and saw a crowd of people in the street behind him.

Deponent further states that the defendant further admitted in sum and substance that he stopped the bus and walked over to where the people were standing and that is when he saw the person lying in the street. He never felt hitting anyone.

Deponent further states that the complainant was removed to a local area hospital for injuries sustained in the above mentioned incident and was pronounced dead on November 6, 2014.

The defendant moves to dismiss the information, arguing first that AC 19-190 [a][b] is unconstitutionally vague and violates his right to due process. Specifically, the defendant asserts that the term “due care” contained in the statute is vague and would be applied on an *ad hoc* basis with no uniformity. The People counter that the term “due care” utilized in AC 19-190 is not unconstitutionally vague on its face or as applied to him and is “sufficiently definite to give persons of ordinary intelligence, and law enforcement officials, adequate notice of the conduct that is forbidden by the provision.” (People’s Response p. 16). The People note that the failure to exercise “due care” is the culpable mental state for a violation of VTL 1146 and is a term that has been long recognized by the courts historically in both in civil and criminal law.

The court finds no merit to the defendant’s contention. Legislative enactments are presumptively constitutional. *See People v. Knox*, 12 NY3d 60, 69 (2009). *See also People v. Novie*, 41 Misc3d 63 (App. Term 9th & 10th Jud. Dists. 2013). The party contending otherwise

carries the burden of demonstrating that the “statute is so unrelated to the achievement of any combination of legitimate purposes as to be irrational. (citation omitted).” *Knox* at 69. Further, that party must overcome the presumption of validity by proof beyond a reasonable doubt. (citation omitted).” *People v. Gallagher*, 50 Misc3d 317 (Bronx Co. Crim. Ct. 2015).

“Violations of either subdivision (a) or (b) [under AC 19-190] require a driver’s failure to exercise *due care*.” *Id.* (emphasis added). Such term possesses “a meaning ‘long recognized in law and life (citation omitted),’¹ [and] provides defendants with adequate notice of the conduct prohibited and the police with “clear guidance for enforcement.” *Id.* Indeed, as noted by the People in their response, the “due care” standard is also applied under VTL 1146.²

The court finds that the defendant has failed to overcome the presumption of validity and has not adequately demonstrated that applying such a standard would result in “arbitrary or discriminatory enforcement,” by the police under the standard set forth above. *Id.*

The defendant also contends that the information should be dismissed because AC 19-190 [a][b], a local law which applies to the New York City area, is preempted by and is inconsistent with the Public Authorities Law, the general state law, which governs proceedings related to the Mass Transit Authority (hereinafter “MTA”). Public Authorities Law 1266 [8]; 1221. The People argue that the Public Authorities Law was not intended to preempt local criminal laws and was designed to address civil matters relating to the general operation of the New York City Transit Authority (hereinafter “NYCTA”).

For the reasons set forth in *Gallagher, supra*, this court finds that AC 19-190 is neither

¹In *Gallagher*, the court noted that “due care” is synonymous with “reasonable care” and has been defined as “the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances.”

²Under VTL 1146, an offender may be charged with a traffic infraction and a repeat offender may be charged with a class B misdemeanor. VTL 1146 (b) (d).

preempted by conflict preemption or field preemption,³ and reiterates that it is inconceivable that the state legislature would intend to exempt the MTA or the NYCTA from **any** law that affects the operations of the authority. Put simply, the due care requirement contained in AC 19-190 is in no way in conflict with the purposes of the NYCTA, and that it is, in fact, consistent with the purpose of promoting the safety of the public.

The defendant also argues that AC 19-190 [a][b] cannot apply to MTA bus drivers because the State Legislature, under Public Authorities Law 1212 [3], mandates that the authority assume the liability for an employee's negligence. The People counter that the Public Authorities Law, which governs general operations that are civil in nature, does not preempt individual bus drivers from being prosecuted under the Vehicle and Traffic Law or any other statute, such as the Administrative Code, for criminal acts. They further assert that AC 19-190 [a][b] is not in conflict or inconsistent with state law.

As discussed in *Gallagher, supra*, this court finds that Public Authorities Law 1212 was not intended to apply in criminal actions, and its application is limited to civil litigation involving tort actions.

The defendant further claims that charging an MTA bus driver with AC 19-190 [a][b] under the given circumstances would interfere with the operation of the transit system in that the system would experience both a shortage of bus drivers, due to their absence in connection with such charges, as well as difficulties in replacing them. He also asserts that applying this statute to MTA bus drivers would deter people from choosing a career as a bus operator since such occupation requires spending much more time on the road than the average driver and would place them in a more vulnerable position to being arrested for this offense.

³Conflict preemption occurs where a local government enactment is in direct conflict with a state statute, while field preemption exists where a locality passes legislation related to an area that the state has indicated an intent to thoroughly regulate. *See Gallagher, supra*.

The People dispute these claims, and this court agrees, finding them, at best, speculative.

The defendant also contends that this court is without jurisdiction over this case because the MTA was not served with a notice of claim, which is required under Public Authorities Law 1212 [4] and General Obligations Law 50-e for any tort action against an employee of the authority.⁴ The People counter that Public Authorities Law 1212 governs civil actions and does not apply to and preempt criminal actions. Again, this court reiterates that the statutory sections cited by the defense are applicable to civil matters, and are not in conflict with AC 19-190.

The defendant also argues that this court does not have jurisdiction over this case because he was arrested without a court ordered warrant. The People counter that no arrest warrant was necessary in this case because one of the offenses charged is a misdemeanor.

The court finds no merit to the defendant's argument that an arrest warrant was required in this case. A police officer may effectuate an arrest without a warrant where there is reasonable cause to believe an individual has committed a crime. CPL 140.10 (1) [b]. *See Gallagher, supra: People v. Wallace*, 46 Misc3d 1217 (A) (Albany City Ct. 2015).

By reply affirmation, the defendant asserts that the deponent's viewing of unauthenticated video surveillance is inadmissible hearsay, and that the charges must be dismissed. The People argue that this "new" claim is not the proper subject of a reply affirmation. They maintain that this particular argument is not jurisdictional in nature, that it should have been made within forty five days of arraignment under CPL 255.20 (1) and that the defense has not offered a good cause explanation for the delay. CPL 255.20 (3). They also contend that the observation of a video surveillance tape is not hearsay.

This branch of the defendant's motion is denied. His argument that the information

⁴In this regard, the defendant argues that since AC 19-190 utilizes the term "due care," it is founded upon tort principles of negligence. (Def. Motion p. 17).

contains hearsay, a non-jurisdictional defect, is waived absent a timely filed pre-trial motion. *See People v. Chung*, 44 Misc3d 1211 (A) (Kings Co. Crim. Ct. 2014); *People v. Ellis*, 31 Misc3d 1213 (A) (Kings Co. Crim. 2011) and cases cited therein. It is noted that the defendant did not provide a good cause explanation for the delay in making this argument. CPL 255.20 (1) (3). In any event, this court finds that the observation of a video surveillance tape is not hearsay. *See People v. Ham*, 43 Misc3d 1227 (A) (Kings Co. Crim. Ct. 2014); *People v. Patten*, 32 Misc3d 440 (Long Beach City Ct. 2011).

The defendant also submitted a recent decision for this court's consideration, *People v. Sanson*, Docket Number 2015QN000650, June 24, 2016, Queens Co. Crim Ct., where the court found AC 19-190 to be unconstitutional on its face. The *Sanson* court reasoned that the application in a criminal case of a civil tort liability standard of negligence, rather than a criminal *mens rea* standard, violates a defendant's right to due process, to be presumed innocent and right against self-incrimination under both the Federal and State constitutions. Initially, this court notes that the constitutional arguments presented in *Sanson* were not proffered by the defense in the case before this court. Further, this court respectfully disagrees with the analysis contained in *Sanson*, and finds that strict liability crimes were contemplated and authorized by the state legislature, as reflected in Penal Law 15.10.⁵ *See People v. Hossain*, 50 Misc3d 610 (NY Co. Crim. Ct. 2015). In any event, the *Sanson* decision was rendered by a court of concomitant jurisdiction and is, therefore, not binding on this court. *See People v. Ham*, 43 Misc3d 1227 (A)

⁵SPL 15.10 provides, in relevant part:

The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is physically capable of performing. If such conduct is all that is required for the commission of a particular offense, or if an offense or some material element thereof does not require a culpable mental state on the part of the actor, such offense is one of 'strict liability. ...'

(Kings Co. Crim. Ct. 2014).

The court has considered defendant's remaining arguments and finds them to be without merit.

The defendant also moves to dismiss the information in the interest of justice pursuant to CPL 170.30 and 170.40. CPL § 170.40 permits the dismissal of an information in the interest of justice provided there is "some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant ... would constitute or result in injustice." CPL § 170.40.⁶ The Court's discretion, however, is not absolute and should only be exercised in that rare or unusual case which cries out for justice beyond the confines of conventional considerations. *People v. Wingard*, 33 NY2d 192 (1973); *People v. Eubanks*, 114 Misc2d 1097 (Appt. Term 2nd & 11th Jud. Dist., 1982). The defendant has made no specific argument in support of his position, and therefore, has failed to meet his burden to demonstrate that a dismissal in the interest of justice is warranted in this case. *Gallagher* at 291.

Accordingly, the defendant's motion to dismiss the information in the interest of justice is denied.

The defendant's motion to dismiss the information is denied in its entirety.

RESERVATION OF RIGHTS

The branch of the defendant's motion seeking the right to make further motions is granted to the extent provided for by CPL 255.20 (3).

This opinion constitutes the decision and order of the Court.

Dated: July 27, 2016
Kew Gardens, NY

Ernest F. Hart
Judge of the Criminal Court

⁶CPL 170.40 provides ten factors that the court must consider before rendering a decision on a motion to dismiss in the interest of justice.