

STATE OF NEW YORK
COUNTY OF LIVINGSTON COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK,

NOTICE OF MOTION

Indict No. 2010/010

-vs-

Presiding Judge:
Hon. Robert B. Wiggins
Supreme Court Judge

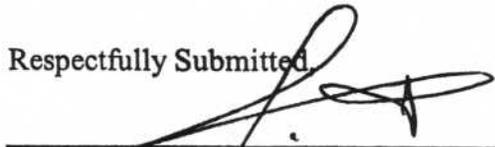
Philip L. STEWART

Defendant

PLEASE TAKE NOTICE, that upon the annexed Affirmation of Maroun G. Ajaka, attorney for the Defendant, the undersigned, will move this Court at a Criminal Term thereof, before the Honorable Robert B. Wiggins, Supreme and County Court Judge, to be held in and for the County of Livingston, at Geneseo , New York, on September 14, 2010 at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard for the following relief:

1. an order dismissing count "1" and count "2" of the Indictment Pursuant to section 260.20a(3) on the Penal Law of the State of New York;
2. an order dismissing the indictment pursuant to CPL 190.50;
3. an order dismissing the indictment pursuant to CPL 210.30;
4. an order Granting the production of the original recording of which the people has made the current video; and
5. An Order granting such other and further relief as the Court deems just and proper.

DATED: Rochester, New York
September 2, 2010

Respectfully Submitted,


MAROUN G. AJAKA, Esq.
Attorney for the Defendant
144 Exchange Boulevard
Suite 103Rochester, NY 14614

STATE OF NEW YORK
COUNTY OF LIVINGSTON COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK,

REPLY TO PEOPLE'S
RESPONSE TO A MOTION TO DISMISS

Indict No. 2010/010

-vs-

Presiding Judge:
Hon. Robert B. Wiggins
Supreme Court Judge

Philip L. STEWART

Defendant.

STATE OF NEW YORK }
COUNTY OF MONROE } ss:
CITY OF ROCHESTER }

Maroun G. Ajaka, Esq. pursuant to Civil Practice Law and Rules §2106, affirms the following statements to be true under penalty of perjury:

1. I am an attorney admitted to practice law in the courts of the State of New York. I maintained an office in Monroe County, state of New York. I am the attorney for Philip L. Stewart, the Defendant in the captioned matter.
2. I submit this affirmation as a reply to the people's Response to Defendant's motion to dismiss counts "1" and "2" of the pending indictment.
3. The reason for this reply is that your deponent received the written response on September 14, 2010, the date of the motion's argument. Your deponent did not have the full opportunity to address all the issues raised in the people's response.
4. The people have agreed with the defendant regarding the statue. In his answering affirmation, Mr. Schiener acknowledged the applicability of the exemption of Section 265.20(a)3 of the Penal Law which was raised in the Defendant's motion to dismiss counts "1" and "2" of the indictment. However the people, citing people vs. Kohut, mistakenly stated

that the Defendant bears the exclusive burden to raise and prove the exemption. The Defense disagrees and opposes to the last part of this statement.

5. Although, your deponent does acknowledge that the defendant has the burden to raise the exemption, he certainly does not have the burden, however, to prove or disapprove any thing. The burden to prove and disapprove rests solely on the people, and this burden never shifts to the defendant. People vs. Kohut talked only about raising the defense and not proving it. Thus the question rests on whether Mr. Stewart has sufficiently raised the exemption in his moving papers.

6. Mr. Stewart submitted a copy of his permit which shows the pistol,CEV3730 is listed on the last page. This copy was included in the discovery package received from the people on April 9, 2010. Your deponent seriously objects to Mr. Schiener's statement in open court that the people are not in the possession of the original permit and that "the provision of a poor quality, unverified and uncertified copy of a purported license can hardly suffice..". the attached affidavit of Mr. Stewart indicates that upon his arrest, the police confiscated the original permit. Mr. Schiener wrongfully and unfairly implied that Mr. Stewart some how altered the permit or added the pistol to it. A simple inquiry with Monroe County Pistol Permits Recording Clerk, Michelle Betters, can reveals that the different typing font on the permit is because different typewriters was used over the years, and that not every one initial next to every gun. Your deponent requests that the original permit be provided to the court for examination and comparison with the copy.

7. The People next conceded that if the defendant were to produce admissible certified documents of a valid permit at trial, he would be entitled to a dismissal. Your deponent disagrees on this requested high standard of proof. For the purpose of this motion, and even for the purpose of trial, the defendant is only required to raises the defense of the exemption, and not proving it beyond reasonable doubt. In people vs. Parker (previously cited in the original moving papers), the defendant's permit was ceased upon his arrest, and only submitted an affidavit were he alleged that he has permit. This affidavit was sufficient to raise and invoke the exemption. In this case Mr. Stewart submitted a copy of the actual license

which was received from the people, the arresting officer's statement and an affidavit which is attached to this reply. Mr. Stewart clearly has raised the exemption sufficiently, where now the Burden rests on the people to disapprove it.

8. Your deponent is submitting this reply be considered and to preserve the records. In any case, your deponent did file and serve a motion to produce records from Monroe county Clerk's Office, to clear up any confusion surrounding Mr. Stewart's permit.

Wherefore, your deponent respectfully request an order granting the relief set forth herein, and in the original motion, and for such other and further relief as the Court deems just and proper.

Affirmed under Penalty of Perjury.

DATED: Rochester, New York
September 15, 2010

Respectfully Submitted,



MAROUN G. AJAKA, Esq.
Attorney for the Defendant

TO:
Hon. Robert B. Wiggins
Supreme and County Court Judge

Livingston County District Attorney
Att.:Eric Schiner, Esq.
First Assistant District Attorney

52 N.Y.2d 935, 419 N.E.2d 347, 437 N.Y.S.2d 669

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The People of the State of New York, Respondent,

v.

Lincoln Parker, Appellant.
Court of Appeals of New York
Argued January 8, 1981;
decided February 10, 1981

CITE TITLE AS: People v Parker

SUMMARY

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that court, entered October 30, 1979, which (1) reversed, on the law, an order of the Supreme Court (E. Leo Milonas, J.; opn 91 Misc 2d 363), entered in New York County, granting a motion by defendant to dismiss an indictment charging him with criminal possession of a weapon in the second degree, (2) denied said motion, and (3) reinstated the indictment. Defendant was alleged to have pointed a pistol at his girlfriend during an altercation on a public street in violation of section 265.03 of the Penal Law. In support of the motion to dismiss defendant contended that he was the holder of a pistol license issued under section 400.00 of the Penal Law and that, therefore, he was exempt from prosecution by virtue of section 265.20 (subd a, par 3) of the Penal Law, which provided that section 265.03 and certain other sections "shall not apply to: * * * 3. Possession of a pistol or revolver by a person to whom a license therefor has been issued as provided under section 400.00". The dissent at the Appellate Division concluded that although defendant could have been charged with other crimes such as menacing, assault or harassment, the Grand Jury returned only an indictment for criminal possession of a weapon in the second degree, and the plain language of section 265.20 (subd a, par 3) required dismissal of the indictment since defendant possessed a pistol license issued under section 400.00 of the Penal Law.

People v Parker, 70 AD2d 387, reversed. *936

HEADNOTES

Crimes--Possession of Weapon--Exemption

(1) An order of the Appellate Division, which reversed an order granting defendant's motion to dismiss an indictment charging him with criminal possession of a weapon in the second degree (Penal Law, § 265.03) and reinstated the indictment, is reversed, and the order dismissing the indictment is reinstated, for the reasons stated in the dissenting opinion at the Appellate Division, which concluded that in view of the fact that defendant was the holder of a pistol license issued under section 400.00 of the Penal Law, dismissal of the indictment was required under the plain language of section 265.20 (subd a, par 3) of the Penal Law, which provided that section 265.03 of the Penal Law did not apply to "[p]ossession of a pistol or revolver by a person to whom a license therefor has been issued as provided under section 400.00".

APPEARANCES OF COUNSEL

Daniel J. Gotlin for appellant. Robert M. Morgenthau, District Attorney (Norman Barclay, and Robert M. Pitler of counsel), for respondent.

OPINION OF THE COURT

Order reversed and order of Supreme Court, New York County, dismissing the indictment reinstated for the reasons stated in the dissenting opinion of Mr. Justice Harold Birns at the Appellate Division (70 AD2d 387, 391-394). *Attached next*

Concur: Judges Jasen, Gabrielli, Jones, Wachtler, Fuchsberg and Meyer. Taking no part: Chief Judge Cooke.

Copr. (c) 2010, Secretary of State, State of New York

N.Y. 1981.

People v Parker

52 N.Y.2d 935, 419 N.E.2d 347, 437 N.Y.S.2d 669

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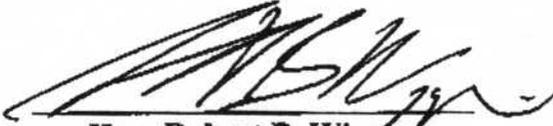
**STATE OF NEW YORK
COUNTY OF LIVINGSTON****COUNTY COURT****THE PEOPLE OF THE STATE OF NEW YORK,****Vs****Indictment No. 2010-010
ORDER****Philip L. Stewart,****Defendant.****ORDER**

Defendant, Philip L. Stewart, was charged in Indictment 2010-010 with Criminal Possession of a Weapon, Second Degree (Felony), Criminal Possession of a Weapon, Third Degree (Felony), Menacing, Second Degree (Misdemeanor), Harassment, Second Degree (Violation), and two counts of Disorderly Conduct (Violations). The felony counts one and two have been dismissed by this court leaving charges of a Misdemeanor and three Violations against Defendant. Therefore, it is hereby:

ORDERED, the remaining non-felony charges are transferred to Justice Court, Village of Caledonia pursuant to this Court's constitutional power provided by New York State Constitution, Article VI §19(b) (see, *Matter of Clute v. McGill*, 229 AD2d 70 [3rd Dept. 1997] *in den* 90 NY2d 803; *People v. Powell*, 25 Misc3d 714 [Warren Co. Ct. 2009]).

The above constitutes the Order of the Court.

Dated: October 4, 2010
Geneseo, New York



Hon. Robert B. Wiggins
Livingston County Court Judge