

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS: CRIMINAL TERM: PART K-TRP

PRESENT:

HON. SEYMOUR ROTKER  
Justice.

-----X  
THE PEOPLE OF THE STATE OF NEW YORK

-against-

Indictment No.: 2657-2001

DANIEL CASTRO, ROMDAL GRANDA  
RICHARD VALASQUEZ,

Motion: TO STRIKE TESTIMONY/  
TO AMEND INDICTMENT.

Defendants.

-----X

STEVEN BRILL, ESQ.  
For the defendant Castro

JOSEPH JUSTIZ, ESQ.  
For the defendant Granda

MICHAEL GAFFEY, ESQ.  
For the defendant Valasquez

RICHARD A. BROWN, DA

BY: KAREN ROSS, ADA  
For the People

Upon the foregoing papers, and due deliberation had, the People's proffered evidence concerning a theory of liability differing from that specifically set forth in the indictment is stricken and their motion to amend is denied. See the accompanying memorandum this date.

Kew Gardens, New York  
Dated: August 1, 2002

\_\_\_\_\_  
SEYMOUR ROTKER, Acting J.S.C.

-----X  
THE PEOPLE OF THE STATE OF NEW YORK

-against-

Indictment No. 2657-2001

DANIEL CASTRO, ROMDAL GRANDA  
RICHARD VALASQUEZ,

MEMORANDUM DECISION

Defendants.

-----X

PROCEDURAL BACKGROUND

The defendants were charged by indictment filed on January 31, 2002 with reckless endangerment in the first degree and criminal trespass in the third degree. They were arraigned on February 27, 2002 and plead not guilty. The first count of the indictment which charged the crime of reckless endangerment in the first degree, specifically alleged that the defendants **“under circumstances evincing a depraved indifference to human life, recklessly engaged in conduct which created a grave risk of death to another person in that the defendants did throw plexiglass down from an observation tower where other persons were present.”**

All three defendants filed omnibus motions seeking, among other things inspection of the Grand Jury Minutes and dismissal of the indictment. The motion to dismiss by the defendant Castro argued that there was no evidence before the Grand Jury to establish the allegation in the indictment that a plexiglass was thrown. The motion by the defendant Granda asked the court to compel a response to a demand for a bill of particulars.. In response to the motions, the People submitted an affirmation which included a bill of particulars. In the bill the People affirmatively stated that the substance of the conduct encompassed by the indictment which the People intended to prove in their direct case was that each defendant **“acting in concert with two apprehended others did engage in conduct which created a substantial risk of serious physical injury to another person and did enter and remain unlawfully inside a location tower at Flushing Meadow Park without permission or authority”**. It is significant, especially in view of the defendant Castro’s argument

and in view of the fact that the indictment specifically charged the throwing of plexiglass as the conduct which constituted the offense of reckless endangerment that no mention was made in the bill of any acts of the defendants which endangered the responding officers. On April 22, 2002 the motions to inspect were disposed of by the court. Although some of the relief requested by the defendants was granted the motion to dismiss was denied.

On June 13, 2002 the defendants waived the right to trial by jury. The Court proceeded to try the case without a jury. The District Attorney waived opening statement (see, CPL 320.20(3)(a)) and proceeded to call witnesses. Detective Sean Barrett testified that he observed pieces of plexiglass coming from the top of a thirty story tower at the Flushing Meadow Worlds Fair site but that he did not see how they were dislodged. He also testified that he arrested defendant Castro coming down from the top of the tower and that one and one half hours later he arrested the other two defendants who had been rescued through the efforts of the NYPD Aviation Unit and the Emergency Services Unit.

The prosecutor then called Sgt. Matthew Rowly of the NYPD Aviation Unit and Police Officer Robert Zajak of the Emergency Services Unit as witnesses. The testimony proffered by these witnesses concerned the dangers to them and other officers inherent in a helicopter rescue of two of the defendants from the top of the observation tower<sup>1</sup>. Based upon the proffered testimony of these witnesses, the People argued that the defendants were guilty of reckless endangerment on the theory that their acts had endangered the lives of the police officers called upon to extricate the two defendants from the top of the tower.

The defense objected to the proffered testimony on the grounds that the indictment and other pleadings alleged that the defendants were guilty of reckless endangerment in that they threw plexiglass from the tower. The testimony now proffered by the People, according to the defense argument, constituted an attempt to introduce an entirely new theory of liability, one that varied from the accusation in the indictment. Under this new theory the defendants were alleged to be guilty of reckless endangerment in that, by placing themselves in a position which required the NYPD to

---

<sup>1</sup> The Court notes that the actions of the police officers in effecting the rescue of the defendants were exemplary and are to be commended.

perform a major rescue operation, they endangered the responding officers<sup>2</sup>. Since up to this point there had been no indication that this was the People's theory of liability, the defense argued that to allow this evidence now would constitute "trial by ambush". In order to avoid delay and inconvenience to the witnesses, the Court took their testimony subject to legal argument and a motion to strike.

Defense counsel submitted a memorandum of law, the people submitted a reply and the defense has submitted a sur-reply. All of these submissions have been considered by the Court.

### ADMISSIBILITY OF EVIDENCE OF ALTERNATIVE THEORY OF LIABILITY

CPL 200.50 provides that an indictment must contain:

(7) a plain and concise factual statement in each count which, without allegations of an evidentiary nature, (a) asserts facts supporting every element of the offense charged...with sufficient precision to clearly appraise the defendant.. of the conduct which is the subject of the accusation.

According to the Practice Commentary for this section the reasons for this requirement are (1) to enable the defendant to prepare for trial (2) to allow the court to determine whether the facts alleged by the Grand Jury are sufficient to support a conviction (3) "to assure that the offense to be tried is the same in name and in theory as the one voted by the Grand Jury—as opposed to some variation substituted by the prosecutor" and (4) to serve as a record if there is a future double jeopardy claim.

---

<sup>2</sup>. The Court notes here that it has serious questions with regard to the viability of this theory as a basis for conviction. The crime charged here requires proof that the defendants acted recklessly, i.e. that they were aware of and consciously disregarded the risk that police officers might be endangered as a result of their conduct. The act of trespassing on property and climbing to the top of the observation tower (unlike, for example, an arson) may not be of such a nature as to establish an awareness of a future risk to responding police officers. There is at least one lower court case which holds that the acts which allegedly constitute reckless endangerment must be directed at someone, known or unknown, who is present at the time the act is committed, see, People v. Buckman, 110 Misc. 2d 753 (Kings Co. Sup. Ct., 1981). Moreover, those cases which do not follow Buckman (see, People v. Rodriguez, 110 Misc. 2d 828 (Bronx Co. Sup Ct., 1981); People v. Winans 170 Misc 2d 586 (Allegany County, Co.Ct., 1996) suggest that whether or not a risk to others is foreseeable consequence of the defendant's conduct is a question of fact.

The lead case interpreting these requirements is People v. Grega, , 72 NY2d 489 (1988). In Grega, the Court of Appeals decided two cases (People v Grega and People v. Roberts). It is the Roberts case which is relevant to the decision in the case at bar. Roberts was a homicide case in which the indictment charged that the defendant caused the death of the victim **by striking her in the neck** (emphasis is ours). At trial the People, over objection by the defense, offered evidence which tended to show that the defendant **strangled the victim** (emphasis is ours). The Court ruled that this was improper and reversed the conviction. The Court reasoned that “ having specified in the indictment and later in their answer to discovery, that the defendant struck the victim, thereby causing her death, the People were not free to present proof at trial that virtually ruled out that theory as a cause of death and substituted another one”. This was because to allow such proof under these circumstances deprived the defendant of “fair notice” of the specific charges against him, People v. Roberts, supra, page 499<sup>3</sup>.

The indictment in this case specifically identified the act which constituted reckless endangerment as the throwing of plexiglass from the observation tower. Now, however, the People seek to prove an alternative theory of liability not set forth in the indictment. They allege that it was the conduct of the defendants in climbing to the top of the tower which subsequently triggered a dangerous rescue attempt by police officers which establishes the crime charged. As noted previously, one of the principal purposes of the indictment is to give a defendant fair notice of the charges against him or her so that he or she can prepare to meet them. The defendants here were not given any advance warning of this theory of liability<sup>4</sup>. To the contrary they were specifically advised that the People would be relying on an entirely different theory. The defendants here, like the defendant in Roberts, would clearly be deprived of their right to “fair notice” were the Court to allow the People to proceed under this alternative theory of liability. For this reason testimony as to the alternative theory will be stricken.

---

<sup>3</sup>. Allowing proof of the alternative theory may also deprive the defendant of the right to be prosecuted by indictment voted by a Grand Jury. This issue was noted but not reached in Roberts, supra..

<sup>4</sup>One might reasonably argue that the defendants were misled as to the theory of liability.

## DUPPLICITOUS COUNTS

In their reply affirmation the People argue that despite the specific factual language of the first count of the indictment it can be interpreted to encompass both theories of liability. As noted in the case of People v. Stockholm, 279 A.D. 2d 704 (3th Dept., 2001) the crime of reckless endangerment can be committed whether the defendant's conduct is directed at one person or a group of persons. For the indictment to be sufficient, however, it is necessary that the accused be adequately apprised of the specific conduct which is alleged to have endangered the victim or victims. In this case the indictment clearly notified the defendants that the specific conduct at issue was throwing of plexiglass from the tower while other persons were present. If the Count now read the subject count of the indictment to encompass an act of reckless endangerment by virtue of thrown plexiglass and also a subsequent reckless endangerment by virtue of risk to rescue personnel<sup>5</sup>, it would clearly charge two separate crimes and would be duplicitous. Duplicitous counts are barred by CPL 200.30 which essentially requires that each count of an indictment may charge only one offense.

## APPLICATION TO AMEND THE INDICTMENT

With respect to the People's application to amend the indictment to reflect the alternative theory of liability, the Court initially notes that the People never formally made such a motion. CPL 200.70 provides that a motion to amend must be in writing and on notice to the opposing party. The People's "motion" here is contained in their reply to the defendants brief. With respect to the merits of this issue, however, the controlling case is People v. Perez, 83 NY2d 269 (1994).

In Perez and in a companion case decided at the same time (People v. Vasquez), the Court of Appeals held that it was error to add a count to an indictment even where that count had been actually voted by the Grand Jury and inadvertently omitted from the indictment. The Court reasoned that any amendment to an indictment must be strictly governed by the terms of CPL 200.70 which (1) allows amendments pertaining to "matters of form, time, place, names of persons and the like, when such amendment does not change the theory or theories of the prosecution as reflected in the

---

<sup>5</sup>. It is significant that the conduct which allegedly endangered the responding officers occurred well after the alleged throwing of the plexiglass.

evidence before the Grand Jury” but which (2) specifically prohibits amendments “for the purpose of curing...(a) failure thereof to charge or state an offense”.

The addition of a new count to an indictment, even though specifically voted by the Grand Jury, was viewed by the Perez Court as an amendment for the purpose of curing a failure to charge an offense. Such an amendment is precluded by statute. The People’s remedy, noted the Court, was to secure a superceding indictment.

In this case, it is not alleged that the Grand Jury voted an indictment based upon the alternative theory now advanced by the People. The addition of a new count in these circumstances, even more than in Perez, is not merely an effort to correct a technical error but is rather an impermissible attempt to charge an offense that was not charged by the Grand Jury. The Court notes that even if it were to assume that there was evidence before the Grand Jury supporting the theory, there is no way of knowing what the Jury’s intent was with respect to this charge<sup>6</sup>. A defendant can be prosecuted only upon an indictment voted by the Grand Jury. He cannot be prosecuted upon a prosecutors independent evaluation of the evidence before the Jury. If an amendment to add a count is not permitted where it is known that the Grand Jury intended to vote the count, it is surely not permitted when no clear action was taken.

For the foregoing reasons the application to strike evidence of an alternate theory of liability is granted and the motion to amend is denied.

Kew Gardens, New York  
Dated: August 1, 2002

---

SEYMOUR ROTKER, Acting J.S.C.

---

<sup>6</sup>. It is conceivable that the Grand jury declined to indict on the theory of danger to the rescuers perhaps believing that a risk of harm to them was not foreseeable.