

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JAMES M. MALONEY,

CV-03-0786 (ADS) (MLO)

Plaintiff,

- against -

ANDREW CUOMO, in his official capacity as
Attorney General of the State of New York,
ELIOT SPITZER, in his official capacity as
Governor of the State of New York and his
successors, KATHLEEN A. RICE, in her official
capacity as District Attorney of the County
of Nassau and their successors,

Defendants.
-----X

**MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION
FOR RECONSIDERATION OF THIS COURT'S
JANUARY 17, 2007 MEMORANDUM OF DECISION AND ORDER**

LORNA B. GOODMAN
Nassau County Attorney
One West Street
Mineola, New York 11501

Of Counsel: Liora M. Ben-Sorek (LMB 1971)
Deputy County Attorney
Attorneys for Defendant Rice
(516) 571-3014

PRELIMINARY STATEMENT

Plaintiff, James M. Maloney, asks this Court to reconsider its Memorandum of Decision and Order, dated January 17, 2007 (the "Order"), which granted defendants' respective motions and dismissed plaintiff's Amended Complaint. Specifically, plaintiff claims that this Court failed to address the allegations set forth in the Amended Complaint at paragraph 54, items (b) through (e).

Defendant Kathleen A. Rice respectfully asserts that this Court has addressed the issues raised in this case and that reconsideration is unwarranted.

No Substantive Due Process Violation

Substantive due process shields against governmental abuse of power during the pursuit of a legitimate governmental objective. See Natale v. Town of Ridgefield, 170 F.3d 258, 263 (2d Cir. 1999); see also Henderson v. State of New York, 423 F. Supp. 2d 129, 146 (S.D.N.Y. 2006). As with procedural due process, plaintiff must identify a cognizable liberty or property interest and then demonstrate that a governmental action was wholly without legal justification. See Natale, 170 F.3d at 263. Such a test strikes a balance between protecting persons' Constitutional rights from governmental abuse of power, and legitimate governmental objectives such as the health, welfare and safety of citizens. See Harlen Assos. v. Inc. Village of Mineola, 273 F.3d 494, 501 (2d Cir. 2001); see also Bower Assos., 2 N.Y.3d at 629. "Substantive due process standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority." See Natale, 170 F.3d at 263 (citing cases); Henderson, 423 F. Supp. 2d at 146 (quoting Barton v. City of Bristol, 294 F. Supp. 2d 184, 198 (Dist. of Ct. 2003)).

In the case at bar, this Court thoroughly examined plaintiff's claims and found that he had no recognized property or liberty interest in possessing chuka sticks. It is only when such right is

present that the Court must weigh the individual's liberty or property interest against that of the government's action. Additionally, plaintiff has not established that the government's conduct in enacting and enforcing New York Penal Law § 265.01, is "so outrageously arbitrary as to constitute a gross abuse of governmental authority." See Natale, 170 F.3d at 263 (citing cases); Henderson, 423 F. Supp. 2d at 146 (quoting Barton v. City of Bristol, 294 F. Supp. 2d 184, 198 (Dist. of Ct. 2003)).

No Violation of the Fourteenth Amendment

The Fourteenth Amendment to the United States Constitution sets forth that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Similar to the analysis for substantive due process, an analysis of a procedural due process claim requires the plaintiff to first establish the existence of a Constitutionally protected right or interest. See Henderson v. State of New York, 423 F. Supp. 2d 129, 145 (S.D.N.Y. 2006). If a protected interest is recognized, then a Court must decide whether the government deprived plaintiff of that interest without procedural due process of law. See Id. Due process requires adequate notice and an opportunity to be heard. See Mathews v. Eldridge, 424 U.S. at 348-49 ("The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and the opportunity to meet it."") (quoting Joint Anti-Fascist Comm. V. McGrath, 341 U.S. 123, 171-172 (1951) (Frankfurter, J., concurring)).

Procedural due process in the context of a criminal prosecution demands that a defendant be adequately notified of the nature of the charges against him and his rights during the course of

his criminal prosecution, and that he be given an opportunity to be heard on the issue of his guilt or innocence. See Ong Chang Wing v. United States, 218 U.S. 272, 279-80 (1910) (“[I]f an accused has been heard in a court of competent jurisdiction . . . proceeded against under the orderly processes of the law . . . only punished after inquiry and investigation, upon notice to him, with an opportunity to be heard . . . he has had due process of law.”); see also People v. Ramos, 85 N.Y.2d 678, 683-84 (1995) (Procedural due process in a criminal prosecution means that the defendant is provided with adequate notice of the proceedings and the opportunity to respond).

Here, the Court has already determined that plaintiff lacks a right to possess chuka sticks. Thus, there is no need to address the Fourteenth Amendment due process claim.

Assuming *arguendo* that such a right existed, a Fourteenth Amendment due process analysis would require plaintiff with notice and an opportunity to be heard. In the case at bar, plaintiff Maloney was duly charged with criminal possession of a weapon (chuka sticks) pursuant to New York Penal Law § 265.01[1]. Plaintiff had an opportunity to challenge that count during the criminal proceedings. Plaintiff chose, instead, to plead guilty to a lesser charge. In doing so he also agreed to the forfeiture and destruction of his chuka sticks. For the Court’s reference, a copy of the plea and sentencing minutes is annexed hereto as Exhibit A.

A review of the Amended Complaint in terms of the equal protection clause is not necessary since the Amended pleading does not assert a claim of unequal treatment to those similarly situated. In light of the foregoing, plaintiff’s Fourteenth Amendment rights were not violated.

Lawrence v. Texas

“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct.” Lawrence v. Texas, 539 U.S. 558, 562 (2003).

Freedom of expression, however, is not without boundaries, especially when it conflicts with statute. Plaintiff's belief that he has a liberty interest in possessing chuka sticks in his home, is in direct contravention of New York State Penal Law § 265.01 which does not discriminate against possession of a weapon whether on one's person, in a car, home or other place. Moreover, this Court has already determined that use (possession) of chuka sticks is not a protected form of expression.

Inferred Rights

Paragraph 54(e) of the Amended Complaint serves as a "catch-all" provision wherein plaintiff requests that if the Court locates a cause of action or a right that plaintiff himself overlooked, that the Court infer same. In addition to the fact that asking the Court to infer claims violates Fed. Rules Civ. P. 8(a)(2), this Court in its wisdom, examined the submissions of all parties and addressed the applicable Amendments. It then rendered its January 17, 2007 opinion dismissing plaintiff's claims.

Conclusion

For the reasons set forth herein, it is respectfully submitted that there is no need for reconsideration of defendant's motion.

Dated: Mineola, New York
January 25, 2007

LORNA B. GOODMAN
Nassau County Attorney
One West Street
Mineola, New York 11501

By: _____

Liora M. Ben-Sorek (LMB 1971)
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(516) 571-3014

EXHIBIT A

1 DISTRICT COURT OF THE COUNTY OF NASSAU
FIRST DISTRICT PART: CRIMINAL 3

2 -----X

3 THE PEOPLE OF THE STATE OF NEW YORK, :

4 -against- :

5 JAMES MALONEY, :

6 DEFENDANT. :

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January 28, 2003
99 Main Street
Hempstead, New York 11550

B E F O R E:

HONORABLE THOMAS FEINMAN, Presiding

A P P E A R A N C E S:

DENIS DILLON, ESQ.
District Attorney - Nassau County
BY: ROBERT FORMICHELLI, ESQ.
Assistant District Attorney
For The People

DENNIS M. LEMKE, ESQ.
114 Old Country Road
Mineola, New York 11501
Attorney for the defendant

CHRISTINE ZALENSKI
Official Court Reporter

PROCEEDINGS

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1 COURT CLERK: For disposition, 31, James Maloney.

2 MR. LEMKE: For Mr. Maloney, your Honor, Dennis
3 Lemke, 114 Old Country Road, Mineola, New York.

4 MR. FORMICHELLI: Under docket 1792 of 2000. The
5 defendant is charged with six violations of the Penal
6 Law. With respect to the first count which charges a
7 violation of Penal Law Section 265.01 --

8 THE COURT: Which is count two.

9 MR. FORMICHELLI: Which is court count two, People
10 move to amend and reduce to a violation of Penal Law
11 Section 240.20(7). Move to dismiss in satisfaction all
12 remaining counts on the docket.

13 The offer is contingent on the defendant pleading
14 guilty I as outlined, waiving the right to prosecution by
15 way of information, waiving any defects in the accusatory
16 instrument, waiving the right to appeal, consenting to
17 the destruction of all the weapons which form the basis
18 of the four counts charging Penal Law Section 265.01.

19 MR. LEMKE: And the chuka sticks.

20 MR. FORMICHELLI: And the chuka sticks.

21 MR. LEMKE: We join in the People's application
22 with the understanding I think as a matter of law after
23 People's witness, Dr. Siegel, evaluated my client, there
24 was a finding, so those matters would have been dismissed
25 anyway.

PROCEEDINGS

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1 As to the other matters, we do join in the
2 People's application. We do submit to the destruction of
3 all unlicensed handguns and there were other items we
4 will be getting back.

5 COURT CLERK: Please raise your right hand.

6 (Whereupon, the defendant complies.)

7 COURT CLERK: Do you swear or affirm to tell the
8 truth, the whole truth and nothing but the truth?

9 THE DEFENDANT: I do.

10 COURT CLERK: Lower your hand. State your name,
11 spelling your last, and give your address in a loud,
12 clear voice for the court reporter.

13 THE DEFENDANT: James M. Maloney. M-A-L-O-N-E-Y.
14 33 Bayview Avenue, Port Washington, 11050.

15 THE COURT: Mr. Maloney, you understand what's
16 taking place here today, correct?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: You understand you're pleading guilty
19 to one count, disorderly conduct, pursuant to Section
20 240.20(7) of the Penal Law?

21 THE DEFENDANT: Yes.

22 THE COURT: You've also heard your attorney
23 consent to the destruction and forfeiture of all the
24 unlicensed handguns and the chuka sticks in this case.

25 THE DEFENDANT: Yes, sir.

PROCEEDINGS

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1 THE COURT: You also consent to that?

2 THE DEFENDANT: I do.

3 THE COURT: Do you acknowledge that on August 23,
4 2000 at 2:03 p.m. at 33 Bayview Avenue, Port Washington,
5 New York, Nassau County you did engage in conduct -- I'm
6 sorry.

7 Mr. Formichelli, you said the first count of the
8 weapons? The first count which is count two involves the
9 chuka sticks.

10 MR. FORMICHELLI: I'm sorry. I wanted one of the
11 firearms.

12 THE COURT: That's count three.

13 MR. FORMICHELLI: Then People's application is
14 amended to reflect count three.

15 MR. LEMKE: Again, no objection, Your Honor.

16 THE COURT: You acknowledge on that date, time and
17 place you did engage in disorderly conduct involving
18 yourself and a 38 caliber revolver?

19 THE DEFENDANT: Yes, your Honor.

20 THE COURT: Count three was replaced by count
21 seven on a prior date. Then his application is to count
22 seven.

23 MR. FORMICHELLI: I believe we may be referring to
24 count seven through 12.

25 THE COURT: All I have is the original.

PROCEEDINGS

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1 COURT CLERK: The file is marked count three was
2 dismissed and replaced by count seven on a prior date.

3 THE COURT: Count seven is also the 38.

4 MR. FORMICHELLI: The People's application remains
5 the same except as to the extent count seven we're
6 anticipating a plea of guilty.

7 THE COURT: Now you're joining in that application
8 nunc pro tunc?

9 MR. LEMKE: Yes, your Honor.

0 THE COURT: The plea of guilty is acceptable.
1 Ready for sentencing?

2 MR. LEMKE: Yes, your Honor.

3 THE COURT: Waive any statutory delay?

4 MR. LEMKE: Yes.

5 THE COURT: Mr. Maloney, anything you want to say
6 prior to sentence?

7 THE DEFENDANT: No.

8 THE COURT: With the conditions of consent of
9 forfeiture and the destruction of the aforementioned
0 weapons, you're sentenced to pay a fine of \$250, \$50
1 surcharge, \$10 crime victim's fee. Conditional discharge
2 pursuant to 65.10 of the Penal Law.

3 THE CLERK: Let the record reflect the defendant
4 is being served the terms of the conditional discharge
5 and his rights after conviction and summons to appear in

PROCEEDINGS

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1 arraignment A if surcharge is not paid.

2 THE COURT: All fines surcharges due are payable
3 today by 4:00 p.m. or 15 days Nassau County Correctional
4 Center.

5 MR. LEMKE: Thank you, your Honor.

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9 CERTIFIED TO BE A TRUE AND ACCURATE
10 TRANSCRIPT OF THE STENOGRAPHIC MINUTES
11 TAKEN HEREIN:

12

Christine Zaleski

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CHRISTINE ZALENSKI

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OFFICIAL COURT REPORTER

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