

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 41

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THE PEOPLE OF THE STATE OF NEW YORK, :

: Indictment Number 2917/06

-against-

ARTHUR RODRIGUEZ,

:  
: Decision & Order  
:

Defendant.

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ZWEIBEL, J.:

The defendant is charged with Criminal Possession of a Weapon in the Third Degree, a violation of Penal Law § 265.02(4). The People allege in substance that on April 12, 2006, at approximately 7:30 p.m. in the vicinity of 1250 5<sup>th</sup> Avenue, New York, New York, the defendant possessed a loaded firearm in his vehicle. There does not seem to be any dispute over whether defendant possessed a loaded firearm. The defendant is a law enforcement officer, namely, a Pennsylvania Constable, authorized to carry a concealed weapon in Pennsylvania. The People concede that defendant is a constable. The only real issue in this case is whether by virtue of his status as a law enforcement officer, defendant was entitled to carry his weapon across State lines and therefore, is exempt from prosecution for a violation of Penal Law § 265.02(4) under either or both New York State and Federal law.

In order to flesh out the record on this issue, the Court, on October 20, 2006, held a hearing with respect to defendant's

motion to dismiss. The sole witness at the hearing was defendant, Manuel Rodriguez, who I found to be credible.<sup>1</sup>

Prior to defendant testifying, the Assistant District Attorney ("ADA") stated, that with respect to defendant's presence in New York County for service of a warrant, she was able to verify that there was an active September 2005 warrant from Pennsylvania for a person located in Kings County, New York. According to the ADA, she spoke to Pennsylvania Judge David Leh, who was the judge who signed the warrant on September 2, 2005, who further confirmed that the warrant was assigned thereafter to defendant.<sup>2</sup> However, Judge Leh was uncertain as to when and if defendant had attempted to execute the warrant.

The ADA also commented on the fact that in the Grand Jury, the arresting officers testified to being aware that defendant

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<sup>1</sup>Although the People had approximately one month to prepare for this hearing, they apparently notified their officers the day prior to the hearing. Prior to sending through that notification, no one spoke to the officers or verified their availability. Needless to say, the officers did not appear nor did the People have any information as to the reason for the officers' failure to appear. In fact, the People did not know if the officers actually received the notifications. The Court denied the People's request for an adjournment because of the length of time the People had to prepare for the hearing, and because the People did not even know if the officers were available Monday.

<sup>2</sup>On cross-examination, when asked about when he received the assignment to execute the warrant in question, Constable Rodriguez did not remember the exact date that the warrant was issued nor could he state on what date he did what in his attempts to locate the person in the warrant and execute it.

was a Pennsylvania Constable and that his duties included serving Pennsylvania warrants.

Defendant testified that his name is Manuel Rodriguez, not Arthur Rodriguez as stated in the indictment, and that he is a Pennsylvania State Constable, employed by the Commonwealth of the State of Pennsylvania, as a sworn law enforcement officer.<sup>3</sup> According to Constable Rodriguez, this is his second term as an elected Constable. His duties include courtroom security, transporting prisoners, executing warrants, both criminal and civil, "PFA's", "standby", and service of court papers. The warrants are executed wherever they are issued. Constable Rodriguez is authorized to collect fines upon confirming the identity of the person so named in the warrant. According to the constable, constables, including himself, go outside the state to locate the person named in the warrant and to try to resolve it. Constables of Pennsylvania are authorized to carry a gun<sup>4</sup> and that he personally was authorized, qualified and certified to

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<sup>3</sup>Constable Rodriguez denied on cross-examination that he ever told the officers who arrested him that his name was Arthur Rodriguez.

<sup>4</sup>Although authorized to carry a gun in Pennsylvania by virtue of their status as constables, constables are not issued weapons by the State of Pennsylvania but rather they purchase their own weapons. Defendant also admitted having a personal license in Pennsylvania to carry a firearm.

carry a weapon as a Pennsylvania State constable.<sup>5</sup>

Constable Rodriguez testified on cross-examination that he has two jobs and that one of those jobs is his full-time employment as a Constable in Pennsylvania. According to the Criminal Justice Administration ("CJA") form based on an interview of the defendant at the time of his arraignment, defendant also stated that his full-time profession was construction worker. Defendant also stated that he told the person from CJA that he was a Pennsylvania State Constable.

On April 12, 2006, at approximately 4:30/5:00 p.m., Constable Rodriguez was sitting in his legally parked car on 5<sup>th</sup> Avenue. He was waiting for his friend Aurora Flores to come down so that he could give her a lift on his way to Brooklyn to execute a warrant<sup>6</sup>. Constable Rodriguez intended to contact the person named in the Brooklyn warrant and see whether the warrant could be "expunged" there and then. After executing the Brooklyn warrant, Constable Rodriguez was going to go through the Holland Tunnel and head back to Pennsylvania, executing the other four

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<sup>5</sup>The Court took judicial notice of the Statutes of Pennsylvania that do in fact exempt constables, as sworn law enforcement officers, from the licensing requirement and permits constables to carry a weapon without a license under the Pennsylvania Firearms Act, citing Title 18 of the Pennsylvania Statutes, section 6106, subdivision (b)(1) [18 Pa.C.S.A. § 6106(b)(1)].

<sup>6</sup>The warrant was for a summary offense, payment of a surcharge upon the person's named in the warrant having pled guilty to public drunkenness and misconduct.

warrants he had in his possession on that date along the way.

While he was waiting in his parked car, Constable Rodriguez was approached by police officers who came alongside his vehicle on the right side. Constable Rodriguez rolled down his window and the officers asked him "What you doing here? Can you-you have any identification because this looks like an unmarked car, out of state plates, Pennsylvania plates?" In response, Constable Rodriguez showed the officers his identification and shield.

According to Constable Rodriguez, the officers proceeded to block his car in its parking space. By this time, Ms. Flores had arrived and said "Let's go." Constable Rodriguez told her, "We can't go nowhere. These guys got me blocked in."

The officers then exited their vehicle and approached defendant on his left side and asked him for additional identification. Constable Rodriguez testified that no matter what form of identification he showed the officers, the officers told him that the identification was fake. Because of the officers scepticism with respect to defendant's identifications, Constable Rodriguez reached up and removed all the warrants he was executing from his visor. He showed the officers the warrants and informed them that they were issued by the State of Pennsylvania and that he is an authorized officer. The officers allegedly told him that the warrants were fake as well.

Constable Rodriguez also testified that Ms. Flores tried to tell the officers that his identification was not fake and that he was a Pennsylvania Constable. According to the constable, the officers told Ms. Flores to shut up.

The officers asked Constable Rodriguez whether he was carrying a weapon. Constable Rodriguez said yes. According to the constable, he was carrying a concealed weapon in a shoulder rig/holster under his shirt.

Constable Rodriguez stated that at the time of his arrest, he was acting in his official capacity as a Pennsylvania State Constable.

The Court notes that Penal Law 265.20(a) [11] specifically states that Penal Law § 265.02 does not apply to "[p]ossession of a firearm ... by a police officer or sworn peace officer of another state while conducting official business within the state of New York." Thus, if a constable is considered a peace officer in the State of Pennsylvania and defendant was conducting official business within the State of New York, he may be exempt from prosecution pursuant to Penal Law § 265.20(a) [11].

First, this Court must determine whether a constable is a "peace officer" in Pennsylvania. It is clear to this Court that constables are peace officers in Pennsylvania whose central functions and activities partake of exercising executive powers. Because constables are considered "related staff" who serve the

unified judicial system but are not personnel of the judicial system and are not supervised by the courts, they are considered "independent contractors" with respect to the Court system.

Statutes govern the election and qualifications of constables; the appointment and qualifications of deputies; the removal of constables; the duties and liabilities of constables; the fees of constables; and actions against constables or their sureties. The Court takes judicial notice of the various Pennsylvania statutes governing constables, including those in Title 13 of the Pennsylvania Commonwealth Statutes ("Pa.C.S.") section 40 through 46 and Title 18 of the Pennsylvania Commonwealth Statutes ("Pa.C.S.") section 6106. In fact, 13 PS § 40 is entitled, "Peace Officers" and states that "Constables... shall perform all those duties authorized or imposed on them by statute." Additionally, according to the Supreme Court of the State of Pennsylvania, a "constable is a peace officer" (see In re Act 147 of 1990, 528 Pa., at 470, 598 A.2d, at 990). As noted by the Pennsylvania Supreme Court, "a constable is a known officer charged with conservation of the peace, and whose business it is to arrest those who have violated it. By statute in Pennsylvania, a constable may also serve process in some instances.... As a peace officer, and as a process server, a constable belongs analytically to the executive branch of government, even though his job is obviously related to the

courts. It is the constable's job to enforce the law and carry it out, just the same as the job of district attorney's, sheriffs and the police generally" (see In re Act 147 of 1990, 528 Pa., at 470, 598 A.2d 985 [citations omitted]). In fact, Pennsylvania constables have the right in Pennsylvania to conduct warrantless arrests for felonies and breaches of the peace, including warrantless arrests for felony violations of the drug laws (see Commonwealth v. Taylor, 450 Pa. Super. 583, 596, 677 A.2d 846, 852 [Pa. 1996]). They also have statutory powers of arrest in certain situations (see e.g. 32 P.S. §582; 53 P.S. §13349). Moreover, they are exempt from the need to have a carry license for their weapon pursuant to 18 Pa.C.S. § 6106. Therefore, this Court finds that a Pennsylvania constable is a "peace officer" of another state as that term is used in Penal Law § 265.20(a) [11].

Second, this Court must determine whether defendant was in New York to conduct official business within the State of New York. According to defendant, he was in the State of New York on official Pennsylvania Court business. Allegedly, defendant was here to serve warrants, which he had in his possession at the time of his arrest, issued by the Pennsylvania courts. If defendant was in fact in New York on official business at the time of his arrest, it seems to this Court that he is exempt under State law from prosecution. Based on the officer's testimony, and there is nothing in the Grand Jury minutes, which



contradicts the officer's testimony, this Court finds that defendant was in New York on official business. This Court does not view as relevant the fact that he was legally parked while awaiting a friend to whom he had offered a lift on his way to Brooklyn to serve and/or collect on an active warrant.<sup>7</sup>

Apparently recognizing this might cast doubt on whether he was in New York County on official business, defendant argues that, pursuant to 18 U.S.C. §629B, he is permitted to carry a weapon across state lines and that the instant prosecution is pre-empted by the Federal statute. 18 U.S.C. § 926B, also known as H.R.218 or the Law Enforcement Officers Safety Act of 2004, states, in pertinent part:

(a) Notwithstanding any other provision of the law of any State or any political subdivision thereof, an individual who is a qualified law enforcement officer and who is carrying the identification required by subsection (d) may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce, subject to subsection (b)....

(c) As used in this section, the term "qualified law enforcement officer" means an employee of a governmental agency who--

(1) is authorized by law to engage in or supervise the prevention, detection, investigation,

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<sup>7</sup>The Court notes that there is no indication in the Grand Jury minutes that defendant was not parked legally or that he was parked by a hydrant. In fact, it appears from the Grand Jury minutes that the officers did not approach defendant because of any illegality but rather because the officers believed that defendant's vehicle might be an unmarked police vehicle and that he might be an officer needing assistance.

or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers of arrest;

(2) is authorized by the agency to carry a firearm;

(3) is not the subject of any disciplinary action by the agency;

(4) meets standards, if any, established by the agency which require the employee to regularly qualify in the use of a firearm;

(5) is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and

(6) is not prohibited by Federal law from receiving a firearm.

(d) The identification required by this subsection is the photographic identification issued by the governmental agency for which the individual is employed as a law enforcement officer....

The Court notes that there is absolutely no case law or articles written about this statute apart from the Congressional Record statements at the time of its enactment. Thus, this is truly a case of first impression.

Looking at H.R. 218, in terms of the known facts in this case, the Court believes that defendant qualifies under it. As defendant points out, the office of the constable is mandated in the Pennsylvania State Constitution. Constables are elected, sworn law enforcement officers with mandatory training requirements and state powers to make an arrest, despite their lack of government funding. They are independent employees of the State of Pennsylvania whose identification cards are issued

by the County as a State identification. Additionally, they are paid for their services by the District Courts and/or the Comptroller's office.

The Court notes that the Grand Jury minutes reflect that defendant showed the arresting officers his badge and his official identification identifying him as a Pennsylvania constable, a fact that the officers themselves admit they verified. As already noted, the People basically concede that defendant is a constable.

Additionally, 42 Pa.C.S. § 2942 states that:

[w]hile a constable is performing duties other than judicial duties, regardless of whether or not he is certified under this subchapter, he shall not in any manner hold himself out to be active as an agent, employee or representative of any court, district justice or judge.

The clear implication of this statute is that when a constable is performing judicial duties, he is an agent employee and/or representative of the court, district justice or judge assigning the judicial duties to him. In this case, the People independently verified, by speaking with the assigning judge, that the warrant defendant claimed to be serving was assigned to defendant and was still active. Thus, he was clearly performing a judicial duty.

Moreover, a constable is elected within an electoral district, i.e. a ward, borough or the like. The elected constable, with the approval of the court, appoints deputy

constables (see 13 P.S. § 21; Com. v. Roose, 456 Pa. Super. 238, 240, 690 A.2d 268, 269 [Pa. Sup. 1997]; aff'd 551 Pa. 410, 710 A.2d 1129 [Pa. 1998]). Constables and deputy constables do not have uniforms and they are not provided with municipal vehicles but rather use their own private cars (see Com. v. Roose, 456 Pa. Super., at 241, 690 A.2d, at 269). They are not paid a salary by any municipal subdivision as police and sheriffs are, but are more like independent contractors whose pay is on a per job basis (see 13 P.S. §§ 63-75; Com. v. Roose, 456 Pa. Super., at 240, 690 A.2d, at 269). They are not considered State employees in order to receive legal representation when sued in connection with their duties (see Com. v. Roose, 456 Pa. Super., at 240, 690 A.2d, at 269). No one supervises constables in the way a police chief supervises police officers or a sheriff supervises deputies. No municipality is responsible for their actions in the way a city, borough or township is responsible for its sheriff's office. In fact, the Pennsylvania Supreme Court has found unconstitutional legislation which attempted to place constables under the supervisory authority of the courts (see In re Act 147 of 1990, 528 Pa. 460, 598 A.2d 985 [Pa. 1991]).

Despite being termed an "independent contractor" by the Courts, it appears that, with respect to the work done by a constable for a court, the constable is performing "judicial duties" and is in fact "employed" by the court, district justice

or judge which engaged his services. Again, according to defendant's attorney, defendant was actively performing judicial duties at the time of his arrest as he was on his way to serve warrants within New York State which were in his possession at the time of his arrest. Thus, there appears merit to defendant's argument that he is a government employee within the meaning of the term as it is used in 18 U.S.C. § 926B.

Moreover, pursuant to 13 P.S. § 31 [Intemperance, neglect of duty, malfeasance or misfeasance, petition; verification; additional security], the Pennsylvania courts of quarter session

...also have full power, on petition of any citizen or citizens of said county, setting forth the complaint, and verified by affidavit, to inquire into the official conduct of any constable of said county ... and to decree the removal of such constable from office, and to appoint a suitable person to fill the vacancy...

Thus, the fact that the Pennsylvania courts have full power to remove Pennsylvania State Constables from their positions and the fact that they are elected officials, conflicts with the People's theory that Pennsylvania State Constables are not government employees.

Based on this analysis, the Court finds that defendant is an "employee of a government agency" as that phrase is used in 18 U.S.C. § 926B. The Court has reviewed all the other requirements listed under this section and finds that Pennsylvania constables come under the protection of 18 U.S.C. § 926B. Accordingly, the

motion to dismiss the instant indictment is granted.

Moreover, looking at the legislative history behind this law, it seems that defendant, in his official capacity of constable and in performance of his statutorily authorized duties, was the type of individual the statute wanted preempted from prosecution. Congress drafted this legislation to help stop and deter crime throughout the country.

Assuming arguendo that Pennsylvania State Constables are "government employees," then defendant's prosecution is preempted by 18 U.S.C. § 926B, also known H.R. 218 or the Law Enforcement Officers Safety Act of 2004 appears to have merit. Accordingly, the motion for inspection and/or dismissal of the Grand Jury minutes, is granted to the extent that the Court has examined the Grand Jury minutes in camera and found the evidence before the Grand Jury to be legally insufficient. The People did not inform the Grand Jury that the instant prosecution was preempted if they found that the constable was here in the furtherance of his official duties or if he qualified as a law enforcement officer under H.R. 218. Accordingly, the motion to dismiss the indictment is granted.

Defendant's property, which was seized from him at the time of his arrest, is to be returned forthwith unless this Decision, Order and Judgment is stayed by virtue of the People filing an appeal from it in the Appellate Division, First Department.

This constitutes the decision, order and judgment of this  
Court.

ENTER:

A handwritten signature in cursive script, reading "Ronald A. Zweibel", written over a horizontal line.

Hon. Ronald A. Zweibel, J.S.C.

Dated: November 3, 2006