

**DISTRICT COURT OF NASSAU COUNTY
FIRST DISTRICT: CRIMINAL PART 1**

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THE PEOPLE OF THE STATE OF NEW YORK,



Plaintiff

against



Defendant.

**Present:
Hon. Sondra K. Pardes**

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**The following papers were submitted
on this Notice on May 4, 2009**

	papers numbered
Notice of Motion and Affidavits Annexed	1-2
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	3
Reply Affidavits	4

The defendant is charged with violating Vehicle and Traffic Law Sections 1212, (Reckless Driving); 1180(a), (Unreasonable Speed); 1163(a), (Improper Turn, 2 counts); 1143, (Failure to Yield); 375(2)(a), (Failure to Display Lights) and Penal Law Section 270.25, (Unlawful Fleeing of a Police Officer).

The defendant now moves to dismiss all of the above referenced charges pursuant to CPL §§§100.25, 100.40, 170.35(i)(a) and 170.30(i)(a) and for other relief.

Procedural History

The defendant was initially charged with six violations of the Vehicle and Traffic Law, as referenced above, by way of Simplified Traffic Informations issued on December 11, 2008. The defendant was charged with violating Penal Law §270. 25, by way of a District Court Information. Prior counsel for the defendant served a Demand for Supporting Depositions pursuant to CPL §100.25 with respect to the VTL charges on December 22, 2008. The defendant was arraigned on all of the above referenced charges on December 26, 2008.

On or about January 22, 2009 the defendant's prior counsel filed a motion to dismiss the Simplified Traffic Informations, pursuant to CPL §100.25, because the police failed to respond to the Demands for Supporting Depositions. The People did not oppose the defendant's motion. Instead, they filed "long form" District Court Informations, on or about February 26, 2009, charging the defendant with the same charges that had been filed on December 23, 2008. The defendant now moves to dismiss the District Court Informations on the grounds that the People cannot supercede the Simplified Traffic Informations with "long form" informations and therefore the accusatory instruments charging the VTL offenses remain facially insufficient because of the failure to respond to the CPL §100.25 Demand.

In opposition to the instant motion the People concede that no supporting depositions were filed on the Vehicle and Traffic Law Violations within 30 days of arraignment. The People argue however that they are "authorized" to re-file District Court Informations to cure the defect. The People cite *People v Green*, 192 Misc. 2d 296, (Nassau District Court, 2002 Kluewer, J.), to support this assertion. However the court finds that the People have in fact misconstrued the law as well as Judge Kluewer's decision. In *Green* the People also attempted to "supercede" concededly defective Simplified Traffic Informations by filing "long form informations". In that case Judge Kluewer held:

To permit the People to circumvent the less factually demanding but temporally stricter pleading requirements attendant upon a prosecution by simplified information by resort to a supersedure device applicable to prosecutions commenced upon accusatory instruments that at the outset must conform to stricter sufficiency requirements but that enjoy lesser time constraints is to defeat the underlying rationale simplified information prosecutions (*People v Nuccio, supra, People v Aucello, supra*). I thus join with those courts that, subsequent to the Court of Appeals decision in *Nuccio (supra)*, have ruled that the People cannot use the device of supersedure to continue a prosecution premised on an insufficient simplified information (*see People v Quarles, People*

Kaid, 165 Misc 2d 489 [1995]; cf. *People v Baron*, supra; *People v Origlia*).

Since the simplified informations in this case are rendered defective by the failure to timely serve supporting depositions (CPL 100.40[2]), they must be dismissed (CPL 170.30 [1]; 170:35[1][a]), (Green at 299).

This court concurs with the court's holding in *Green*. Accordingly, the defendant's motion to dismiss the Simplified Traffic Informations, Counts 2,3,4 5,6 & 7, is **Granted**.

The defendant also moves to dismiss Count 1, the District Court Information charging the defendant with violating PL §270.25.

With respect to the defendant's motion to dismiss that information based on facial insufficiency, CPL §100.40 provides that an information is facially sufficient if: 1) it conforms to the requirements of CPL §100.15; 2) the non-hearsay facts stated in the information, together with any supporting depositions, establish reasonable cause to believe that the defendant has committed the crime alleged in the accusatory portion of the information; and 3) the non-hearsay allegations of the factual portion of the information and/or any supporting deposition establish each and every element of the offense charged, and the defendant's commission thereof. CPL §100.15 provides that every accusatory instrument must contain two separate parts: 1) an accusatory portion designating the offense charged; and 2) a factual portion containing evidentiary facts which support or tend to support the charges stated in the accusatory portion of the NY2 instrument. The facts set forth must provide reasonable cause to believe that the defendant has committed the crime alleged in the accusatory portion of the accusatory instrument. (*People v. Dumas*, 68 NY2d 729; *People v. Strafer*, 10 Misc 3d 1072[A]) When these requirements are met, the information states a *prima facie* case and is sufficient (*People v. Alejandro*, 70 NY2d 133).

On a motion to dismiss for facial insufficiency, the Court's review is limited to whether or not the People's allegations, as stated in the accusatory instrument, are facially sufficient. The facts alleged need only establish the existence of a *prima facie* case, even if those facts would not be legally sufficient to prove guilt beyond a reasonable doubt

(*People v. Jennings*, 69 NY2d 103). In assessing the facial sufficiency of an accusatory instrument, the court must view the facts in the light most favorable to the People (*People v. Mellish*, 4 Misc 3d 1013(A); *People v. Gible*, 2 Misc 3d 510). The allegations only need make out a *prima facie* case and need not establish the defendant's guilt beyond a reasonable doubt. (*People v. Henderson* 92 d 677)

Penal Law §270.25 provides in pertinent part:

A person is guilty of unlawful fleeing a police officer in a motor vehicle in the third degree when, knowing that he or she has been directed to stop his or her motor vehicle by a uniformed police officer or a marked police vehicle by the activation of either the lights or the lights and siren of such a vehicle, he or she thereafter attempts to flee such officer or such vehicle by driving at speeds which equal or exceed twenty-five miles per hour above speed limit or engaging in reckless driving as defined by section twelve hundred twelve of the vehicle and traffic law.

The defendant argues that this accusatory instrument does not "articulate" facts sufficient to establish each element of PL §270.25.

The sworn statement of the arresting officer, P.O. Michael Palazzo, attests:

The defendant, Jin Hong DOB 08/17/73, did knowingly and unlawfully flee from a police officer in her motor vehicle, a 2004 Lexus NY reg K99OWN. Your uniformed deponent, Police Officer Palazzo was operating marked radio motor Patrol 639 when he observed defendant commit two Vehicle and Traffic Law infractions. P.O. Palazzo attempted to stop defendant by activating his emergency lights and siren at which time the defendant did shut her lights off while she accelerated to a high rate of speed westbound on Harrow Ln in a reckless manner disobeying a stop sign, and failing to signal a right turn

onto Winchester Dr., and continued to drive with her lights off for approximately one half mile. The road was very wet and slippery due to the heavy rain. Your deponent did observe other vehicles travel on the same roadway at the same time.

After reviewing the accusatory instrument, the court finds that it does contain non-hearsay facts sufficient to establish the existence of a *prima facie* case of a violation of PL §270.25.

Accordingly, the defendant's motion to dismiss Count 1 is **Denied**.

With respect to the defendant's motion to dismiss the District Court Information in the interest of justice, a dismissal in the interests of justice requires a sensitive balance between the interest of the individual and the state (*People v. Clayton*, 41 AD2d 204, 342 NYS2d 106 [2d Dept 1973]). Further, the purpose of said motion is to allow justice to prevail over the strict letter of the law so as to prevent a miscarriage of justice (*People v. Toback*, 170 Misc 2d 1011, 652 NYS2d 946 [City Ct, Long Beach 1996]). After considering all of the above, the court finds that the defendant fails to set forth factors compelling enough to justify the court exercising its discretion to dismiss the accusatory instrument under CPL §170.40. Accordingly, that branch of the defendant's motion which seeks to dismiss the accusatory instrument in the interests of justice is **Denied**.

Any further relief requested is denied in all respects.

This constitutes the decision and order of the court.


DISTRICT COURT JUDGE

Dated: Hempstead, New York
June 15, 2009

cc: Kathleen Rice, Nassau County District Attorney
Eric A. Pack, Esq.,

SKP:rad