SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 71

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THE PEOPLE OF THE STATE OF NEW YORK

-against- Ind. No. 2721/09

RAFAEL GOLB,

Defendant.

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BERKMAN, J:

Defendant is charged with two counts of identity theft in the second degree, fifteen counts of identity theft in the third degree, ten counts of forgery in the third degree, fifteen counts of criminal impersonation in the second degree, P.L.§190.25(1), five counts of criminal impersonation in the second degree, P.L.§190.25(4), three counts of aggravated harassment in the second degree, P.L.§240.30(1)(a) and one count of unauthorized use of a computer. Defendant has asserted, *inter alia,* that the prosecution violates the right to freedom of speech, and seeks to controvert the search warrants on various grounds.

Leaving aside the standing issues with respect to the motion to controvert the search warrants, defendant's complaints as to allegedly material omissions (such as the failure to state that - as every holder of an email account knows - a user can choose any name for such an account) and material misstatements (primarily about the history of the Dead Sea Scrolls and related scholarship) are without merit. The warrants were issued on probable cause. The motion to controvert is in all respects denied.

As this court has previously ruled, the evidence before the grand jury was factually sufficient and the proceedings procedurally proper. Upon reviewing the submissions of counsel,

the court adheres to that ruling.

It is virtually impossible - and legally unnecessary - for this court to address all of the myriad of arguments raised by the defense at this point. Suffice it to say that the trial of the charges in this indictment will not resolve the controversy in the world of Dead Sea Scroll scholarship or even the issue (for example) of whether the accusation of plagiarism against one of the complainants is accurate.[1]

With respect to the First Amendment challenges, the People do not disagree with defendant that there is a constitutional right to speak anonymously or pseudonymously. The gravamen of the identity-theft and related charges, however, is the intentional assumption of specific identities of actual people - to wit, "individuals within and around the Dead Sea Scrolls community, namely Dr. Schiffman, Dr. Jonathan Seidel, Dr. Stephen Goranson, Dr. Frank Cross, and Jeffrey Gibson" (People's response, ¶31) - with the requisite intent to obtain a "benefit," as the statute broadly defines that term. As the People assert, "a reasonable view of the evidence indicates that defendant did not pick these names by mere 'coincidence'" (People's response, ¶52). From the evidence, various "benefits" suggest themselves, but there is no requirement that the benefit be financial or that the People specify further.[2] *People v. Mackey,* 49 N.Y.2d 274 (burglary).

With respect to the aggravated harassment counts, the constitutional challenge is more viable. This is particularly so as to any count or counts depending on proof of indirect

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1 It is this court's view that the "truth" of the Dead Sea Scrolls controversy or of the claims in the blogs or emails allegedly created by defendant is not relevant to any issue actually presented in this case, or as to any issue presented by this motion, whether the freedom of speech claims or the propriety of the warrants or the sufficiency of the evidence. As the defendant correctly argues in this motion, there is no longer a criminal penalty for libel, and neither good faith nor truth is a defense to any of the crimes charged here. Accordingly, absent a persuasive offer of proof in this regard, this court declines to enter into this fray.

2 The defendant's factual arguments are not pertinent here, either to the warrant or sufficiency issues.

communications. *People v. Dupont,* 107 A.D.2d, 247, 252.[3] Nonetheless, the statute has repeatedly been held constitutional on its face. *E.g., People v. Cooper,* 4 Misc.3d 788 (District Court, Nassau Cy), and cases therein cited. The final determination of this issue can and should be deferred until the development of a full trial record. Nor will this unfairly impact on the defendant's right to a fair trial. First of all, it is plain that the evidence with respect to the harassment counts, if not identical to the evidence of the other charges, is very similar. That evidence is in any event part of the narrative of the events relating to this prosecution and relevant at least to the required *mens rea* for all of the charges. Further, even as to the indirect harassment, this case is distinguishable from *Dupont*, as the evidence before the grand jury supports the inference that the communications initiated by defendant were targeted with the intent of having specific others communicate with the victim, and thus intentionally causing that victim annoyance and alarm. *People v. Kochanowski,* 186 Misc.2d 441 (App.Term 2nd Dep't).

The charge of unauthorized use of a computer is proper.

The court declines to issue an advisory opinion as to what defendant may or may not do under the order of protection in terms of his participation in the academic debate in which he is so interested. The best remedy for his uncertainty in this respect is a speedy trial, which this court strongly encourages.

The foregoing constitutes the order and opinion of the court.

Dated: New York, New York
February 11, 2010

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3 *Dupont's* reference to "communications transmitted directly to the complainant," at 252, is *dictum*, and thus does not mandate dismissal on that ground. Nor, contrary to defendant's argument, at page 8 of the Memorandum of Law (Counts 3, 40 and 48), has *Dupont* been read as striking down the statute. Indeed, there have been successful prosecutions since *Dupont* with a case by case analysis of the constitutional issues, and since *People v. Dietze,* 75 N.Y.2d 47 (a case also relied on by defendant to support his claim that the harassment charges are unconstitutionally brought).

CAROL BERKMAN