Buffalo Law Review

Volume 9 | Number 1 Article 68

10-1-1959

Criminal Law—Sufficiency of Information

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water land.[97] A trial of the matter had been held, and the Police Justice dismissed the information at the close of the evidence.[98] Defendant in the original action brought an action to prohibit the prosecution of the appeal.[99] The Appellate Division granted an order restraining the appeal,[1] and the Court of Appeals affirmed in a four-three decision.

The Trial Court in a lengthy opinion had concluded that the defendants were not guilty of criminal trespass as charged because the waters in question were navigable and as such open to public use. At the trial, entry onto the waters in question was conceded by defendants, and the evidence there adduced pertained to the classification of those waters as navigable. The nature of the Trial Court's dismissal is determinative of the People's right to appeal under Section 518(3). If it was upon the "insufficiency of the evidence adduced at the trial" no appeal lies. If, on the other hand, it was upon the legal insufficiency of the information regardless of the time of dismissal, the Section allows an appeal. The evidence of the navigable nature of the waters in question tended to prove that the defendant's admitted acts did not constitute a crime. Is such evidence that alluded to in Section 518(3)? The Judicial Council in its 1942 report "would *not* allow an appeal from an order dismissing an indictment for reasons connected with the weight or sufficiency of the evidence."[2] If the rule were otherwise, a possible question of double jeopardy might arise.[3]

The majority in this case held that the Trial Judge's dismissal was on the weight of the evidence, while the minority indicated that it was on the legal insufficiency of the information. It cannot be disputed that the "evidence" (as used in a generic sense) presented by the People in this case was not sufficient to persuade the Trial Judge. However, all of that evidence related to a point of law, not one of fact. The insufficiency of such evidence does not appear to be the same "insufficiency" to which Section 518(3) refers. The purpose of that Section is to prevent the relitigation of a factual determination. The evidence concerning the navigable nature of the water in question here seems to relate to the determination of the sufficiency of the information as a matter of law.

SUFFICIENCY OF INFORMATION

An information must state facts necessary to constitute a designated crime or it is defective, and for that reason void.[4] The information in *People v. McGuire*[5] charged that defendant "did unlawfully and willfully possess and

97. People v. Kramer, 14 Misc. 2d 42, 177 N.Y.S.2d 425 (County Ct. 1958).
98. People v. Kramer, 7 Misc. 2d 373, 164 N.Y.S.2d 423 (Police Ct. 1957).
99. The action was brought under the authority of Article 78 of the Civil Practice Act.

1. 7 A.D.2d 644, 180 N.Y.S.2d 408 (2d Dep't 1958).
2. 8TH ANNUAL REPORT OF N.Y. JUDICIAL COUNCIL, *supra* note 92 at 63.
3. SEE 5TH ANNUAL REPORT OF N.Y. JUDICIAL COUNCIL, *supra* note 92 at 41 and the cases cited therein.
4. N.Y. CODE CRIM. PROC. § 145 provides: The information is the allegation to the magistrate, that a person has been guilty of some designated crime.
5. 5 N.Y.2d 523, 186 N.Y.S.2d 250 (1959).

have under his control a quantity of obscene, lewd, lascivious and indecent pictures and books," but failed to allege that they were possessed "with intent to sell," which is a required element of the crime of which he was convicted.[6] The Court of Appeals, in a five-two decision, reversed the conviction and dismissed the information.

Two subdivisions of Section 1141 of the Penal Law set out different crimes.[7] Subdivision 1 makes it criminal to possess any number of items of obscene material with the intent to sell. Subdivision 4 makes it criminal to possess more than six such items—under this subdivision the possession of more than six items is made a conclusive presumption of an intent to sell.

The purpose of an information is to inform the defendant of the nature of the charge against him, and the acts constituting it, so as to enable him to prepare his defense and to prevent his being tried twice for the same offense.[8] If any of the elements contained in a statutory definition of a crime is omitted, the information is fatally defective, and a conviction based on it is void even though the defendant had pleaded guilty to the charge.[9] A general statement of the offense is not sufficient, since this does not apprise the defendant of all the elements of the crime charged. For example, an information failing to state that a breach of the peace occurred in a public place as required by the statute has been held defective.[10] Also, a failure to allege that obtaining goods by false pretenses was done with intent, as required by the statute, was held to make the information void.[11]

The majority took a view consistent with the prior cases, and held that the omission of an allegation of intent made the information defective, as it related to a conviction under Section 1141 Subdivision 1. The minority, on the other hand, took the view that the general allegation in the information was sufficient for a conviction under either Subdivision 1 or 4, because it did in fact charge defendant with a criminal act. In this position the minority relied on *People v. Love,*[12] and *People v. Paolillo,*[13] but both of these cases appear to be distinguishable. In *Love,* the Court held that, where an incorrect section of the Penal Law was charged, but all of the elements of the correct crime were contained in the information, a conviction would be upheld. In that case, the defendant was sufficiently apprised by the complete statement of the necessary acts, and the incorrect statement of the section was not prejudicial. In *Paolillo* the Court held that the omission of the word "larcenous" in an information for larceny did not make it defective because the remainder of the information charged all of the elements necessary to constitute larceny. Thus, it would

6. N.Y. PEN. LAW § 1141(1).
7. *Id.,* § 1141(1),(4).
8. People v. Zambounis, 251 N.Y. 94, 167 N.E. 183 (1929).
9. People v. Patrick, 175 Misc. 997, 26 N.Y.S.2d 183 (County Ct. 1941).
10. People v. Schultz, 301 N.Y. 495, 95 N.E.2d 815 (1950).
11. People v. Williams, 135 Misc. 564, 238 N.Y. Supp. 713 (County Ct. 1930).
12. 306 N.Y. 18, 114 N.E.2d 186 (1953).
13. 15 Misc. 2d 1031, 132 N.Y.S.2d 161, *aff'd* 307 N.Y. 736, 121 N.E.2d 548 (1953).

seem that an information will fail if the necessary elements of the crime charged are not included, but the inclusion need not be in the exact words of the statute. In the instant case the necessary element of intent was never even alluded to in the information.

BAIT ADVERTISING UNDER THE PENAL LAW

New York Penal Law Section 421 makes criminal the fraudulent advertising of goods intended for sale.[14] The statute has been liberally construed, in cognizance of the need to halt misleading advertising, and to protect the credulous against themselves.[15] No distinction has been drawn between intentional and unintentional misrepresentations, both being declared unlawful.[16] Nor have the courts required that a person be actually cheated or defrauded.[17]

Prior decisions have concerned only those instances where the goods falsely advertised were the same goods intended for sale.[18] *People v. Glubo*[19] posed the unique problem of whether Section 421 includes "bait advertising," where the false representations are as to goods not intended for sale but intended only to bring in prospective customers for other goods. The defendants were indicted for conspiracy in attempting to sell expensive sewing machines by advertising over television a less expensive machine which defendant allegedly had no intention to sell.

The Court held that the defendants' acts violated the statute, and that to hold otherwise would frustrate legislative intent, for the act charged is as much a vice as other acts admittedly criminal under this statute.

The dissent accepted the defendants' contention that Section 421 is to be strictly construed in accordance with various District Attorneys' interpretations, as communicated through ex-Governor Harriman's message to the State Legislature.[20] Rejecting this contention, the Court stated the interpretative function is reserved to the judiciary, not the executive.

This decision extends the scope of the statute to effectively include those

14. N.Y. PEN. LAW § 421:
Any person . . . who with intent to sell . . . merchandise, . . . or anything offered by such person . . . directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof . . . places before the public in this state, . . . over any radio station or in any other way, an advertisement, . . . of any sort regarding merchandise . . . or anything so offered, . . . which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading, shall be guilty of a misdemeanor.

15. People v. Reilly, 255 App. Div. 109, 6 N.Y.S.2d 161, *aff'd* 280 N.Y. 509, 19 N.E.2d 919 (1939).

16. People v. Richter's Jewelers, 291 N.Y. 161, 51 N.E. 690, 691 (1943).

17. People v. Federated Radio Corp., 244 N.Y. 33, 39, 41, 154 N.E. 655, 656 (1926).

18. *Supra* note 3; People v. Custom Shops, 267 App. Div. 168, 45 N.Y.S.2d 218 (1st Dep't 1944).

19. 5 N.Y.2d 461, 186 N.Y.S.2d 26 (1959).

20. N.Y. STATE LEGIS. ANNUAL (1958) at 381:
As various district attorneys have indicated publicly, the present Penal Law does not give them adequate authority to prosecute those who cheat consumers by means of various sales promotional practices. One such practice is bait advertising, where products are advertised for sale at a price at which the seller has not intention of selling. . . .