29 Misc.3d 1217(A)
Unreported Disposition
(The decision of the Court is referenced
in a table in the New York Supplement.)
Supreme Court, Bronx County, New York.

The PEOPLE of the State of New York,
v.
Jason CASTRO, Defendant.

No. 22653C–2008.
|
Oct. 28, 2010.

Attorneys and Law Firms

John Ruti, Esq., Assistant District Attorney, Office of Robert T. Johnson, District Attorney of Bronx County, Bronx.

Jeffrey T. Schwartz, Esq., New York, attorney for defendant.

Opinion

COLLEEN D. DUFFY, J.

***1** Defendant Jason Castro was charged with Criminal Possession of a Weapon, PL 265.01(1); Resisting Arrest, PL 205.30; Obstructing Governmental Administration in the Second Degree, PL 195.05; Menacing, PL 120.15; and two violations, Harassment in the Second Degree, PL 240.26(3); and Disorderly Conduct, PL 240.20(1). On July 22, 2010, the People sought to withdraw the Resisting Arrest and Obstruction of Governmental Administration counts and to amend the charge of Criminal Possession of a Weapon to Attempted Criminal Possession of a Weapon, PL 110.00/265.01(1). Defendant did not object and the motion was granted.

SUMMARY OF THE CASE

The charges allege that Defendant engaged in an altercation with two New York City police officers on April 9, 2008 when one of the officers was writing a parking violation summons for an illegally parked car near a Toyota car dealership on West Fordham Road in the Bronx.

On July 23, 2008, Defendant filed an omnibus motion seeking, among other things, to have the Court: (1) grant discovery and a Bill of Particulars; (2) suppress any physical evidence seized from the Defendant; (2) suppress any statements of the Defendant; and (3) prevent the People from introducing any previous criminal convictions or bad acts of Defendant if Defendant were to testify. On August 27, 2008, the People filed an opposition to Defendant's motion.

On that same date, August 27, 2008, the Honorable William Mogulescu granted Defendant's motions for discovery and granted Defendant's motion for a *Mapp* hearing as to the admissibility of the physical evidence and a *Huntley* hearing as to the admissibility of the statements. Judge Mogulescu also ordered a *Dunaway* hearing as to probable cause for the arrest. The Court reserved the *Sandoval* issue as to Defendant to the trial court.

This Court commenced the combined *Huntley–Mapp–Dunaway* hearing on July 22, 2010. The hearing did not conclude that day and was continued on July 23, 29, and August 4, 5, 13 and concluded on August 13, 2010.

Before the hearing commenced, Defendant informed the Court that repeated requests to the People to provide to defense counsel a copy of any summons(es) issued to Defendant or to Defendant's vehicle at or about the time Defendant was arrested were unavailing; the People had failed to supply any summons. Defendant asserted that the summons was *Rosario* material and the failure by the People to turn such material over to Defendant should be sanctioned by the Court. In addition, Defendant informed the Court that a copy of the memo book of Police Officer **Raymond Marrero**, Shield No. 25173, which had been provided to Defendant as *Rosario* material, was missing some information. Specifically, Defendant contended that, at the very least, one line of information and possibly more, was missing and/or illegible and that the People's failure to provide such information in the memo book to Defendant was a *Rosario* violation.

***2** Defendant asked this Court to dismiss the action as a sanction against the People for their failure to give *Rosario* material to Defendant and for their failure to preserve such material. Defendant also requested, in the alternative, that the Court take an adverse inference about any testimony pertaining to the summons and/or to strike or preclude any such testimony at trial.

With respect to the parking violation summons, the People contended, initially, that a copy of such summons was provided to Defendant at the time of the arrest and that it is not the practice of the police department to retain any copies of parking violation summonses. July 22, 2010 Transcript ("Tr.") at p. 9, lines 1–15. Contrary to that representation, Police Officer Marrero testified at the hearing that it is the practice and procedure of the police department to maintain a log book which sets forth the parking violation summons "book" number (containing approximately 20 multiple-copy parking violation summonses) and information about each police officer to whom each summons book is assigned. July 22 Tr. at 201. Officer Marrero testified that when all of the summonses in the summons book are issued, the summons book (with all copies except that copy distributed to the vehicle) is returned, the return is noted in the log book and, at least one copy of each summons in the summons book is given to the highway safety officer at the precinct to maintain. July 22 Tr. at p. 200.

Thereafter, at the direction of the Court, the People, upon further inquiry, determined that there was, in fact, at the time of the incident in question, a police protocol with respect to distribution and retention of parking violation summonses. The People represented that every parking violations summons book contains 20 summonses-each with 4 copies-and that a summons distribution card exists at the precinct wherein a police officer, upon receiving a summons book, signs the card and indicates the summons book number and the date of receipt. The books are numbered sequentially. One copy of each issued summons is to be left on the vehicle to which the summons is issued, two copies are to be returned by the police officer to the precinct at a designated box and one pink copy is to remain in the summons book. When all twenty summonses are issued, the remaining twenty copies in the book are to be removed from the summons book and stapled to the summons distribution card and returned to the highway safety officer. Tr. at 62–67, 199–200.

After further inquiry, the People thereafter reported that no copy of the summons at issue was located by the highway safety personnel at the precinct. The People also informed the Court that, with respect to the two other copies of each summons that are to be returned to a box in the precinct, one copy is to be sent to the patrol borough in the Bronx and another copy is to be retained by the precinct.

The People represented to the Court that Lieutenant Schwartz at the 52nd Precinct informed the People that he had initiated a search for the summons, and that he had been unable to locate the file box that would contain the summons.

***3** At the end of the hearing no copy of the summons at issue yet had been located. In addition, no explanation was provided as to why a copy of the summons at issue had not been preserved by the People or what efforts, if any, had been made to preserve the copy.

FINDINGS OF FACT

Police Officer Marrero, Shield Number 25173 of the 52nd Precinct, testified that on April 9, 2008, he and his partner, Officer Santana, responded to a call regarding a complaint from someone at the Toyota dealership at 236 West Fordham Road that two cars were blocking the dealership's driveway. Officer Marrero testified that, upon arriving at the scene and speaking with the dealership manager and a few employees, he and Officer Santana proceeded to write a parking violation summons for each of the two vehicles in the driveway.

Officer Marrero testified that, as he was writing a summons, Defendant appeared and asked, "Why the f* * * did you give my car a ticket?" [1] Officer Marrero testified that he then told Defendant that if there was a problem with the ticket, Defendant should just plead not guilty.' Officer Marrero testified that Defendant then became verbally abusive, raising his voice, cursing at the officer, and further stated that, "If you didn't have that gun or badge, I would f* * * you up." Officer Marrero testified that, at the same time, Defendant approached Officer Marrero with his fists clenched and his chest puffed out in a threatening manner. Officer Marrero testified that he repeatedly asked Defendant to step back but that Defendant refused and continued to yell and curse at him.

Officer Marrero testified that he decided to arrest Defendant because Defendant was preventing him from continuing to write the summons. Tr. at 27. Officer Marrero testified that when he asked Defendant to place his hands behind his back, Defendant started to walk away and, when Officers Marrero and Santana tried to detain

him, Defendant flailed his arms and fought their efforts to place his hands behind his back. According to Officer Marrero, the officers struggled with Defendant, and he and Defendant fell to the ground, where the handcuffs were placed on him. Officer Marrero testified that the struggle took three to five minutes.

Officer Marrero testified that, once Defendant was handcuffed, he searched Defendant's pockets and found a gravity knife in Defendant's right pants pocket.

Officer Marrero further testified that, on the ride back to the precinct in the police car, Defendant apologized to the officers for yelling and screaming, but stated that he did not understand why he was being arrested.

With respect to the parking violation summons, Officer Marrero testified that, when he was back at the precinct, he finished writing the summons—for blocking a driveway. He then testified that Defendant received a copy of that summons.

Officer Marrero also testified as to the police procedure and protocol that existed with respect to maintaining and preserving copies of the summons, as noted *supra.* Specifically, Officer Marrero testified that he did not retain a copy of the summons and that he was unable to locate a copy at the precinct. Officer Marrero testified that, on the day he issued the summons, he placed a copy of the summons in the appropriate box at the precinct, in the control of the highway safety officer, as was the policy and procedure at the 52nd Precinct. Officer Marrero testified that the highway safety officer at the time of arrest had since retired. Officer Marrero further testified that each time an officer is given a book of summonses, which book holds 20 summonses, the officer must sign the book out via a log book and sign the log book again when returning the completed book of summonses, and that he had followed this procedure with the summons book at issue. Officer Marrero testified that the log book from that time period was no longer at the precinct, that he was told it was sent to an office called "Quality Assurance" and that he had not checked with any such office to determine if they had the log book.

CONCLUSIONS OF LAW

***4** Turning first to the *Rosario* issues raised by the Defendant, upon consideration of the credible testimony and evidence, and for the reasons set forth below, this Court finds that the summons issued by Officer Marrero on April 9, 2009, is *Rosario* material. The People's failure to preserve and provide to Defendant that document—which Officer Marrero testified that Defendant prevented him from issuing—is a *Rosario* violation; the People failed to exercise due care in preserving such material that could be important to Defendant's defense. In contrast, the tiny portion of the memo book that was illegible or obscured was *de minimus* and not material and thus its omission does not rise to the level of a *Rosario* violation.

Nonetheless, with respect to the missing parking violations summons, as noted further herein, an appropriate sanction is warranted. Dismissal of the action would be draconian and not an appropriate sanction for this violation; instead, the Court will take an adverse inference as to the Officer's testimony about the summons which will cure any prejudice to Defendant. Specifically, as noted below, an adverse inference will be taken as to the testimony that Officer Marrero was writing the parking violation summons when Defendant approached him.

Parking Violation Summons Is Rosario

That parking violation summons issued on April 9, 2010, by Officer Marrero was paperwork that he prepared, which contents, presumably, would include date, location, time of issuance and description of the vehicle to which the summons was being issued, as well as the type of parking violation at issue. Such information is germane to Officer Marrero's credibility, the basis for Defendant's arrest, and to establish the sequence of events. *People v. Wallace,* 76 N.Y.2d 953, 955 (1990)(undercover's "buy report" was *Rosario;* report prepared immediately after defendant's arrest contained description of defendant without which defendant could not properly cross examine undercover officer); *People v. Jordan,* 207 A.D.2d 700, 700–01 (1st Dept.1994)(officer's scratch notes were *Rosario*—they related to key trial issues); *People v. Mack,* 180 A.D2d 824, 825 (2nd Dept.1992)(undercover officer's supervisor's notes as to description of suspect *Rosario* where identification is an issue).

Officer Marrero testified that he arrested Defendant because Defendant was preventing him from writing a parking violation summons for illegal parking. The time when Office Marrero began writing the summons is a critical issue in that Officer Marrero testified that he was writing the ticket when Defendant first approached him and that the Defendant began yelling and cursing at him

about the ticket. The summons issued could be used by Defendant in his cross examination of Officer Marrero as to the sequence of events and the how the events unfolded. Without the summons, which, presumably, would contain the time of issuance, Defendant was unable to properly cross examine Officer Marrero on the sequence of events. *See People v. Bramble, et al.,* 158 Misc.2d 411, 418–19 (Sup. Ct ., Kings Co.1993)(time of stop and arrest was key issue such that loss of tapes of radio communication had significant potential for prejudice). Defendant also could not properly cross examine Officer Marrero with respect to the basis for the arrest—to wit, that Defendant had prevented Officer Marrero from writing the summons—because of the absence of the document.

***5** In addition, the contents of the summons which were created by Officer Marrero could be used on cross examination to test Officer Marrero's credibility, something that Defendant could not fully explore without the document. *People v. Jones,* 70 N.Y.2d 547, 550 (1987); *People v. Rosario,* 9 N.Y.2d 286, 289 (1961); *People v. Adger,* 75 N.Y.2d 723, 728 (1989)(Titone, J., concurring).

Any Receipt of the Summons by Defendant Does Not Cure Violation

The People's contention that no *Rosario* violation occurred because Defendant was given a copy of the summons on the day of the incident is without merit. First, although the People have argued that Defendant was given a copy of the parking violation summons after Officer Marrero had completed it at the precinct, no such evidence was presented on that issue. Officer Marrero did not testify that he gave the ticket to Defendant at the precinct—he simply responded "yes" to the question as to whether "[D]efendant receive[d] a copy of the summons." Tr. at 36. There is no testimony as to when or where Defendant received the summons. Indeed, as noted below, in light of Officer Marrero's testimony about police protocol regarding summonses (to wit, placing the summons on the vehicle to which it is issued, Tr. at 200), it is possible that Officer Marrero's answer "yes" to the question as to whether Defendant received the summons actually simply meant that, consistent with protocol, he had placed the summons on the vehicle at issue. Notably, the People emphasized to the Court when asked about the production of the summons at issue that " ... with regard to parking summonses, parking summonses are given to vehicles ... * * * What usually happens, ... tickets are left on vehicles. We stand here today having no idea whose vehicle was ticketed." Tr. at p. 181.

Moreover, even if the Court found that Defendant had personally received a copy of the summons at issue, any such fact is insufficient to cure the *Rosario* violation. The People have the burden of retaining material created by and relevant to the testimony of their witnesses, not Defendant. Unlike the analysis conducted by a court in evaluating the loss of potential *Brady* material,[2] the *Rosario* "rule is simple and unequivocal"—defense counsel must be given a copy. While a court may consider the defendant's knowledge of a *Rosario* document in its fashioning of a sanction for failure to disclose *Rosario* material, a document which Defendant has knowledge of, or even has seen, is still *Rosario. See People v. Heverly,* 70 AD3d 1405, 1406 (4th Dept.2010)(three *letters written by defendant to District Attorney* constitutes *Rosario*).

For these reasons, the Court finds that the summons is *Rosario* material and the People's failure to disclose the summons to Defendant is a *Rosario* violation.

Sanction Must Cure Prejudice to Defendant

Where *Rosario* material is lost or destroyed, the Court must impose an appropriate sanction to eliminate the prejudice caused to a Defendant by the loss. *People v. Carracedo,* 89 N.Y.2d 1059, 1062 (1997); *People v. Martinez,* 71 N.Y.2d 937, 940 (1988); *People v. Kelly,* 62 N.Y.2d 516, 520–21 (1984).

***6** In fashioning a sanction, the degree of prosecutorial fault in failing to preserve the evidence is to be considered. *Kelly,* 62 N.Y.2d at 520–21; *People v. Saddy,* 84 A.D.2d 175, 179 (2nd Dept.1981), *app. denied,* 56 N.Y.2d 599 (1982).

Here, the People have failed to demonstrate that they have made any effort, let alone diligent efforts, to preserve the evidence, as is their burden. *People v. Wallace,* 76 N.Y.2d at 955. The People were unable to locate a copy of the summons, and initially erroneously represented to the Court that police protocol did not include retention of such documents. Tr. at pp. 8–9.

Only after Officer Marrero's testimony contradicted the People's representation to the Court, and after further Court prodding, did the People initiate any sort of search

for the summons. The People presented no evidence that diligent efforts were made to retain a copy of the summons at the precinct, or to determine whether copies were retained by the Parking Violations Bureau or any other governmental entity.

Indeed, the only efforts to locate the document were made at the behest of this Court immediately before and during the hearing—not at the time the evidence was obtained or when the case was pending prior to the hearing.

Moreover, on cross examination, Officer Marrero testified that, although he was aware after his testimony on direct examination that the Court had directed that he make every effort to locate the missing summons, he took no action except to look for the log book where summons books were logged in and out. Tr. at pp. 201–03. When Officer Marrero learned that the log book was not kept at the precinct, but rather at "Quality Assurance," he took no further steps to recover the log book or to contact someone at Quality Assurance to ask as to its whereabouts. Tr. at pp. 202–05.

The People's telephone call to Lieutenant Schwartz at the 52nd Precinct during the course of the hearing inquiring about the whereabouts of the summons at issue, and a representation by the People that the Lieutenant was unsuccessful in locating the file box containing the summons, fail to establish that the People made diligent efforts to locate and preserve the evidence in this case. *People v. Ariosa,* 172 Misc.2d 312, 315 (County Ct., Monroe Co.1997)(efforts must be more than just boilerplate, cursory review; a proactive vigorous attempt to respond to requests made by defense counsel is required).

The People's efforts to locate and preserve the summons should have been made at the time of the incident and should have continued to the hearing—not at the time the hearing commences. [3] *People v. Kelly,* 62 N.Y.2d 516, 520 (1984)(corollary of duty to disclose is obligation to preserve evidence until a request for disclosure is made."); *People v. Saddy,* 84 A.D.2d at 178. Although the Court has considered the People's representation that Defendant was given a copy of the summons, in fashioning a sanction, as noted *infra,* the Court is not persuaded that Defendant, in fact, ever personally received the summons.

***7** For these reasons, the Court determines that an adverse inference must be drawn with respect to Officer Marrero's testimony regarding the summons. *People v. Morris,* 186 Misc.2d 564, 570 (Crim. Ct., New York Co.2000)(at suppression hearing, adverse inference appropriate sanction for loss or destruction of *Rosario* material); *People v. Cunningham,* 21 A.D.2d 746, 752 (1st Dept.2005)(adverse inference charge to jury for People's loss of DD5 report proper exercise of judicial discretion), *app. dismissed,* 6 NY3d 775 (2006); *People v. Minnifield,* 182 A.D.2d 1064, 1064 (2nd Dept.1992)(adverse inference charge appropriate when People lost stolen jewelry). Such a sanction will cure any prejudice to Defendant as a result of the loss of the summons.

Officer Marrero testified that he was writing the summons at the time he was approached by Defendant and that this is what prompted Defendant to start yelling and cursing at him. The Court takes an adverse inference as to that fact and, upon consideration of the all the credible testimony and evidence, finds Officer Marrrero's testimony about the summons and when he issued it to be incredible. *Matter of Ricardo M.,* 2006 N.Y. Slip Op. 51468U, *5–6, 12 Misc.3d 1187A (Family Ct., Richmond Co.2006); *People v. Morris,* 186 Misc.2d at 570 (court weighs the credibility of witnesses at hearing and any adverse inference from loss of *Rosario* material).

Obscured/Illegible Portion of Memo Book Is Not a Rosario Violation

With respect to the missing portion of Officer Marrero's memo book, based upon the Court's consideration of the evidence and credible testimony, only a tiny portion of only one line in Officer Marrero's memo book—indeed, at most one word and possibly no word, simply a blank space—was obscured. Such omission was immaterial, unintentional and does not rise to the level of a *Rosario* violation. *People v. Hyde,* 172 A.D.2d 305, 305 (1st Dept.1991)(minor discrepancies between destroyed 911 tape and Sprint transcript and destroyed handwritten copy of complaint report and typed copy did not require adverse inference charge); *People v. Bell,* 179 Misc.2d 410, 417 (Sup.Ct., New York Co.1998)(minor variances, or variances already exploited on cross could not be defined as *Rosario*); *People v. Machado,* 243 A.D.2d 505, 505 (2nd Dept.1997 (no prejudice to defendant where shown single line of report was not disclosed). Notably, unlike the absent summons, the minor omission/obscured portion of the memo book did not prevent Defendant from a

thorough cross examination of that witness with respect to the memo book entries, nor did it prevent Defendant from properly preparing a defense to its contents and Officer Marrero's testimony about it. *People v. Hyde,* 172 A.D.2d at 305; *Bell,* 179 Misc.2d at 417.

No Probable Cause Existed To Arrest Defendant

Turning to the issue of Defendant's arrest, the Court finds that there was no probable cause to arrest Defendant. In order to effectuate an arrest without a warrant, a police officer must have probable cause for the arrest. *U.S. v. Watson,* 423 U.S. 411, 418–19 (1976); *People v. Fellows,* 239 A.D.2d 181 (1st Dept.1997). Probable cause is information that would lead a reasonable police officer to conclude that a crime is being committed. *People v. Ogen,* 36 N.Y.2d 382, 384–85 (1975); *People v. McRay,* 51 N.Y.2d 594, 602 (1980). Pursuant to the facts of this case, no probable cause existed here.

Defendant Did Not Prevent Officer Marrero from Performing his Duties

***8** Officer Marrero testified that he arrested Defendant because he was writing the summons when Defendant approached and that he was prevented from continuing to do so by Defendant.[4] The Court finds this testimony incredible. First, as noted above, the Court did not believe Officer Marrero's testimony that he was writing the summons when Defendant approached. Second, as noted below, even if the Court were to believe that Officer Marrero had been writing the summons, there is no evidence to show that Defendant's behavior caused Officer Marrero to be unable to continue to write the summons or that Defendant's behavior rose to the level of a criminal act.

Although the Court does not condone the offensive and provocative behavior by Defendant as testified to by Officer Marrero, such behavior, without more, did not give rise to probable cause for the arrest.

Even if the Court found credible Officer Marrero's testimony that he was writing a summons when Defendant approached, which it does not, in order to establish probable cause sufficient to arrest Defendant, the People must show that Defendant's behavior was such that it somehow prevented Officer Marrero from performing his duties as a police officer. *In re Kendall R.,* 71 AD3d 553, 554 (1st Dept.2010)(defendant who used obscene language when police placed him and others against the wall, but was not shown to interfere with police activity, could not be found guilty of obstruction).

Defendant did not touch or strike Officer Marrero or prevent Officer Marrero from moving or walking away. Instead, according to Officer Marrero, Defendant cursed and yelled and clenched his fists near his sides approximately two feet from where Officer Marrero was standing. When Defendant failed to comply with Officer Marrero's direction to step back away from him and continued to yell, Officer Marrero then ordered Defendant to put his hands behind his back.

Although the Court finds that Officer Marrero credibly testified that Defendant was yelling at Officer Marrero, and that Defendant stated, "If you didn't have that gun or badge, I would f* * * you up," and stood approximately two feet from Officer Marrero with his fists clenched at his sides, such words and actions, without more, are insufficient to form the basis for an arrest. *People v. Case,* 42 N.Y.2d 98, 102–03 (1977) (use of CB radio to warn other drivers of radar speed checkpoint was not obstruction within the statute; the interference with governmental administration must be physical in some way); *People v. Longo,* 71 Misc.2d 385, 389–90 (County Ct., Onondaga Co.1971)(verbal act alone is insufficient to constitute physical force or interference); *People v. Alston,* 9 Misc.3d 1046, 1048 (Crim. Ct., New York Co.2005)(mere verbal refusal to give police officer license, registration and proof of insurance not intimidation or physical force or interference).

The Court also finds notable that Officer Marrero testified that Defendant turned his back to Officer Marrero and tried to walk away, in effect, trying to remove himself from the escalating situation. Officer Marrero stopped Defendant from doing so, having already decided to arrest Defendant.

Defendant's Behavior and Words Did Not Form Basis For Any Crime

***9** Turning to the assertion that Defendant's behavior and words formed the basis of probable cause for menacing, disorderly conduct and/or harassment, the Court must examine the words and actions within the context of the guarantees of freedom of expression under the First and Fourteenth Amendments to the U.S. Constitution, as well as those provided in Article I, § 8 of

the New York State Constitution. The Court notes that the safeguards provided to free expression by the New York State Constitution have been construed as more expansive than those protected under provisions of the U.S. Constitution. *See People v. Arcara,* 58 N.Y.2d 553, 557–58 (1986); *People v. Stephen,* 153 Misc.2d 382, 388 (Crim. Ct., New York Co.1988).

With respect to the charge of menacing, PL 120.15, the People must be able to establish that, by physical menace, Defendant intentionally placed or attempted to place Officer Marrero in fear of death, imminent serious physical injury or physical injury. The People must also establish that Officer Marrero had a "well-founded fear of physical injury." *In re Steven W.,* 294 A.D.2d 370, 371 (2nd Dept.2002)

Here, Defendant's behavior did not rise to the level of physical menace. As noted above, Defendant did not touch Officer Marrero nor did he threaten him. Defendant's words, "If you didn't have that gun or badge, I would f* * * you up," were phrased as a hypothetical, not a threat, and also constituted protected speech. There also was no credible evidence that Officer Marrero or his partner feared that they were in danger of serious physical injury or physical injury.

In addition, given his training as a police officer, Officer Marrero should have had a higher tolerance for belligerent and aggressive speech than would the average person. *See People v. Stephen,* 153 Misc.2d 382, 388 (Crim. Ct., New York Co.1992)(where reasonable civilians might have been provoked into retaliatory action by defendant's comments, a trained police officer should remain calm).

Accordingly, no probable cause existed to arrest Defendant for menacing. *People v. Womack,* 2008 N.Y. Slip. Op. 50319U, *3, 18 Misc.3d 1135A (Crim. Ct., New York Co.2008); *People v. Carlson,* 183 Misc.2d 630, 636–37 (Crim. Ct., New York Co.1999) (element of physical menace not satisfied where defendant spit in victim's face; no physical injury could result).

Nor was there any evidence to support Defendant's arrest for disorderly conduct pursuant to PL 240.20(1). To establish that Defendant's behavior violated that section of the Penal Law, the People must demonstrate that Defendant had the intent to cause public inconvenience, annoyance or alarm, or that he recklessly created the risk of such, when he engaged in fighting or in violent, tumultuous or threatening behavior. PL 240.20(1). The disorderly conduct statute "applies to words and conduct reinforced by a mental state to create a public disturbance." *People v. Tichenor,* 89 N.Y.2d 769, 775 (1997). Here, as there was no evidence that Defendant had any intent to cause public inconvenience, annoyance or alarm, the People have failed to establish that there was probable cause to arrest Defendant for disorderly conduct.

***10** The disruptive behavior proscribed by this section of the disorderly conduct statute must be of "public rather than individual dimension." *People v. Munafo,* 50 NY.2d 326, 331, 406 N.E.2d 780, 783 (1980); Staff Notes of the Commission on Revision of the Penal Law, Proposed New York Penal Law, McKinney's Spec. Pamph. (1964), p. 388 (disorderly conduct statute "designed to proscribe only that type of conduct which has a tendency to provoke public disorder"). Here, there simply was no evidence that Defendant's acts had become a public problem or had the potential of becoming a public problem. *Munafo,* at 331. *See also People v. Pritchard,* 27 N.Y.2d 246, 248–49 (1970)(fight between two teens failed to demonstrate conscious disruptive intent; therefore not disorderly conduct).

According to Officer Marrero, Defendant's conduct—yelling at the officers, puffing his chest out with hands at his sides—was directed only at the officers. There is no evidence that Defendant attempted in any way to incite or involve any spectators. There was no evidence of any spectators whatsoever except for Officer Marrero's testimony that there were "several people passing by that witnessed the event," and that some of these individuals stopped. Tr. at p. 25.

Even if this were sufficient to establish that Defendant had the intent to create a risk of causing public inconvenience, annoyance or alarm, the People would need to establish that Defendant's conduct constituted "fighting, or violent, tumultuous or threatening behavior" in order for probable cause to exist to arrest Defendant under that section of the Penal Law. They could not. With respect to "fighting, there simply is no claim that Defendant engaged in fighting.

Turning to the "violent" behavior proscribed by this section, there must be evidence of the use of physical force.

People v. Stephen, 153 Misc.2d 382, 385–86 (Crim. Ct., New York Co.1992); **[cites].** Here, there is no allegation that Defendant was physically violent. Thus, this prong of the statute cannot be shown.

With respect to whether Defendant's behavior constituted "tumultuous" behavior, there also is no showing of any such behavior. The term tumultuous, as defined by both caselaw and dictionary, requires a crowd, and the relates to the violent movement, agitation or milling about of the crowd. *Stephen,* 153 Misc.2d at 385–86; M–W.com, 2010 Merriam–Webster Incorporated, Inc. (tumult defined as "disorderly agitation or milling about of a crowd usually with uproar and confusion of voices"). Here, there has been no showing that Defendant's behavior was tumultuous; no crowd developed as a result of the altercation, nor was there testimony that the officer believed there was a risk of a crowd developing. On the contrary, the testimony established the occurrence of a private dispute, albeit loud, between the officers and Defendant.

With respect to whether Defendant's behavior was "threatening," the allegations against Defendant also fail to establish this element as well. Defendant's behavior toward the police officers also did not rise to the level of threatening. As noted, infra, there is no evidence whatsoever that Defendant hit or ever touched Officer Marrero. Officer Marrero testified that Defendant had his fists clenched at his sides two feet from Officer Marrero. This does not, even with the words used by Defendant, rise to the level of threatening. With respect to the words used by Defendant, the First Amendment protects a "significant amount of verbal criticism and challenge directed at police officers." *City of Houston v. Hill,* 482 U.S. 451, 461, 96 L.Ed.2d 398 (1987); *Posr, v. Court Officer Shield No.207, et al.,* 180 F.3d 409, 415 (2nd Cir.1999). Only "fighting words" directed at police officers are criminal. The "fighting words" doctrine under the First Amendment is even more narrowly applied in cases involving police officers than in cases between ordinary citizens "because a properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen." *City of Houston,* 482 U.S. at 462. Provocative speech used against a police officer is protected unless it is shown that there was a clear and present danger of a serious evil, far more than mere public inconvenience, annoyance or unrest. *Id.*

***11** Here, Defendant's statements could not be deemed "fighting words" even if they had been spoken to a private person, which they were not. Fighting words must tend to incite an *immediate* breach of the peace. *Posr,* 180 F.3d at 415, citing *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 927, 73 L.Ed.2d 1215 (1982) and *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572, 86 L.Ed 1031 (1942). Defendant's statement, "If you didn't have that gun or badge, I would f* * * you up," certainly could not be seen as an immediate threat, if it were to be viewed as a threat at all. There also were no circumstances surrounding how Defendant said those words that would make such a statement an immediate threat. Officer Marrero testified that Defendant made that statement after the officer did not answer Defendant's question as to why he was giving him a ticket, and then Defendant continued yelling and cursing at the officer. This evidence is not sufficient to find Defendant in violation of the disorderly conduct statute on the basis of threatening behavior. **[cite]**

Accordingly, for all these reasons, the People have failed to establish that there was probable cause to arrest Defendant for disorderly conduct under PL 240.20(1).

The People also failed to show that there was probable cause to arrest Defendant for harassment pursuant to PL 240.26(3). In order to support an arrest for harassment under that section of the Penal Law, the People must show that defendant, "with intent to harass, annoy or alarm another person ... engage(d) in a course of conduct or repeatedly commit(ted) acts which alarm or seriously annoy such other person and which serve no legitimate purpose." *People v. Wood,* 59 N.Y.2d 811, 812 (1983); *Sawdey–Dacey v. Dacey,* 236 A.D.2d 896, 896 (4th Dept.1997); *People v. Chasserot,* 30 N.Y.2d 898, 899 (1972). Defendant's conduct must be shown to be more than an isolated incident. *People v. Wood,* 59 N.Y.2d 811, 812 (1983)(harassment charge dismissed as no evidence conduct was anything other than an isolated incident); *People v. Valerio,* 60 N.Y.2d 669, 670 (1983). A course of conduct has been defined as "a pattern of conduct composed of same or similar acts repeated over a period of time, however short, which establishes a continuity of purpose." *People v. Peyton,* 161 Misc.2d 170, 173–74 (Crim Ct., Kings Co.1994); *People v. Barrow,* 2008 N.Y. Slip. Op. 52571U, *3, 22 Misc.3d 1101A (Crim. Ct., Kings Co.2008).

Here, Defendant's conduct was a spontaneous, emotional, verbal outburst consisting of repeated cursing occurring during one altercation, did not constitute a course of conduct pursuant to this section of the statute. *People v. Barrow,* 2008 N.Y. Slip. Op. 52571U, *3 (defendant's numerous threats to kill his neighbor, made in the course of a few minutes, did not establish a course of conduct).

Knife Seized from Defendant is Suppressed

As probable cause did not exist for the arrest, Defendant's motion to suppress the knife recovered from him during the search incident to his arrest is granted. The knife, which the police found after arresting Defendant, was found only as a result of an illegal arrest. *Mapp v. Ohio,* 367 U.S. 643, 655–56 (1961); *Wong Sun v. United States,* 371 U.S. 471, 486–488 (1963); *People v. Irizarry,* 17 Misc.3d 1118A (Sup.Ct., New York Co.2007); *see also* CPL 710(1).

Defendant's Statements are also Suppressed

***12** Defendant's motion to suppress his statements is granted in part and denied in part. There is no basis to suppress the first set of statements attributed to Defendant, "Why the f* * * did you give my car a ticket?" and "If you didn't have that gun or badge, I would f* * * you up." These statements were spontaneous utterances, before any arrest occurred, and not a product of any police interrogation. *People v. Lainez,* 2009 N.Y. Slip Op 51257U; 24 Misc.3d 1204A (Sup.Ct., Kings Co.2009) (defendant's statements, made before arrest and without any prompting from the police officer, were voluntary and spontaneous); *People v. Carroll,* 2010 N.Y. Slip Op 51277U; 28 Misc.3d 1211A (Sup.Ct., Bronx Co.2010) (statement made spontaneously, and not in response to custodial inquiry, is admissible).

In contrast, the second statement attributed to Defendants, wherein Defendant apologized to the officers for yelling and screaming and stated that he did not understand why he was being arrested, must be suppressed. Although the Court finds that this statement was a spontaneous utterances, not made in response to interrogation, the statements is the fruit of Defendant's unlawful arrest. *Wong Sun,* 371 at 471, 486–488; *Dunaway v. New York,* 442 U.S. 200, 216–218 (1979); *People v. Johnson,* 129 A.D.2d 739 (2d Dept.1987); *People v. Taveras,* 155 A.D.2d 131, 138 (1990)(defendant's statement suppressed as illegal fruit of unlawful arrest despite the fact that hearing court determined it to be a spontaneous utterance). But for the illegal arrest, Defendant would not have been in the police car or making such a statement. Accordingly, this statement also must be suppressed.

Conclusion

For the reasons set forth above, the Court finds that the summons issued by Officer Marrero on April 9, 2009, is *Rosario* material and the People's failure to preserve the summons is a *Rosario* violation. The tiny portion of the memo book that was illegible or obscured was *de minimus* and not material and its omission does not rise to the level of a *Rosario* violation. To cure any prejudice and to sanction the prosecution for the loss of the summons, an adverse inference is taken as to Officer Marrero's testimony that he was writing the parking violation summons when Defendant approached him.

Since there was no probable cause for the arrest, the knife seized from Defendant, as well as the statement Defendant allegedly made to police in the police car after his arrest, are suppressed as fruit of the illegal arrest. Although Defendant's motion to suppress the statement to the officers at the time he first approached them is denied, that statements is an insufficient basis upon which the People could proceed against Defendant on these charges. Accordingly, the charges are dismissed.

The following papers also were considered by the Court in deciding the motion: Notice of Motion, filed July 23, 2008, and Affirmation of Jeffrey T. Schwartz, Esq., attorney for Defendant, in Support of Motion; Affirmation in Opposition, filed August 27, 2008, by Janelle C.L. Matthews, Esq., Assistant District Attorney.

***13** This constitutes the Decision and Order of this Court.

All Citations

29 Misc.3d 1217(A), 918 N.Y.S.2d 399 (Table), 2010 WL 4273808, 2010 N.Y. Slip Op. 51859(U)

Footnotes

1 The actual profane word which the People allege was uttered by Defendant has been omitted in this Decision and is referenced herein and throughout this Decision as "f* * * " as this Court believes this commonly recognized reference to the actual word is sufficient for the purposes of this Decision.

2 *See e.g., People v. Fein,* 18 N.Y.2d 162, 170, 219 N.E.2d 274, 277 (1966), *cert. denied,* 385 U.S. 649, *reh. denied,* 386 U.S. 978 (1967) (exculpatory information not deemed *Brady* material when the Defendant has knowledge of it); *People v. Banks,* 130 A.D.2d 498, 499 (2nd Dep't 1987) (no *Brady* violation when Defendant can use own knowledge of material to prepare his defense) (*People v. Sebak,* 270 A.D.2d 166, 166 (1st Dep't 2000)

3 Indeed, Defendant represented to this Court that he had requested this document from the People on more than one occasion during the pendency of the case. Tr. at p. 3. The People's representation to the Court that the document was not retained by the police turned out not only to be wholly incorrect but also evidence of the People's failure to timely investigate the existence and whereabouts of the document.

4 The Court notes that the charges of Obstruction of Governmental Administration and Resisting Arrest were dismissed. Tr. at 18. Nonetheless, in the context of examining whether probable cause existed to arrest Defendant, it is appropriate to examine the facts upon which the arrest was predicated to determine if there was probable cause. *People v. Maldonado,* 86 N.Y.2d 631, 634 (1995)(in case where only remaining charge was first degree escape, court must determine whether probable cause existed for arrest on underlying charge to determine whether arrest was lawful; ultimate disposition of that charge is irrelevant); *In the Matter of James T.,* 189 A.D.2d 580, 580 (1st Dept.1983)(defendant was too young to be charged with disorderly conduct, but court looks to that charge to determine probable cause for arrest; defendant was charged with only resisting arrest); *People v. Thomas,* 239 A.D.2d 246, 247 (1st Dept.1997)(defendant never charged with particular offenses for which he was arrested, but was charged only with resisting arrest; court looks to those offenses to determine if arrest was authorized).

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