

NASSAU COUNTY FIRST DISTRICT COURT
FIRST DISTRICT : CRIMINAL PART 7

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

Index No.
2004NA002058

JOSHUA WHARTON,

Defendant.

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Monday, December 12, 2005
Hempstead, New York

B E F O R E : HONORABLE SONDR A K. PARDES
District Court Judge

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

DENIS DILLON, ESQ.
District Attorney of Nassau County
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Hempstead, New York 11550
BY: MICHAEL CANTY, ESQ.
Assistant District Attorney

MASSIMO & PANETTA, ESQS.
99 Quentin Roosevelt Boulevard
Garden City, New York 11530.
BY: NICHOLAS MASSIMO, ESQ.
Attorney for the Defendant

M I N U T E S O F B E N C H T R I A L

Reported by:
Jean H. Beskin
Official Court Reporter

1 THE CLERK: For the record, Number 1 on the
2 calendar, People versus Joshua Wharton.

3 People ready?

4 MR. CANTY: People ready?

5 THE CLERK: Defendant ready?

6 MR. MASSIMO: Defendant is ready.

7 I just received the Rosario.

8 THE COURT: You want to take a minute?

9 MR. MASSIMO: I asked the ADA if it applies to
10 the surveillance witness. I might ask for a few minutes
11 before we put the police officers on. I have no problem
12 going forward.

13 MR. CANTY: Your Honor, this is complete
14 Rosario pack. I can't speak definitively who it applies
15 to. It's any conversations I had with witnesses that
16 were documented are in this pact and also appended to
17 the pact which I put in. This is the Court's copy.

18 THE CLERK: Court 1.

19 MR. CANTY: The district attorney's notes that
20 were taken subsequent to the original pack being made.
21 The pact is complete at this time.

22 THE COURT: That's going to be marked Court
23 Exhibit 1.

24 COURT OFFICER: (Marking).

25 (The above-mentioned document, Rosario

1 Material, was marked Court Exhibit Number 1.)

2 THE COURT: Counsel, who is in the courtroom?

3 MR. MASSIMO: Defendant and his parents.

4 THE COURT: I am assuming his parents are not
5 going to be called as witnesses.

6 MR. MASSIMO: Actually, can we approach
7 briefly?

8 THE COURT: Yes.

9 (Discussion held off the record.)

10 MR. MASSIMO: The Advisement has been
11 executed.

12 THE COURT: It is going to be marked Court
13 Exhibit 1 and 2.

14 THE CLERK: 2 and 3.

15 THE COURT: I am sorry. 2 and 3.

16 COURT OFFICER: (Marking).

17 (The above-mentioned documents, Parker
18 Advisement and Antommarchi Waiver, were marked for
19 identification as Court Exhibits 2 and 3 respectively.)

20 THE COURT: Mr. Wharton, I have this document
21 here which is called a Parker Advisement. You have read
22 it and reviewed it with your attorney?

23 THE DEFENDANT: Yes.

24 THE COURT: You understand clearly you have a
25 right to be present. Once this trial starts, you are

1 expected to be here. And, if this trial continues to
2 tomorrow or even the next day, which is a possibility,
3 you must be in court, and I'm going to tell you if you
4 are not here, this trial is going to go on without you.

5 Do you understand that?

6 THE DEFENDANT: Yes.

7 THE COURT: The Court starts at nine-thirty in
8 the morning. We expect you here at nine-thirty in the
9 morning.

10 THE DEFENDANT: All right.

11 THE COURT: People, ready?

12 MR. CANTY: Yes, your Honor. May I proceed?

13 THE COURT: Please.

14 MR. CANTY: Thank you, your Honor.

15 Mr. Massimo, your Honor, this is a case about
16 a defendant who thought he was above the law. On
17 January 20, 2004 at approximately 8:45 at the Dunkin'
18 Donuts located on the southwest corner of Herricks Road
19 and Jericho Turnpike, this defendant violated five
20 counts of the Penal Law.

21 The People intend to call four witnesses in
22 this case: Detective Kouril, Detective DeCaro,
23 Ms. Suraya Swedy, and Swarna Wijebahu.

24 These witnesses will tell you that on the
25 evening of January 20, 2004 Officers Kouril and DeCaro

1 received a radio message for a mob trespass at Mineola
2 High School. They took the call in and proceeded to
3 Mineola High School along Armstrong Avenue located in
4 Mineola.

5 As they approached this school, they saw four
6 males traveling in the opposite direction away from the
7 school. When they arrived at this school, they were
8 informed by the athletic director that these individuals
9 had just left and one of the individuals refused to
10 leave when he was told to do so.

11 Based upon their training and experience they
12 suspected the four individuals they had just seen were
13 individuals they needed to speak to about a possible
14 trespass disturbance at the Mineola High School.

15 They immediately got back into their car,
16 traveled in the opposite direction from which they had
17 come eventually spotting the defendant and two other
18 individuals at the Dunkin' Donuts located in Mineola --
19 excuse me -- in Garden City Park. The officers entered
20 the Dunkin' Donuts and observed two individuals standing
21 over to the side by glass windows. They walked over to
22 inquire about whether or not those individuals were
23 involved in the possible trespass when the defendant,
24 who was about 10 feet away from the officers, yelled
25 out, fuck that. This is my hood. We don't have to talk

1 to you niggers. You might as well wait for me to finish
2 eating because I ain't talking to you. This is my hood
3 and you don't tell me what to do in my hood.

4 The defendant walked over to the table and the
5 officers were immediately alerted, based on his conduct.
6 They were unable to continue their investigation into
7 whether or not the two other individuals were involved
8 in this trespass.

9 They walked up to the defendant and asked him
10 to produce an ID. He refused. Again, yelling out that
11 he didn't have to show an ID to the police. Again they
12 asked for an identification. The defendant refused and
13 not only did he refuse, but he took the table he was
14 sitting at and shoved it into the leg of Detective
15 Philip Kouril.

16 At this point the officers decided they were
17 going to place the defendant under arrest for
18 obstruction of governmental administration because of
19 his conduct with interfering with their ability to
20 conduct an investigation in the trespass, as well as
21 disorderly conduct. It was the defendant's intent to
22 cause public inconvenience, annoyance, and alarm in
23 three different ways.

24 First, fighting or in violent, tumultuous
25 behavior in that the defendant took the table and shoved

1 it into the leg of an officer.

2 Second, a public place. He used abusive and
3 obscene language for no legitimate purpose.

4 And, third, create a hazardous or physically
5 offensive condition by any act which serves no
6 legitimate purpose other than to thwart the officer's
7 investigation.

8 The officers told the defendant he was going
9 to be placed under arrest and when they put their hand
10 on the defendant, he flailed his arms and refused to be
11 handcuffed. He refused to the point where one officer
12 was able to get handcuffs on this defendant. Eventually
13 the defendant needed to be put on the ground in order to
14 get the cuffs on him as he flailed his arms not allowing
15 the officers to conduct a valid arrest, based on the
16 charges he was facing.

17 Your Honor, that's the testimony the People
18 intend to proof through our four witnesses, and I'm
19 confident after you hear all their testimony and we
20 review all the evidence at the end of this case, you
21 will come to the only conclusion that is consistent with
22 the evidence, consistent with the facts that are
23 presented, and consistent with the law, and, that is,
24 this defendant is guilty of obstruction of governmental
25 administration, guilty of disorderly conduct, the three

1 counts in which he faces, and guilty of resisting arrest
2 in that these actions occurred here in Nassau County in
3 the State of New York, I ask you to return the only
4 verdict consistent with those facts and that's the
5 verdict of guilty. Thank you.

6 THE COURT: Mr. Massimo, do you wish to open?

7 MR. MASSIMO: Thank you.

8 May it please the Court, Mr. Wharton, this is
9 the case about abuse of authority. Contrary to what the
10 People say, this is a case about our most basic
11 constitutional rights, rights that derive from hundreds
12 of years ago.

13 This is a case about the First Amendment,
14 Article 1, Section 8, of the New York State
15 Constitution, freedom of speech, and officers exceeding
16 their authority.

17 On this evening my client was in a Dunkin'
18 Donuts. Two police officers walked in. According to
19 the officers, they were investigating a trespass of
20 Mineola High School. My client was not a suspect in
21 that trespass. He was there with two friends of his.

22 When the police officers came in and tried to
23 speak to Mr. Wharton -- I'm sorry -- to Mr. Wharton's
24 friends, Mr. Wharton said to these friends they didn't
25 have to speak to them. Mr. Wharton, himself, and his

1 friends did not have to speak to the police officers
2 and, indeed, when he did that, Mr. Wharton was
3 exercising a constitutional right, the right not to
4 speak to police officers, the right that not only falls
5 under the constitution, but the Court of Appeals has
6 made in People v. Johnson, which I will be presenting to
7 the Court before the end of this case, the police
8 overreacted. Feeling that Mr. Wharton is being a wise
9 guy to them, the police decided to teach him a lesson.

10 Now, the officers are going to tell you they
11 asked him for identification and he refused to give the
12 identification. I submit to this Court that Mr. Wharton
13 at that time was well within his constitutional rights
14 to do so, and there is law to that effect, as well.

15 According to the police officers, Mr. Wharton
16 allegedly pushed the table toward them. The evidence
17 will be contrary to such an allegation. The police
18 officers decided to place Mr. Wharton under arrest for
19 disorderly conduct. However, as the Court will see,
20 that this situation did not create a public disturbance,
21 and this is how that is defined under the law, that the
22 language that he used or allegedly used even from the
23 police officers allegations is protected by the First
24 Amendment of the United States Constitution and Article
25 1, Section 8, of the New York State Constitution. And,

1 indeed, the police officers instead of doing what the
2 United States Supreme Court has told police officers,
3 which is act like the bigger man and walk away from the
4 situation, did quite the opposite. They attempted to
5 place my client under arrest, though they had no
6 probable cause to believe he had committed any crime.

7 MR. CANTY: Objection. These are legal issues
8 you litigated before the trial, the factual part of the
9 trial. If he wants to raise any legal issue, they can
10 be done outside of the scope of the trial. The whole
11 purpose of the opening statement is to show the evidence
12 that produce or attack, not to the legal sufficiency of
13 the charge which is already adjudicated.

14 THE COURT: There was a motion on the
15 evidence. We don't have a jury here, counsel.

16 MR. MASSIMO: Your Honor, I submit to this
17 Court that after the evidence comes in this case, it
18 will be very clear a verdict of not guilty on all counts
19 is the only verdict consistent with justification.

20 It will be clear the People will be unable to
21 prove beyond a reasonable doubt that the defendant had
22 committed the act of disorderly conduct or there was
23 reason to believe he would.

24 It will be clear the defendant did not commit
25 the act of obstruction of governmental administration

1 and he did nothing. The arrest of the case was not
2 authorized nor did Mr. Wharton resist arrest, as you
3 will see on the tape. And, at the end of this case,
4 your Honor, I'm going to ask you to come back with the
5 only verdict that's consistent with the law, consistent
6 with the facts of this case, and consistent with
7 justice, and that will be a verdict of not guilty on all
8 charges. Thank you.

9 THE COURT: People.

10 MR. CANTY: At this time the People call
11 Ms. Swarna Wijebahu, S-W-A-R-N-A, W-I-J-E-B-E-H-U.

12 (The Court Officer left the courtroom and
13 returned shortly thereafter with the witness.)

14 THE CLERK: Step into the box, remain
15 standing, and raise your right hand.

16 Do you swear or affirm the testimony you are
17 about to give will be the truth, the whole truth, and
18 nothing but the truth?

19 You have to keep your voice up.

20 THE WITNESS: I'm going to tell the truth.

21 THE CLERK: Do you swear or affirm to tell the
22 truth?

23 THE WITNESS: Yes.

24 THE CLERK: Have a seat, please.

25 THE COURT: You have to speak very loud.