

STATE OF MARYLAND : IN THE CIRCUIT COURT
V. : FOR
EDWARD NERO : BALTIMORE CITY
Defendant : Case No. 115141033

DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO CHARGE A CRIME

The Defendant, Edward Nero, through his counsel, Marc Zayon, hereby files this Motion to Dismiss, pursuant to Maryland Rule 4-252(d), and in support thereof, states:

INTRODUCTION

The Defendant has been charged in the above captioned matter in a four-count indictment with second degree assault, two counts of misconduct in office and reckless endangerment. As neither the Indictment nor the State's Response to the Defendant's Request for a Bill of Particulars allege facts that support the charge of Second Degree Assault, the Defendant moves for dismissal pursuant to Maryland Rule 4-252(d).

ARGUMENT

It is first important to note that defense counsel could not locate a single case in Maryland, any other state, or in the federal courts where a police officer has been charged criminally with second degree assault **solely on the basis** that he/she made an arrest allegedly without probable cause. Common sense dictates that officers would simply not make arrests if they were subject to criminal prosecution if it was later determined that probable cause did not exist. The long term established remedy for a Fourth Amendment Constitutional violation has always been suppression of the evidence. Therefore, the

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CRIMINAL DIVISION

State has not demonstrated that a crime can even be committed under its theory of this case.

As asserted in the State's Response to the Defendant's Motion for Bill of Particulars, the State alleges that the second degree assault was committed when the Defendant caused offensive physical contact to Mr. Gray; the contact was the result of an intentional act; and the contact was not legally justified in that force was used to place Mr. Gray under arrest without probable cause. To be convicted of committing this intentional battery, there must be sufficient proof that the Defendant intended to cause harmful or offensive contact against a person without that person's consent AND without legal justification. Elias v. State, 339 Md. 169, 183 (1995).

Though the legal term "without legal justification" is not specifically defined by Maryland statute, a review of caselaw demonstrates that the State cannot prove that the Defendant acted "without legal justification." In People v. Schuett, 833 P.2d 44 (Colo. 1992), the Colorado Supreme Court defined the term "without legal justification" noting that the term is a term of art which means that "the actions of the defendant were committed in the pursuit or furtherance of an illegal purpose." Id. at 45. Blacks Law Dictionary (Rev. 4th ed. 1968) uses the term "without legal justification" interchangeably with a "malicious act; an unlawful act done willfully or purposely to injure another." Id. at 1110.

In Green v. Brooks, 125 Md. App. 349 (1998), the Court of Special Appeals also used the terms interchangeably when discussing what a plaintiff must prove to prevail on a claim of false arrest after an officer asserts qualified immunity. The Court noted that immunity does not apply when the official acts with malice. Malice in this context

requires a showing that “the official intentionally performed an act without legal justification or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately injure the plaintiff. Id. at 377.

Further, the Maryland Civil Pattern Jury Instructions also demonstrate the connection between “without legal justification” and “malice.” Maryland Pattern Jury Instruction 15:16 (b) defines a false arrest as an arrest made without legal justification. *See* MPJI-CV False Arrest. Maryland Pattern Jury Instruction 15:10 specifically states, “a police officer is not responsible for false arrests unless the officer acts with malice.” *See* MPJI-CV Qualified Immunity.

In this case, there is NO allegation by the State that the Defendant acted with malice- or with excessive force. The sole allegation in the Indictment and in the State’s Response to the Defendant’s Bill of Particulars is that the Defendant arrested Mr. Gray without probable cause, a Fourth Amendment violation.

The Defendant is aware that the granting of a Motion to Dismiss, pursuant to Maryland Rule 4-252(d) , is not often appropriate and is mindful of the language expressed by the Court of Appeals in State v. Taylor, 371 Md. 617, 645 (2002), noting:

A motion to dismiss is not directed to the sufficiency of the evidence, i.e. the quality or quantity of the evidence that the State may produce at trial, but instead tests the legal sufficiency of the indictment on its face. A pretrial motion to dismiss an indictment may not be predicated on insufficiency of the evidence because such an analysis necessarily requires consideration of the general issue. Thus, where there are factual issues involved, a motion to dismiss on the grounds that the State’s proof would fail is improper.

Id. at 654. However, in this case, there are no factual issues involved.

Though unusual, courts have granted such motions in situations analogous to the case at bar. In United States v. Vigil, 2006 U.S. Dist. LEXIS 97295, the United States

District Court for the District of New Mexico dismissed the defendant's indictment for a violation of the Hobb's Act because the Government failed to allege the existence of a quid pro quo which was an essential element of extortion. The Court noted that without the quid pro quo "there can be no crime." Id. at 34.

In United States v. Simpson, 2011 U.S. Dist. LEXIS 76881, the United States District Court for the Northern District of Texas granted the defendant's motion to dismiss alleging evidence tampering and obstruction of justice because it was not clear that an FBI investigation qualified as an "official proceeding" and that requirement was an essential element of the crime. Id. at 117.

In State v. Ferris, 284 A.2d 288 (1971), the Supreme Judicial Court of Maine concluded that the trial court erred in failing to dismiss an indictment for failure to charge a criminal offense. In that case, the Court ruled that the possession that the State allegedly seized from the defendant, namely betting slips, was not prohibited by law. The Court analyzed the statute and ruled that the slips were not gambling devices, but instead the records of such things as amounts wagered which aid the memory of a gambler and are not themselves prohibited gambling devices. Id. at 290.

In State v. Brinson, 51 N.C. App. 413 (1981), the North Carolina Court of Appeals upheld the granting of a motion to dismiss of an indictment charging the defendant with receiving stolen goods. The Court noted that the indictment failed to demonstrate that the defendant knew that the credit card had been taken with the intent to use it, an essential element of the crime. Therefore, the indictment failed to charge a crime and the motion to dismiss was properly granted. Id. at 417.

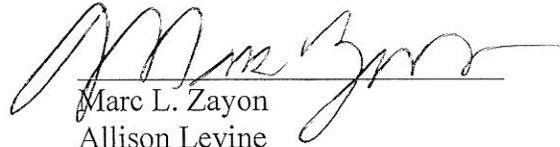
In State v. St. Paul Fire and Marine Insurance Company, 835 So.2d 230 (2000), the Alabama Court of Appeals upheld a trial court's dismissal of an indictment against an insurance company after an anesthetist, in a civil suit, testified he lied at the direction of the company. The Court found that the legislature did not expressly state that corporations could be liable for perjury- therefore, the company could not be charged criminally. Id. at 231. The Court correctly noted, "statutes creating crimes are to be strictly construed in favor of the accused. Moreover, criminal statutes should not be extended by construction." Id. at 232.

The same result should be reached in this case. This Motion is not based on the fact that the State's proof would fail, but rather that on its face, the indictment fails to charge a crime. For example, if the Defendant was charged with being a felon in possession of a firearm and the weapon identified in the indictment and response to a Bill of Particulars was not a firearm, the indictment would be properly dismissed. On its face, the indictment and the Response to the Bill of Particulars fail to charge a crime. The language of the charging documents alleges a Fourth Amendment violation which does not render an arrest "not legally justified." The remedy for a fourth amendment violation has never been to charge an officer with a crime. The proper remedy is suppression of the evidence.

CONCLUSION

For the foregoing reasons, the Defendant respectfully requests that this Honorable Court grant this Motion to Dismiss Count One of the Indictment charging second degree assault.

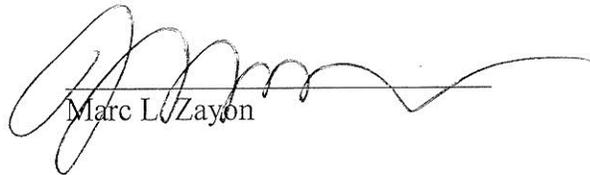
Respectfully submitted,



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CERTIFICATION OF SERVICE

I HEREBY CERTIFY that on the 1st day of February 2016, a copy of the foregoing Motion was hand-delivered to Janice Bledsoe, Deputy State's Attorney for Baltimore City, 120 E. Baltimore Street, 9th Floor, Baltimore, Maryland 21202.



Marc L. Zayon

STATE OF MARYLAND

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CIRCUIT COURT

v.

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FOR

EDWARD NERO

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BALTIMORE CITY

Defendant.

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CASE NO. 115141033

ORDER

Upon consideration of the Defendant's Motion, it is this ____ day of _____,
2016 hereby **ORDERED** that the Defendant's Motion is **GRANTED**.

Judge