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

PRESENT:
HON. SEYMOUR ROTKER
Justice.

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

Indictment No.: 3523/2000

JEREMIAS AMADEO,

Motion: TO DISMISS PURSUANT TO CPL 210.25(3) ON THE GROUNDS THAT PENAL LAW ARTICLE 485 IS UNCONSTITUTIONAL.

Defendant.
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MICHELE MAXIAN, ESQ

BY: HOWARD TURMAN, ESQ
For the Motion

RICHARD A. BROWN, DA

BY: GEORGE FARRUGIA, ADA
Opposed

ELLIOT SPITZER,
ATTORNEY GENERAL
Intervenor

BY JO W. FABER
ASST. ATTORNEY GENERAL
Opposed

Upon the foregoing papers, and due deliberation had, the motion is denied See the accompanying memorandum this date.

Kew Gardens, New York
Dated: August 1, 2001

SEYMOUR ROTKER, Acting J.S.C.

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

-against- Indictment No. 3523/2000

JEREMIAS AMADEO, MEMORANDUM DECISION

Defendant.

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The defendant is charged in an eight count indictment filed on November 24, 2000, with various violent felonies. Counts one, two and three of the indictment charge, respectively, attempted murder in the second degree, assault in the second degree and assault in the first degree committed as hate crimes under New York's newly enacted Penal Law Article 485 (hereafter, "Hate Crimes Act").

The alleged facts underlying the charges are as follows. The defendant approached his victim at 6:00 a.m. on the northbound A-train platform of the Broad Channel subway station in the County of Queens. The defendant asked the complainant if he spoke Spanish. The complainant responded in the negative and the defendant asked "what the f–k" language the complainant was speaking. The complainant responded that he was speaking English and the defendant asked if it was "American-English or English-English". When the complainant responded "what does it matter, English is English", the defendant repeatedly asked the complainant "what the f–k" he meant. The defendant then allegedly stated that he was going to kill the complainant and stabbed him in the face with a knife causing serious injury.

About one half hour later, as the victim was being removed from the scene by ambulance, the defendant allegedly stated that "he (the victim) was a dumb stupid Mexican" and that "he (the defendant) was Puerto Rican and a United States Citizen who was from this country not like this motherf–ker here" referring to the victim.

By motion dated June 8, 2001, the defendant has moved pursuant to CPL sections 210.20(1)(c), 210.35(5) and 190.25(6) to dismiss counts one, two and three of the indictment on the grounds that Penal Law Article 485 ("Hate Crimes Act") is unconstitutional on its face. The People have responded with an affirmation in opposition and a memorandum of law dated June 25, 2001. The Attorney General of The State of New York has intervened in the case and has also filed an affirmation in opposition and a memorandum of law dated June 22, 2001[1].

Preliminarily it should be noted that in response to a perceived increase of bias related incidents in recent years both the United States Congress and the Legislatures of most of the various states have enacted remedial legislation[2]. The majority of these enactments have been based upon a model statute drafted by the Anti-Defamation League of B'nai B'rith (ADL). The model legislation is a penalty enhancement statute. It creates no new crimes but enhances the punishment for violation of existing Penal statutes based upon proof of the offender's discriminatory intent in selecting his or her victim.

New York's Statute is based upon the model legislation. It provides in Section 485.05 that a person commits a "hate crime" when he or she commits a "specific offense" (set forth in CPL 485.05(3))[3] and either:

> (a) intentionally selects the person against whom the offense is committed or intended to be committed in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age disability, or sexual orientation of a person regardless of whether the belief or perception is correct, or (b) intentionally commits the act or acts

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[1]. CPLR 1012(b) gives the Attorney General an absolute right to intervene in support of the constitutionality of state statutes.

[2]. See, Crimes Motivated by Hatred: the Constitutional Impact of Hate Crimes Legislation, Syracuse Journal of Law and Policy, Spring, 1995, page 34. As of the date of this article, the Federal Government and forty seven of the fifty states have enacted some form of hate crime legislation.

[3]. All of the "specific offenses" are already crimes or offenses defined in the Penal Law.

> constituting the offense in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person regardless of whether the belief or perception is correct.

Section 485.10 enhances the sentencing options allowed to the court when a "specific offense" is committed as a "Hate Crime".

The defendant contends that the statute, on its face, violates the guarantee of freedom of speech embodied in Article 1 Section 8 of the Constitution of the State of New York and the guarantee of due process contained in Article 1 Section 6 of the same document. He raises no challenge under Federal Law, conceding that any such argument is probably foreclosed by the holding of the United States Supreme Court in Wisconsin v. Mitchell, 505 US 476 (1993).

A party seeking to nullify a statute must overcome the presumption of constitutionality that favors legislative enactments, People v. Demperio, 86 NY2d 549 (1996), People v. Scalza , 76 NY 2d 604 (1991), Matter of Von Berkel v. Power, 16 NY2d 37 (1959). The invalidity of a law must be demonstrated beyond a reasonable doubt, People v. Paznotta, 25 NY 2d 333 (1961), see NY v. Ferber , 458 US 747 (1982).

New York's guarantee of Freedom of Speech and of the press as embodied in Article 1 Section 8 of our State's Constitution reads differently from its federal cousin. It has , on occasion, been construed to provide different and greater protections to New Yorkers than those which they enjoy as United States citizens, People v. Santiago , 185 Misc. 2d 138 (Co. Ct, Monroe Co, 2000)[4]. The burden is on the defendant, however, to establish the specific manner in which the State Constitution creates some independent New York right and to establish that the Hate Crimes Act violates that right.

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[4]. See the analysis of the history of Article 1, Section 8 of the New York State Constitution contained in this decision.

The defendant's affirmation cites two New York cases in support of his argument. The two cases are of marginal relevance and certainly do not establish that the Hate Crimes Act is unconstitutional under the New York State Constitution.

In Arcara v. Cloud Books, Inc., 68 NY2d 553 (1986), the District Attorney of Erie County sought a court order closing a bookstore on the grounds that it was a public nuisance because some patrons were committing sexual acts on the premises. The case reached the New York State Court of Appeals on remand from the United States Supreme Court, see, Arcara v. Cloud Books, 478 US 697 (1986), which had ruled that the order sought by the prosecutor, because it was aimed at curtailing illegal acts of some of the store's patrons and not at speech or expression raised no issue under the First Amendment to the Federal Constitution.

The Court of Appeals, applying State law, reached a different conclusion but not, as the defendant argues, because New Yorkers have different and greater rights under the State Constitution than under the First Amendment of the United States Constitution. The Court held that, under Article 1, section 8 of the State Constitution, the protections of the First Amendment had a wider application in New York than required by Federal Law. The Court reasoned that "the State constitutional guarantee of freedom of expression (was) implicated by an order closing the defendant's bookstore to prevent illegal acts by the patrons" and that, under settled First Amendment principles, "when government regulation designed to carry out a legitimate and important State objective would incidentally burden free expression, the government's action cannot be sustained unless the State can prove that it is no broader than needed to achieve its purpose, (Matter of Nicholson v. State Commn. on Judicial Conduct, 50 NY2d 597; People v. Taub, 37 NY2d 530)". The Court concluded that the proposed order was vastly broader than necessary to prevent the illegal conduct of the bookstore patrons and that, therefore, it represented an unconstitutional abuse of State power.

In People v. P.J. Video, 68 NY2d 296 (1986), the other case relied on by the defendant, the Court of Appeals held that Article 1, section 12 of the New York State constitution required a different and stricter test for reviewing the validity of a search warrant than that required by the

Fourth Amendment to the United States Constitution. This case stands for the undisputed proposition that state courts are free to interpret their own law to supplement or expand Federal rights. The fact that the Court of Appeals in P.J. Video read Article 1, section 12 of the State Constitution as conferring rights to New York citizens greater that those contained in the Fourth Amendment to the US Constitution does not necessarily mean that the rights of New Yorkers under Article 1, section 8 of the State Constitution are different from or greater than those under the First Amendment.

Neither of theses cases establish any specific New York rights under Article 1, section 8 which would render the Hate Crimes Act unconstitutional under that section of the State Constitution. P.J. Video concerns Article 1, section 12 of our State Constitution which is not at issue here. Except in so far as one paragraph of the decision cites cases where the Court of Appeals has "applied the State Constitution, in both civil and criminal matters, to define a broader scope of protection than that accorded by the Federal Constitution", PJ Video has no relevance to the issues raised by the defendant. Cloud Books expands the application of the First Amendment in New York state but does set forth a unique or different New York State standard for reviewing governmental actions which burden freedom of speech or of expression.

As the defendant concedes, the Supreme Court of the United States, in the case of Michell v. Wisconsin, supra, considered and rejected a First Amendment challenge to the constitutionality of a hate crimes act that is virtually identical to the New York Law[5]. In the Mitchell case, the State of Wisconsin, like the prosecutor in Cloud Books, raised the argument that because the statute was directed at conduct and not speech no First Amendment issue was raised. The Court rejected this argument. It held that First Amendment analysis was appropriate but that the scope of the amendment was not absolute. The Court upheld the Wisconsin statute based upon previous precedents that had sanctioned the consideration of motive at sentencing, Dawson v. Delaware, 503 US 1159 (1992), Barclay v. Florida, 463 US 939 (1983) and in the context of anti-discrimination statutes, Roberts v. United States Jaycees, 468 US 609 (1984), Hishon v. King & Spalding, 467 US 69 (1984).

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[5]. See, Attorney General's memorandum of law, pages 3-5.

Given that the defendant has failed to demonstrate that New Yorkers enjoy any rights or protections under the State Constitution that they do not enjoy under the First Amendment the decision in Mitchell conclusively forecloses the free speech argument.

The defendant also challenges the Hate Crimes Act based upon Article 1 Section 6 of the New York State Constitution which, like the Fourteenth Amendment of the United States Constitution guarantees due process of law. He argues that "the statutory language authorizes such a broad reading that prosecutors would be able to prosecute defendants under the statute even though such actions probably were not intended to be encompassed by the legislation."[6] No cases or precedents are cited in support of this argument. It is unclear in what respect the defendant claims his due process rights are being violated. If his argument is that the statute is over broad in that it impermissibly reaches or impacts the legitimate conduct of individuals other than himself, the defendant has the burden to show that constitutionally protected activity is effected and that the effect is "substantial", People v. Shack, 86 NY2d 529 (1995), People v. Foley, 94 NY2d 668 (2000).

The examples of conduct which the defendant claims the statute impermissibly reaches[7] are, as the Attorney General's brief points out, probably not even covered by the act. In the event that they are, however, they are clearly crimes prohibited by the Penal Law and not by any stretch of the imagination protected activity.

The defendant's affirmation suggests a second due process argument when he states that the Hate Crimes Act is unduly vague in that it creates "uncertainty" over the precise state of mind that warrants enhanced punishment"[8]. For procedural reasons, this argument was not addressed in Mitchell, supra, and cannot be said to be foreclosed by the holding in that case.

This issue was specifically addressed by Justice Atlas in his decision in People v. Diaz, NYLJ, July 2, 2001, page 22, col. 6. In Diaz, the defendant challenged New York's Hate Crimes

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[6]. Defendant's affirmation, page 6.

[7]. The defendant fears that purse snatchers who target women because they are perceived as easier victims or juveniles who rob immigrant shopkeepers based on a belief that they will be unwilling or unable to press charges will be unintended candidates for enhanced punishment under the Act.

[8]. Defendant's affirmation, page 8.

Act on the ground that it was unconstitutionally vague. The Court held that "in a challenge to the constitutionality of a penal law on the grounds of vagueness, it is well settled that a two prong analysis is required". Under the two prong test, the statute must "provide sufficient notice of what conduct is prohibited," and must "not be written in such a manner as to permit or encourage arbitrary and discriminatory enforcement", see People v. Bright, 71 NY 2nd 376, 382 (1988).

Applying this standard to the New York statute, Justice Atlas found that it "clearly delineated specific conduct (which could) easily be avoided by the innocent minded", Diaz, supra. Moreover, the Act was "not subject to arbitrary and discriminatory enforcement". This is primarily so because the application of the Act is triggered by an "ordinary" penal law violation. It is only in the charging phase, after an arrest based upon probable cause has already been made, that the decision to seek the enhanced penalty features of the Hate Crimes Act is considered. Thus, for the reasons articulated by Judge Atlas, the Hate Crimes Act does not violate due process based on vagueness.

Based upon the foregoing, the Court concludes that the defendant failed to meet his burden to demonstrate beyond a reasonable doubt that New York's Hate Crimes Act in any way violates either the State or Federal Constitutions. The defendant's motion is, in all respects, denied.

Kew Gardens, New York
Dated: August 1, 2001

SEYMOUR ROTKER, Acting J.S.C.