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People v Iverson
2011 NY Slip Op 51712(U)
Decided on September 21, 2011
Supreme Court, Kings County
Ferdinand, J.
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Supreme Court, Kings County

<p>The People of the State of New York</p> <p>against</p> <p>Lamar Iverson, Defendant.</p>

4220-2011

ADA Jonathan Laskin, Of Counsel

Charles J. Hynes, District Attorney, Kings County, for People

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The Legal Aid Society, Brooklyn, for Defendant

Jo Ann Ferdinand, J.

On May 24, 2011, the defendant was arrested during the execution of a search warrant in his reported residence of 2950 West 35th Street in Kings County. The search warrant was based in part upon an undercover police officer's sworn allegations that on 13 separate occasions between February 2 and May 24, 2011, the defendant, while acting in concert with co-defendant Yearwood, sold cocaine and heroin. For these actions, the indictment charges the defendants, inter alia, with two counts of the Class E felony Conspiracy in the Fourth Degree (one count for cocaine and one count for heroin) for conspiring to commit 13 counts of the Class B felony Criminal Sale of a Controlled Substance in the Third Degree.

The case was referred to the Brooklyn Treatment Court on August 16, 2011, upon the defendant's request for Judicial Diversion. The Judicial Diversion Program for Certain Felony Offenders (Criminal Procedure Law Article 216) grants authority to judges to determine which nonviolent defendants, whose criminal activity is the result of substance abuse or dependence, should have the opportunity to avoid a jail sentence by agreeing to complete court monitored treatment.

CPL Article 216 defines those defendants who are eligible for Judicial Diversion as ones charged with certain Class B, C, D, and E felony drug offenses, or those charged with specified nonviolent offenses listed in CPL § 410.91(4), so long as they do not have a disqualifying condition listed in CPL § 216.00(1). If the District Attorney consents, a non-eligible defendant will be deemed eligible. The list of eligible crimes is specific and does not include every nonviolent felony. For example, Robbery in the Third Degree and felony DWI, both nonviolent offenses, are not specified eligible crimes. Disqualifying conditions include: convictions within the past ten years for a Class A felony or a violent felony; those who have a prior second violent felony or persistent felony offender adjudication; and those who are presently charged with certain violent felony offenses. Prior YO adjudications for disqualifying crimes may also be considered by the court in determining eligibility. [*2]

The statute is silent as to whether the presence on an indictment of nonviolent, non-specified crimes along with specified eligible charges precludes eligibility. Judges have reached different conclusions on this issue. Two courts have held that, so long as a defendant is charged with an eligible offense and is not otherwise

disqualified by CPL § 216.00(1), the presence of a neutral charge on the indictment will not preclude participation.^[FN1] These courts reasoned that, since the Legislature chose to list disqualifying charges, its clear intent was that omitted charges are not disqualifying. Two other courts have determined that the list of eligible charges is exhaustive and anyone charged with neutral charges is ineligible for Judicial Diversion.^[FN2] These courts reasoned that, had the Legislature wanted those charged with neutral offenses to be eligible, it would have included those offenses in the list of eligible charges. The *Jaen* court held "[i]n the absence of legislative action, the Court cannot expand the provisions of the statute (*People v. Jaen, supra* fn.2).

The People contend that the defendant herein is not eligible for Judicial Diversion because the indictment charges him with two counts of Conspiracy in the Fourth Degree, which are not specified as either eligible or disqualifying offenses. The People argue that to permit those charged with neutral crimes to be eligible, would have the absurd result of finding those charged with a Class A drug felony or Criminal Use of a Chemical Weapon or Biological Weapon in the Second Degree (PL § 490.50), a Class A-II felony eligible.^[FN3]

The defendant contends that he is eligible for Judicial Diversion because he is charged with specified B felony drug crimes, has no prior disqualifying convictions, and no pending disqualifying charges. He argues that to exclude those charged with neutral crimes along with specified eligible charges from eligibility for Judicial Diversion would have the illogical result of excluding those whom the People choose to charge with neutral lesser-included misdemeanors and/or conspiracies to commit specified eligible offenses.

"Given that the underlying purpose of the statute, as stated in both the Senate and Assembly Memoranda in Support of Legislation, is [t]o significantly reduce drug-related crime by addressing substance abuse that often lies at the core of criminal behavior,' and to accomplish this goal by returning discretion to judges to tailor the penalties of the penal law to the facts and [*3]circumstances of each drug offense and authorizing the court to sentence certain nonviolent drug offenders to probation and drug treatment rather than mandatory prison where appropriate,' a more expansive interpretation of the statute favors the underlying legislative purpose (*see* NY

Sponsors Memorandum, 2009 S.B. 2855/A.B. 6085)" ([*People v. Jordan*, 29 Misc 3d 619, 621-622](#)).

Given the Legislature's failure to include any misdemeanors among the eligible offenses, it must have intended that such crimes would not automatically disqualify a defendant from Judicial Diversion. To find otherwise would result in the absurd conclusion that a defendant charged with an eligible felony drug possession offense would be disqualified by the inclusion of the lesser-included misdemeanor of Criminal Possession of a Controlled Substance in the Seventh Degree. This reasoning leads to the ineluctable conclusion that lesser-included crimes, though not specified, are not disqualifying.

By the same reasoning, while a conspiracy to commit a completed crime is not a lesser-included offense of the completed crime, it embraces all of the overt acts and substantive crimes in the particular criminal enterprise (*People v. Abbamonte*, 43 NY2d 74, 85), and is integrally related to the commission of the completed crime. In the present case, because the neutral charges of Conspiracy in the Fourth Degree embrace and integrally relate to the specified eligible charges of Criminal Sale of Controlled Substance in the Third Degree, this Court concludes that the defendant is not disqualified from eligibility for Judicial Diversion as a result of the inclusion of these charges in the indictment.

Having determined that the defendant meets the statutory definition of eligibility, the Court must next determine whether or not he should be referred for an evaluation. The statute does not require that every eligible defendant be guaranteed an evaluation to determine if he should be offered diversion for treatment. Article 216 clearly leaves this determination to the judge's discretion (CPL § 216.05[1]). In the present case, the defendant's request to be evaluated is denied. Diversion into treatment is designed for those who not only have a history of alcohol or substance abuse or dependence, but whose abuse or dependence is a contributing factor to their criminal behavior (CPL Article 216). The purpose of diversion of such defendants to substance abuse treatment is that, once drug abuse is overcome, the criminal behavior will also stop. Where a defendant's criminal behavior is motivated by greed or profit, rather than a need to obtain money to purchase drugs for immediate use, drug treatment may have no effect on the behavior.

Here, the defendant was the subject of a long-term investigation into the sale of controlled substances in a New York City public housing development. Acting in concert with another, he is alleged to have sold a quantity of cocaine or heroin to an undercover officer on 13 occasions. These sales were allegedly negotiated by the defendant in advance over the phone with the UC and involved substantial amounts of drugs. At the time of the search warrant execution in the defendant's residence, he is alleged to have been in possession of drug packaging and scales. Based on these allegations, even if his claim of alcohol and substance dependence were to be credited, this Court is not persuaded that such dependence is a contributing factor to his criminal behavior. The allegations are not indicative of the kind of criminal behavior that results from substance abuse or dependence. These are not the crimes of someone who compulsively needs to [*4] obtain money to purchase drugs for immediate use. Rather, the allegations describe the actions of a businessman selling drugs to make money.

Accordingly, having considered all of the arguments presented, this Court finds that the defendant is an eligible defendant as defined in CPL § 216.00(1) despite the presence of neutral charges on the indictment; nevertheless the court also finds that the defendant is not a suitable candidate for the Judicial Diversion Program.

This constitutes the decision and order of the court.

E N T E R,

JO ANN FERDINAND

ACTING SUPREME COURT JUSTICE

Footnotes

Footnote 1: [People v. Jordan, 29 Misc 3d 619](#), Westchester County Court (Capeci, J.)(Defendant eligible for diversion pursuant to Article 216 where one count in a 23 count indictment charges an "eligible" offense); *People v. Kithcart*, Ind. No. 2009-0813-1, Onondaga County Court (Merrill, J.)(Defendant eligible for diversion pursuant to Article 216 where, in addition to eligible felonies, the indictment charged

Tampering with Physical Evidence).

Footnote 2: *People v. Sheffield*, Ind. No. 4364-2009, Supreme Court New York County (Nuñez, J.)(Defendant not eligible for diversion pursuant to Article 216 where, in addition to eligible felonies, the indictment charges Auto Stripping in the Second Degree); *People v. Jaen*, Ind. No. 5704-2008, Supreme Court Special Narcotics Court of the City of New York (Coin, J.)(Defendant not eligible for diversion pursuant to Article 216 where, in addition to eligible felonies, the indictment charges misdemeanors).

Footnote 3: Article 216 does not classify Class A drug felonies as eligible crimes. However, they are also not classified among the disqualifying pending charges. In addition, Class A felonies in general are not classified as violent or non-violent (PL § 70.02), and the disqualifying charges listed in Corrections Law § 803(d)(ii) do not include Class A drug felonies or Class A-II felonies.

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