INTENT TO CAUSE "PUBLIC" ALARM (OR RECKLESSLY CREATING A RISK THEREOF) ARE THE KEYS TO DISORDERLY CONDUCT

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One of the most convenient and frequently-used vehicles to resolve criminal charges at the non-criminal level is to have a client plead guilty to a violation of Disorderly Conduct (PL 240.20) under one of the several subdivisions (preferably something relatively innocuous like #2, "unreasonable noise,"or #5, "obstructing traffic" or #6 "refusing an order to disburse").

More often than not, judges who accept a guilty plea to a "DISCON" are content to have the defendant simply admit that he/she behaved in a "disorderly manner," and then off he/she goes with either time-served, a conditional discharge, a fine of no more than $250.00 and, most importantly, NO CRIMINAL RECORD.

Purely a statutory creation dating back to the late 1800's in New York State, (unlike, for example, Trespass laws which are firmly rooted in property rights), the DISCON was and always has been intended to proscribe BREACHES OF THE (PUBLIC) PEACE (i.e. community safety, health and morals), rather than conduct that is private in nature and scope (e.g. Harassment) and, therefore, limited to the individuals immediately involved. (See People v Munafo 50 NY2d 326 [1980], citing inter alia, People ex. rel. Mulhern v Kaufman 165 Misc 670 [City Mag. Ct. of Brooklyn 1937] People v Chesnick 303 NY 58 [1950]).

As the Court of Appeals in Munafo (and many other cases citing it), stated, the statute is "reserved for situations that carry BEYOND THE CONCERNS OF THE INDIVIDUAL DISPUTANTS to a point where they become a POTENTIAL OR IMMEDIATE PUBLIC PROBLEM."

In Munafo, the defendant, a farmer who was most unhappy with the State Power Authority (SPA) for taking over and dividing his property (via eminent domain) and installing power lines, took a stand (literally) on a private right-of-way, and after firing some shots across the road (with eight or so people in the vicinity), blocked the path of oncoming SPA construction backhoes. His gun was seized by police and he was charged with violating PL 240.20(5)(6): (obstructing vehicular and pedestrian traffic and congregating in a public place and refusing a lawful order to disperse).

Focusing on several factors including the location and circumstances (private property far from any public highway), the number of people present (not many given the broad expanse of land they were on), their reaction (passive observation and no one endangered), and the defendant's conduct vis-a-vis the others (i.e. no effort to engage, excite or alarm them), the Court determined that this was a purely private confrontation between the defendant and SPA, carried out with no INTENT (or recklessly created risk) of creating a public commotion. (Citing inter alia People v Phillips 245 NY 402[1960]).

Inasmuch as the blocking of the backhoes occurred on a private road rather than a public highway, the defendant, in the Court's view, could not be convicted of blocking vehicular traffic under the statute (People v Carcel 3 NY2d 27 [1957]), and since the defendant was not part of any crowd or congregation in a public place, he couldn't be convicted for refusing to disperse. (See also People v Jemzura 29 NY2d 590[1971]).

While the DISCON is a common and often easy "go-to" for purposes of plea dispositions, it is not as simple to prove (or uphold an accusatory instrument), especially where the allegations/evidence of the risk or likelihood PUBLIC HARM from the defendant's conduct is scant or otherwise lacking in factual support.

The common (and critical) thread that binds all forms of Disorderly Conduct (i.e. the MENS REA COMPONENT), can be found it the statute's preamble which states that a person is guilty of this offense: "WHEN WITH INTENT TO CAUSE PUBLIC INCONVENIENCE, ANNOYANCE OR ALARM, ('OR RECKLESSLY CREATING A RISK THEREOF), he/she engages in in any of the following types of conduct including:

1. FIGHTING, VIOLENT OR TUMULTUOUS OR THREATENING BEHAVIOR; OR

2. MAKES UNREASONABLE NOISE; OR

3. IN A PUBLIC PLACE, USES ABUSIVE OR OBSCENE LANGUAGE OR MAKES AN OBSCENE GESTURE; OR

4. WITHOUT LAWFUL AUTHORITY, DISTURBS ANY LAWFUL ASSEMBLY OR MEETING OF PERSONS; OR

5. OBSTRUCT VEHICLE OR PEDESTRIAN TRAFFIC; OR

6. CONGREGATES WITH OTHER PERSONS IN A PUBLIC PLACE AND REFUSES TO COMPLY WITH A LAWFUL POLICE ORDER TO DISPERSE; OR

7. CREATES A HAZARDOUS OR PHYSICALLY OFFENSIVE CONDITION BY AN ACT WHICH SERVES NO LEGITIMATE PURPOSE.

LEGAL (IN)[SUFFICIENCY OF ACCUSATORY INSTRUMENTS:

In People v Dailey 196 Misc 3d 649 (Town of Webster Justice Court 2003), the court found the accusatory instrument (charging PL 240.20[2], unreasonable noise) facially insufficient (and, therefore jurisdictionally defective), under CPL 100.15[b] and 100.40[4], People v Alejandro 70 NY2d 133 [1987]) for failing to allege sufficient facts to support the inference of public disturbance or alarm.

The officer alleged that at 3:30am, the defendant "started to yell and make unreasonable noise with obscene language while on the exterior porch of an apartment building...He was told several times (it didn't say by whom) to shut up but refused."

Considering the statute's purpose to proscribe conduct intended to cause a public nuisance (citing, inter alia People v Tichenor 89 NY2d 769 [1997]), the court found that the information was devoid of any facts with respect to the number of people present (or in the vicinity), the effect of the defendant's conduct on others present, or whether anyone actually complained. (The reference to the defendant being told to shut up, like the mention of "obscenities" was deemed to be too vague and conclusory). Absent any factually supported allegations of an intentional/recklessly created risk of public disturbance, the information was deemed to fail for legal insufficiency.

Similarly, in People v Ferguson 2015 NY Slip Op. 5127(U) (Crim. Ct. City of NY 8/27/15), the court dismissed the information charging PL 240.20(1) because the facts alleged (that the defendant was yelling at another person on a Manhattan street while five people stopped and stared) failed to support the element of "public alarm or tumultuous conduct." (Citing, inter alia People v Henderson 92 NY 677 [1999] and People v Kalin 12 NY3d 228 [2009]).

The court observed that "simply yelling" at someone on a public street does not rise to the level of fighting words contemplated by the statute. (In contrast, see People v Weaver 16 NY3d 123 [2011] where the defendant berated his newlywed bride outside of their reception venue with a torrent of invectives that only escalated when an officer tried to intervene). The Ferguson court, citing, inter alia, People v Munafo supra, said that a private conflict between two people (even if it occurs in public in front of curious but otherwise unengaged onlookers), does not qualify as Disorderly Conduct unless there is a breach of the peace.

Noting that the "public harm" element of PL 240.20 serves an important "narrowing function" to distinguish it from other offenses (e.g. PL 240.26), the court held that absent any allegations supporting an intent to carry his conduct beyond the individual target of his ire (or recklessly creating a risk of public engagement beyond rubber-necking), the information was legally insufficient. (Citing, inter alia, People v Castro 918 NYS 3d [Sup.Ct. Bronx Cty. 2010]: No Disorderly Conduct for yelling at police in front of passers-by).

See also People v Palmer 176 Misc 2d 813 (City of New York 1988): Swearing at police in front of others does not qualify as Disorderly Conduct. It would appear that verbal abuse of police in public (whether deserved or not), without more, is an occupational indignity that police have to endure without valid recourse to the Penal Law. (Which is not to suggest that people who verbally attack and then struggle and fight with the police don't find themselves on the wrong end of accusatory instruments charging Disorderly Conduct, Obstructing Governmental Administration and/or Resisting Arrest).

The court in Ferguson also concluded that merely yelling at someone does not amount to “tumultuous conduct” which implies loud, excited and emotionally charged behavior that creates chaos and confusion bordering on violence. (Citing, inter alia, People v Moreno 47 Misc 3d 138[A] [App. Terms 11th, 13th, 15th dists 2015] and People v Square 20 Misc 3d 1126[A] [Crim Ct. NYC 2008]); See also People v Stephen 153 Misc 3d 382 [Crim. Ct. NYC 1992]: grabbing genitals and yelling offensive words at police did not equal Disorderly Conduct. Public Lewdness, maybe?).

In People v Alcantara 46 NYS 3d 475 (Crim.Ct. NYC 2016), the court dismissed the information charging the defendant with Disorderly Conduct (PL 240.20[1[), Resisting Arrest and Littering (City Ordinance violation), where the officer alleged that he observed the defendant spitting on the street, and upon seeing officers approach, started screaming “pussies,” and “faggots,” causing a crowd to gather. The court, citing, inter alia, People v Johnson 22 NY3d 1162 (2014), held that a charge of Disorderly Conduct can only stand if there is evidence of an actual or threatened public harm (i.e.. inconvenience, annoyance or alarm), which does not necessarily require that members of the public be actually involved. (Citing People v Weaver supra where defendant’s increasingly loud and bellicose conduct directed at his wife and then at the intervening officer in an otherwise quiet area late at night with no one else actually present was deemed to evince and intent to create (or demonstrated a reckless disregard for) the prospect of public alarm.

Weaver appears to be an exception to the rule requiring at least some human evidence of public presence/engagement/alarm, (perhaps because of the defendant’s entirely offensive, boisterous and increasingly hostile behavior toward his bride and then to a police officer in an otherwise peaceful place) for a Disorderly Conduct charge to withstand challenge. In People v Tichenor 89 NY2d 769 (1997) supra, by contrast, it was precisely because the defendant’s abusive conduct (spitting and swearing at a police officer walking by the doorway of a loud and crowded bar), incited fellow drunken patrons to join in the yelling (which led to a brawl that spilled inside), that the situation escalated to one where the intent to create a public ruckus could readily be inferred.

SUPPRESSION OF EVIDENCE/ SUFFICIENCY OF EVIDENCE.

As noted above, disrespectful words and/or coarse criticism/disapproval of police conduct, without more (e.g. evidence of others being frightened, alarmed or otherwise getting involved in the fracas), will not support a charge of Disorderly Conduct. In People v. Gonzalez 25 NY3d 1100 (2015), the Court of Appeals reversed the Appellate Division’s affirmance of the lower court’s denial of the defendant’s motion to suppress evidence (a knife found on the defendant) for lack of probable cause to arrest the defendant for Disorderly Conduct (PL 240.20[3], shouting obscenities in a public place).

The officer testified that the defendant “shouted obscenities”at the police in a Manhattan subway provoking looks of surprise and curiosity from some people and causing others to take evasive action. The defendant ran upstairs to a higher level where the officers caught, arrested and searched him which led to recovery of the knife.

The Court held that there was no “record support” for the motion court’s determination that the defendant’s rant extended beyond the officers involved so as to create a potential or immediate public problem. (Citing, inter alia, People v Baker 20 NY3d 354 [2013]).

Similarly, in People v Baker 20 NY3d 354 (2013) the Court of Appeals found insufficient support in the record for County Court’s determination of probable to cause to arrest the defendant for Disorderly Conduct for cussing out police (who were in a patrol car) in the middle of the street (with a small crowd of onlookers on the sidewalk), for inquiring of his girlfriend (who was videotaping the police), about the ownership of a car parked in a driveway. After the defendant’s motion to suppress was denied, the defendant pled guilty to felony Criminal Possession of a Controlled Substance (crack cocaine seized from him incident to arrest), and to Assault 2d degree (under an unrelated indictment), for which he received concurrent six-year determinate sentences of imprisonment and post-release supervision.

In overturning both convictions (the drugs, for lack of probable cause, and the Assault for lack of any legal basis for concurrent sentencing), the Court reversed the Appellate Division’s affirmance on the grounds that the defendant’s remarks (uttered as he backed away from the patrol and in front of a mostly passive crowd of observers), lacked any indicia of intent to create a public kerfuffle. (Citing, inter alia, People v Oden 36 HY2d 382 [1975]).

The Court stated that the key to a finding of disorderly conduct is that the defendant’s disruptive statements/behavior are of a PUBLIC RATHER THAN INDIVIDUAL DIMENSION. This derives from the requirement that the defendant’s conduct manifest an intent to threaten public safety, peace and order. So, only when the conduct EXTENDS BEYOND THE EXCHANGE BETWEEN THE INDIVIDUAL DISPUTANTS to the point of becoming a POTENTIAL OR IMMEDIATE PUBLIC PROBLEM, will a charge of Disorderly Conduct be satisfied. (Citing, inter alia, People v Weaver supra).

The court further stressed that the PUBLIC HARM component is what sets Disorderly Conduct apart from other offenses containing similar elements but which are restricted to altercations of a purely personal nature. (Citing People v Bakolas NY2d 51 [1983]). As the Court observed, “the significance of the public harm element CANNOT BE OVERSTATED. In virtually all (cases), the validity of the Disorderly Conduct charge (turns) on the presence or absence of adequate proof of public harm.” (Citing People v Weaver, supra).

Courts, therefore, must employ a contextual analysis that takes into account several factors including: the TIME/PLACE of the episode, the NUMBER, NATURE AND CHARACTER of any people in the immediate vicinity, whether they are ALARMED BY and/or DRAWN TO THE DISTURBANCE and any other relevant factors. The Court in Baker noted that the RISK OF PUBLIC DISORDER DOES NOT HAVE TO BE REALIZED BUT THE CIRCUMSTANCES MUST BE SUCH THAT THE DEFENDANT’S INTENT TO CREATE A PUBLIC THREAT (or reckless disregard thereof) IS READILY APPARENT. (Citing People v Todaro 26 NY2d 325 [1970].

In Baker, the factors that, in the Court’s view, cut against public harm included, the daytime encounter with police who were well protected in their separate cars, the defendant backing away as he took issue with their conduct, (why he could call attention to himself with several bags of crack cocaine on his person is another story), the brevity (15 seconds) and non-threatening nature of his outburst and the fact that the crowd (unlike in People v Tichenor, supra) did not engage beyond a few brief comments of disapproval of what was going on.

The bottom line, according to the court, was that isolated statements containing coarse language to criticize the police unaccompanied by provocative acts or other aggravating circumstances will seldom provide a sufficient basis to infer the presence of the “public harm” mental state necessary to support a charge of Disorderly Conduct. Consequently, if the Disorderly Conduct is without sufficient factual foundation to support the element of intended public harm, an accompanying charge of Resisting Arrest (which requires that such arrest be lawful), should, absent any other valid basis to arrest, follow suit and fail as well. (People v Jones 9 NY3d 259 [2007]).

The public harm element was also found to be lacking in People v Pritchard 27NY2d 246 (1970), where an off-duty police officer, moonlighting as security at a teenage night club (what could go wrong?), attempted to break up a scuffle in which the defendant was embroiled while others in attendance uttered provocative epithets. Finding that this momentary flare-up was the result a purely personal clash between the defendant and the other teenager, the Court concluded that the did not intentionally sow the seeds of crowd reaction (i.e. recklessly create a risk of public disorder) to warrant criminal criminal prosecution.

As is evident, crude and/or offensive words or behavior aimed at others (even police officers), will it not rise to DISCON levels unless they demonstrate, in context, an intent to offend the peace and dignity of the public, or are carried out in such a manner and under such circumstances as to reveal a reckless disregard for a substantial and unjustifiable likelihood of public offense. Close scrutiny of accusatory instruments (with appropriate motions to dismiss for legal insufficiency), and vigorous challenges to the evidence offered at trial with respect to the element of public harm can bring private satisfaction to counsel and welcome relief to clients when such efforts achieve favorable results.