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SUPREME COURT ; STATE OF NEW YORK  
COUNTY OF QUEENS - CRIMINAL TERM PART K-3

X Indictment No. 2664/2000

PEOPLE OF THE STATE OF NEW YORK

- against -

: DECISION/ORDER

JERRY PEREZ

X

HOLLIE, RONALD D., Justice

In the above captioned case, the People and the Defendant have answered "ready for trial" on the charges contained within the indictment filed by the Grand Jury. Before jury selection commenced, the People have moved to amend the indictment to "... include language that pertains to Counts SEVEN and EIGHT that are already charged in the indictment ...."

For reasons more fully set forth below, the motion to amend the indictment is denied and Counts SEVEN and EIGHT are, upon reinspection of the indictment, dismissed as defective. Additionally, and for reasons further set forth below, Counts TWO and THREE are dismissed because the dismissal of Counts SEVEN and EIGHT created a legal impediment to a conviction under Count TWO or Count THREE.

BACKGROUND

The Defendant is a police officer with the Port Authority Police Department of New York and New Jersey. In October 1999, the Defendant had been a police officer

with the "Port Authority" for 13 years and was assigned to LaGuardia Airport. The Defendant's customary assignment at LaGuardia involved patrol duties, in uniform, in an assigned sector.

On October 18, 1999, an airline passenger had made a purchase at a bookstore located within one of the airline terminals at LaGuardia Airport. Upon exiting the bookstore, the passenger boarded his flight and departed New York unaware that he had left his wallet on the sales counter of the bookstore. The sales clerk, who made the sale to the passenger, found the wallet. She and her fellow employees safeguarded the wallet and waited for the owner to call or return to claim his wallet. When the wallet owner had neither called nor returned, by the time the bookstore was to close that evening, two employees (in the presence of each other) opened the wallet to determine if it contained identification and a way of contacting the owner. The wallet contained various forms of identification that included a name, picture, addresses of the owner and there was approximately \$350. in U.S. currency in the wallet.

After the content of the wallet was observed by the store employees, one of the employees saw the Defendant patrolling near the bookstore and motioned him over. After a few words were exchanged, the wallet and its contents were handed to the Defendant. The Defendant took possession of the wallet and its contents and returned to his command.

The Defendant never recorded his receipt of the wallet or its contents in his memo book or in any other police department records. The Defendant had not advised a

supervising officer, police department personnel or the wallet owner of his receipt of the wallet or its contents until after he became aware that the Port Authority police had initiated an investigation into the whereabouts of this wallet. That police investigation was initiated approximately seven weeks after the wallet was handed to the Defendant. The Defendant is the last person known to have possession of the wallet and its contents. After the night of October 18, 1999, the wallet and its contents were never again seen.

The prosecution presented evidence surrounding this missing wallet to a Grand Jury. The theories of prosecution, as reflected in the evidence before the Grand Jury, were that the Defendant committed five (5) separate offenses involving Falsifying Business Records and three (3) additional, and in some cases related, offenses of Criminal Misconduct, Petit Larceny, and Criminal Possession of Stolen Property in the Fifth Degree.

The Grand Jury was charged, as to the applicable law, relative to each of those eight offenses. The Grand Jury voted to indict the Defendant for each of the eight offenses and those offenses were properly voted by the Grand Jury. The indictment was then filed by the Grand Jury with this Court.

#### DEFECTIVE INDICTMENT

The form and content of this indictment include a "face sheet" that lists eight separate counts addressed to the eight separate offenses the Defendant is charged with having committed and the penal law section number of each offense. Following the face

sheet, and attached thereto, are several pages that together contain six additional statements. Each of these six additional statements are numbered to correspond to the first six counts listed on the face sheet and each recites that the Grand Jury accuses the Defendant of a designated offense and that offense was committed by the Defendant, in Queens County, on or about a designated date. Each statement also contains a plain and concise factual statement that supports every element of the offense charged with sufficient precision to apprise the Defendant of the conduct which is the subject of the accusation. With these six additional statements, this indictment satisfies the minimum formal requirements of CPL Section 200.50 and is therefore legally sufficient to constitute the offenses charged as Count ONE through Count SIX.

As filed with this Court, the indictment does not contain an additional statement relative to Count SEVEN or Count EIGHT. It is clear that the additional statements for Counts SEVEN and EIGHT were left out of the indictment by clerical error.

MOTION TO AMEND  
COUNTS SEVEN and EIGHT

It is the position of the People that this Court's authority to grant the requested amendments to Counts SEVEN and EIGHT derives from CPL Section 200.70(1). In presenting their argument that the requested amendments are (1) one of form and not substance and (2) would cause no prejudice to the Defendant and (3) would not change the theories of prosecution as reflected in the evidence before the Grand Jury, the People contend that an order granting the requested amendments would be an appropriate

exercise of the Court's authority.

Given, however, the statutory design of CPL Section 200.70, before the Court may consider any arguments in support of an amendment to an indictment, the Court must first determine if the requested amendment is of a type described in CPL Section 200.70(2). If the requested amendment is of a type covered by subdivision 2 of CPL Section 200.70, the Court has no authority to order that amendment to the indictment. In this **permissive** amendment (CPL Section 200.70(1)) versus **prohibited** amendment (CPL Section 200.70(2)) analysis, of primary importance is the Court's assessment of the impact the requested amendment will have on the indictment qua document or on the evidence upon which the indictment is based. (See, People v. Iannone, 45 NY2d 589, 600; cf., Preiser, 1993 Practice Commentaries, McKinney's Consolidated Laws of NY, Book 11A, CPL Section 200.70, at 517). Whether the People characterize this requested amendment as a correction or a supplementation by omitted accusatory language, it is the effect of the amendment that will dictate whether it is permissible or prohibited. (See, People v. Gill, 223 AD2d 447, 637 NYS2d 48).

To the extent relevant to this case, CPL Section 200.70(2) reads:

“ ... nor may an indictment ... be amended  
for the purpose of curing:  
(a) A failure thereof to charge or  
state an offense; ... .”

In the case at bar, it is clear that without the additional statements for Counts SEVEN and EIGHT included in the indictment, those Counts, to a substantial degree, do not satisfy the minimum formal requirements of CPL Section 200.50. That failure in satisfying

those requirements causes Counts SEVEN and EIGHT, as listed on the face sheet, to each be insufficient accusatory instruments. As a consequence, the indictment, as filed and without the requested amendment, fails to charge or state an offense as to Count SEVEN or Count EIGHT.

Because the requested amendment to Counts SEVEN and EIGHT would create a valid and sufficient accusatory instrument as to Counts SEVEN and EIGHT and would thereby cure the failure to charge or state an offense, the amendment requested is of a type covered by CPL Section 200.70(2) and is therefore prohibited. Such an amendment would be a change in substance, not in form. (People v. Perez, 83 NY2d 269, 609 NYS2d 564). The motion to amend the indictment, relative to Count SEVEN (Petit Larceny) and Count EIGHT (Criminal Possession of Stolen Property in the Fifth Degree), is therefore denied.

MOTION TO DISMISS  
COUNTS SEVEN AND EIGHT

A valid and sufficient accusatory instrument is a non-waivable jurisdictional prerequisite to a criminal prosecution (People v. Franco, 86 NY2d 493, 500, 634 NYS2d 38, 42; People v. Jones, 267 AD2d 89, 700 NYS2d 141).

After this indictment was filed with this Court, the Defendant had timely filed an omnibus motion that included a motion to dismiss the indictment. That motion to dismiss was denied, in part, because of Defendant's "bare allegations." Those allegations did not specifically refer to the absence of additional statements for Counts

SEVEN and EIGHT . . . the absence of which cause Counts SEVEN and EIGHT to be defective and insufficient accusatory instruments.

Given the failure by the Defendant, in his omnibus motion, to clearly set forth the basis for his motion to dismiss the indictment and *further*, given the jurisdictional mandate that there be a valid and sufficient accusatory instrument in order to proceed with this criminal prosecution, this Court hereby finds "good cause" and determines "in the interest of justice" to reconsider Defendant's motion to dismiss the indictment (See, CPL Section 255.20(3)).

Upon reconsideration, Defendant's motion to dismiss the indictment is granted to the extent that Count SEVEN and Count EIGHT are dismissed as defective, pursuant to CPL Sections 210.20(1)(a) and 210.25(1).

MOTION TO DISMISS  
COUNTS TWO and THREE

Among the theories of prosecution involving the five (5) separate offenses of Falsifying Business Records, Count TWO and Count THREE each charge the Defendant with Falsifying Business Records in the First Degree. In relevant part, each reads:

"... The Defendant, on or about October 18, 1999, in the County of Queens, with intent to defraud, omitted to make a true entry in the business records of an enterprise in violation of a duty to do so which he knew to be imposed upon him by law or by the nature of his position, and the Defendant's intent to defraud included an intent to commit another crime, to wit:  
...."

In Count TWO, the other crime the Defendant is charged with having the intent to commit is specifically stated to be "Petit Larceny or to aid or conceal the commission thereof." In Count THREE, the other crime the Defendant is charged with having the intent to commit is specifically stated to be "Criminal Possession of Stolen Property in the Fifth Degree or to aid or conceal the commission thereof."

The Grand Jury went on to charge the Defendant with the separate offenses of Petit Larceny (Count SEVEN) and Criminal Possession of Stolen Property in the Fifth Degree (Count EIGHT). The offense charged in Count SEVEN is an essential element of Count TWO and the offense charged in Count EIGHT is an essential element of Count THREE.

The dismissal of Count SEVEN and Count EIGHT negates an essential element of the crimes charged in Counts TWO and THREE. (People v. Griffin, 242 AD2d 70, 671 NYS2d 34). There exists therefore, relative to Count TWO and Count THREE, a legal impediment to conviction within the contemplation of CPL Section 210.20(1)(h). (See, People v. Gordon, 88 NY2d 92, 97, 643 NYS2d 498).

Accordingly, Count TWO and Count THREE are dismissed pursuant to CPL Section 210.20(1)(h).

The foregoing constitutes the decision and order of this Court.

Dated: July 11, 2001

  
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RONALD D. HOLLIE, J.S.C.