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Criminal Law—Homosexual Proposal Constitutes Vagrancy

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Prior to 1957, Section 15 (now Section 375) of the Vehicle and Traffic Law made, without qualification, the failure to signal before turning a traffic infraction.[73] However, the Legislature, cognizant of the many instances when such act was insignificant, amended Section 15 through the enactment of Section 1163.

In *People v. Lyons*,[74] defendant maintained the evidence was insufficient as a matter of law to show his failure affected other traffic. The Court said that testimony of a policeman that other vehicles were within 700 feet of the rear of defendant's car, and defendant's own admission that there was traffic coming into the street, was sufficient to find that other traffic could be affected by the lack of a turn signal. In justifying its decision, the Court pointed to the mounting highway fatality toll as demanding a tight application of "these simple, easy-to-obey traffic rules."[75]

HOMOSEXUAL PROPOSAL CONSTITUTES VAGRANCY

The defendant in *People v. Hale*[76] was arrested for making a homosexual proposal to a police officer in a bus terminal. A conviction was obtained for vagrancy under Section 887(4) cls. (b) and (c) of the Code of Criminal Procedure.[77] The Supreme Court, Erie County, reversed, holding that the defendant's conduct did not constitute vagrancy, but rather that he should have been proceeded against for disorderly conduct under Section 722(8) of the Penal Law.[78] The Court of Appeals held that cl. (b) of Section 887(4) of the Code of Criminal Procedure was restricted in application to those who solicit on behalf of third parties, e.g. "pimps,"[79] but that cl. (c) did include this type of activity, and reversed the Supreme Court's dismissal.

It appears that the defendant's conduct is covered by the disorderly conduct,[80] as well as the vagrancy statute, and that this is an unavoidable result

appropriate signal in the manner hereinafter provided in the event any other traffic may be affected by such movement.

73. N.Y. Vehicle and Traffic Law § 15(18) (now Section 375):
. . . it shall also be unlawful to fail to cause such signals to be maintained at all times, in good and sufficient working order, or to fail to use the same when making or preparing to make any stop or turn. . . .

74. 7 N.Y.2d 36, 194 N.Y.S.2d 491 (1959).

75. Id. at 37, 194 N.Y.S.2d 493.

76. 8 N.Y.2d 162, 203 N.Y.S.2d 71 (1960).

77. N.Y. Code Crim. Proc. § 887:
The following persons are vagrants: . . . (4.) (a) person . . . (b) who offers or offers to secure another for the purpose of prostitution, or for any other lewd or indecent act, or (c) who loiters in or near any thoroughfare or public or private place for the purpose of inducing, inticing or procuring another to commit lewdness, fornication, unlawful sexual intercourse or any other indecent act.

78. N.Y. Penal Law § 722:
Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct: . . . (8.) Frequents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness.

79. People v. Gould, 306 N.Y. 352, 118 N.E. 553 (1954).

80. Supra note 77; See People v. Lopez, 7 N.Y.2d 825, 196 N.Y.S.2d 702 (1959); People v. Liebenthal, 5 N.Y.2d 876, 182 N.Y.S.2d 26 (1959).

in a criminal system such as New York's. When nothing constitutes a crime unless it is so designated by statute,[81] the Legislature in attempting to cover all areas of prospective criminal activity will of necessity overlap areas in order to avoid creating loopholes. Thus situations will arise, as in the present case, where the defendant's activity is covered by two different sections.[82] Had the Court of Appeals decided conversely we would have the anomalous result of the defendant picking, in these areas of overlap, the section under which he preferred to be charged. This would undoubtedly be the more difficult under which to obtain a conviction and would consequently seem out of line with the accusatory process. The Court of Appeals might have also been influenced by the possibility of a requirement of showing a breach of the peace in order to obtain a conviction for disorderly conduct,[83] and perhaps did not wish to impose this formidable burden on the prosecutor.

CHARGE TO JURY CONCERNING SECOND DEGREE MANSLAUGHTER

The seventeen year old defendant fatally stabbed another youth with a paring knife in a pool hall fracas. In *People v. Drislane*,[84] his conviction of first degree manslaughter which was affirmed by the Appellate Division,[85] was reversed by the Court of Appeals.

The instructions of the trial court concerning the first degree were correct.[86] As to the second degree, however, the court only instructed the jury as to Section 1052(2) of the Penal Law which reads in part: "Such homicide is manslaughter in the second degree, when committed without design to effect death: (2). In the heat of passion, but not by a dangerous weapon . . .". The court failed to give any instructions under Section 1052(3), the so-called omnibus clause, which reads in part: "By any act, procurement or culpable negligence . . . which, . . . does not constitute the crime of murder in the first or second degree nor manslaughter in the first degree." The Court of Appeals interpreted the trial court as also charging that the paring knife was a dangerous weapon.[87]

The jury became perplexed as to what constituted manslaughter in the second degree and returned for further instructions. Prompted by the jury's question, the court flatly charged that the second degree could not be found where a dangerous weapon was used. Since it failed to instruct the jury concerning the omnibus clause, and since it had previously charged that this paring

81. Supra note 78.
82. People v. Florio, 301 N.Y. 46, 92 N.E.2d 881 (1950); People v. Hines, 284 N.Y. 93, 29 N.E.2d 483 (1940); People v. Bord, 243 N.Y. 595, 154 N.E. 620 (1926).
83. People v. Evans, — Misc. —, 192 N.Y.S.2d 144 (Ct. Spec. Sess. 1959).
84. 8 N.Y.2d 67, 201 N.Y.S.2d 756 (1960).
85. 9 A.D.2d 932, 196 N.Y.S.2d 1022 (2d Dep't 1959).
86. N.Y. Penal Law § 1050.
87. A search of the Record on Appeal does not clearly establish that the Trial Court instructed the jury that the knife was a dangerous weapon, although the instructions could be read with that interpretation.