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THE PEOPLE OF THE STATE OF NEW YORK

VS.

RYAN ACUFF, JACOB ALLEN, LEAH ANDREWS, OWEN ARTHUR,  
MICHAEL CONNELLY, PAUL DEWHIRST, JEAN DOUTHWRIGHT,  
PATRICIA DURR, BRIAN ERWAY, JONATHAN FOSTER, LYNN GIGLIO,  
EMILY GOOD, DENISE HERRERA, REAM KIDANE, JAMES KOLB, DAVID-  
JOSIAH KRAUSE, JAMIE KROLAK, BRIAN LENZO, CHARLOTTE MILLER,  
CHELSEA MILLER, BENJAMIN MILLER-JACOBSON, OLIVIA NOLE-  
MALPEZZI, COLIN O'MALLEY, EVAN PEACOCK, ANNA SOMMER-  
GROHENS and EVAN VAUGHN,

Defendants.

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### DECISION

The above matters were before the Court on December 14, 2011 for bench trials. Each defendant had been charged with trespass, a violation of Penal Law §140.05 and a violation of the City of Rochester's Municipal Code §79-2( C), being in the park after hours. All of the defendants except defendants Acuff, Allen, Douthwright, Krause, Chelsea Miller, Peacock and Vaughn filed written motions of various kinds. Counsel for those who did not file written motions asked to be heard on December 14, 2011, to argue motions and sought to adopt the written motions and arguments of co-defendants' counsel. Because the constitutionality of a section of the Municipal Code of the City of Rochester was challenged, the City of Rochester sought to intervene to respond to the motions. The application to intervene was granted. For the reasons set forth below, the charges of trespass in violation of Penal Law §140.05 and violation of the City of Rochester's Municipal Code §79-2 ( C) are dismissed, both without prejudice to refile, as against all of the above defendants.

To be sufficient on its face an accusatory instrument must contain non-hearsay allegations of fact establishing the defendant's commission of every element of the offense charged. Crim. Proc. Law §100.40 subd. 1. See also People v. Alejandro, 70 NY2d 133 (1987). The defendants were all charged with trespassing in Washington Square Park in violation of §140.05 of the Penal Law. That section provides: "A person is guilty of trespass

when he knowingly enters or remains unlawfully in or upon premises.” The Penal Law, §140 subd. 5, specifically defines “enter or remain unlawfully” as: “A person “enters or remains unlawfully” in or upon premises when he is not licensed or privileged to do so. A person who, regardless of his intent, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless he defies a lawful order not to enter or remain, personally communicated to him by the owner of such premises or other authorized person.” The accusatory instrument in these cases does not allege that the park was closed at the time the defendants entered or that they defied lawful orders not to enter. The essential allegations are that they refused to leave the park in violation of law.

Here, the accusatory instrument in each case must establish that the defendant remained in the park after a lawful order not to remain was personally communicated to him or her. That must be done by non-hearsay allegations. All of the defendants were charged by the same accusatory instrument. The factual allegations are as follows:

“That your complainant is the Police Chief of the City of Rochester Police Department. While so employed and working in that capacity, did have an opportunity to investigate the violation of trespass and the Rochester Municipal Code Violation of being in the City of Rochester Park after hours, which occurred at 172 South Clinton Avenue - known as Washington Square Park, Rochester, New York. The defendants, refused to leave the above-referenced city owned park. Rochester Municipal Code Section 79-2-c prescribes that city owned parks are closed from 11:00 pm until 5:00 am during the time period of April 1 until November 15. The defendants refused to leave park after being warned numerous times both in writing and verbally by your complainant and other members of the Rochester Police Department.

The basis for your complainant’s knowledge of the fact is his personal knowledge and investigation of this incident as well as observations of other members of the Rochester Police Department.”

Chief Sheppard does not sufficiently allege non-hearsay factual allegations establishing every element of trespass. He alleges in the accusatory that the defendants were warned both in writing and verbally by him and other members of the Rochester Police Department. On this date, October 29, 2011, thirty-two (32) defendants were arrested at Washington Square Park. The accusatory does not allege that Chief Sheppard personally communicated to each defendant that he or she had no authority to remain in the park. Nor does it allege that he witnessed each defendant’s refusal to leave the park. To the extent that the factual allegations are based on other than Chief Sheppard’s personal knowledge (and he asserts that it is based

on his investigation of the incident as well as observations of other members of the Rochester Police Department) they are based on hearsay allegations in violation of the Criminal Procedure Law.

To the extent that the necessary factual allegations with respect to any one defendant are within the personal knowledge of Chief Sheppard, new accusatory instruments may be filed so stating. To the extent they are not within his personal knowledge, new accusatory instruments, brought by or supported by sworn depositions of those with personal knowledge must be filed. Any re-filed complaints and accompanying supporting depositions, however, must establish non-hearsay allegations with respect to each individual defendant, in compliance with §100.40 of the New York State Criminal Procedure Law.

The defendants are also charged, by the same accusatory instrument, with violating the Municipal Code of the City of Rochester. Rochester Municipal Code Chapter 79 is the "Parks Code". Park closing hours are contained in §79-2( C). In order to remain in the park during the hours the park is closed an individual is required to be an authorized employee or in possession of written permission from the Commissioner of Recreation and Youth Services or his or her designee. Chapter 79 contains its own penalty section at §79-26. Not until 1987, by Rochester City Ordinance 87-156, did the penalty provision provide for imprisonment as a possible penalty. Given that possible penalty, the cases, of necessity, would have had to have been brought in Rochester City Court. By Rochester City Ordinance 90-400, however, the Rochester City Council changed the potential penalties. Pursuant to that 1990 ordinance, violations of Chapter 79 must be heard and determined by the Municipal Code Violations Bureau. All possible jail penalties were removed, and new penalties were established as set forth in §13A-11 of the Municipal Code. The only penalty set forth in that chapter is a scheme of fines, the amounts of which escalate by the number of offenses. Therefore, standing alone, being in the park during hours the park is closed is a violation of the City of Rochester's Municipal Code to be resolved in the Municipal Code Violations Bureau, and not in a court of law. For that reason, the charges under Municipal Code §79-2 ( C) are dismissed, without prejudice to filing at the Municipal Code Violations Bureau.

Based upon the dismissal of all charges as against all defendants, this Court need not reach the Constitutional issues raised regarding the Municipal Code. See, generally, Matter

of Syquia v. Board of Education of Harpursville Central School District, 80 NY2d 531, 535 (1992); Matter of Vogel v. Blackwell, 225 AD2d 1091 (4<sup>th</sup> Dept. 1996). All applications for dismissal in the interest of justice are also denied.

**SO ORDERED.**

Jan 12, 2012

Teresa D. Johnson  
Hon Teresa D. Johnson  
Rochester City Court Judge