

STATE OF NEW YORK COUNTY OF WAYNE
LOCAL CRIMINAL COURT VILLAGE OF LYONS

THE PEOPLE OF THE STATE OF NEW YORK

vs.

**MOTION TO DISMISS
February 18, 2010 cases**

John Murtari,

Defendant.

SIRS:

PLEASE TAKE NOTICE that upon the included Affidavit of Andrew D. Correia, attorney for the Defendant herein a motion will be made at the Courthouse at Lyons, New York at the Court's convenience for the following relief:

Dismissal of Making Graffiti, Possession of Graffiti Instruments and Trespass charges.

Counsel for the Defendant hereby affirms and says:

1. I am duly licensed to practice law in the State of New York and am the attorney for the Defendant herein. All facts asserted in this motion are true to the best of counsel's knowledge and belief.

FACTS

2. John Murtari stands accused of Making Graffiti, Possession of Graffiti Instruments and Trespass. It is alleged that on February 18, 2010, at or about 8:50 AM, Mr. Murtari wrote in chalk on the wall of the old Wayne County Courthouse at 26 Church Street, Lyons. In addition, it is alleged that Mr. Murtari was trespassing as he entered upon the premises of the Wayne County Courthouse without "having a legal write [right] to do so." All charges are signed by Deputy Harry Aunkst. There are no supporting depositions. The charging documents do not allege that Deputy Aunkst witnessed any of these allegations, only that the information was obtained by "official police investigation." Upon information and belief, Deputy Aunkst did not observe the defendant doing any of the acts alleged, but got his information from another sheriff.

LEGAL ARGUMENT

3. The complaint must be dismissed as facially insufficient because it does not contain non-hearsay allegations which, if true, establish all the elements of the offense charged and the defendant's commission thereof. People v. Alejandro 70 N.Y.2d 133, 517 N.Y.S.2d 927.
4. **Making Graffiti**: The term “graffiti” is defined by statute [Penal Law 145.60] and requires that a mark be placed upon public property “with the intent of damaging such property.” Citizens are prohibited from making graffiti on public buildings without permission. The building in question here, 26 Church Street is a public building owned by Wayne County.
5. This charging document alleging Making Graffiti is insufficient because there is no fact alleged which demonstrates any intent to damage any property. Mr. Murtari made no statements indicating he intended to damage property, and writing with chalk does no damage to the property. The misdemeanor complaint must be dismissed as insufficient.
6. In addition, there is no allegation in the misdemeanor information that Deputy Aunkst personally observed any of the allegations. Therefore, there is no non-hearsay information contained in the charging documents. Based on that fact alone, this Court must dismiss the charge of Making Graffiti.
7. **Possession of Graffiti Instruments**: The identical argument applies to the Possession of Graffiti instruments charge. Whatever objects Mr. Mutari had in his possession, it can only become a criminal charge if there is evidence that he possessed those instruments “under circumstances evincing an intent to use...to damage...property.” [Penal Law 145.65] There is no allegation in the charging document with Mr. Murtari possessed any object with the intent to damage property. It is alleged he possessed chalk which he used to write on a wall. There was no intent to damage property and no fact supporting intent to damage property is alleged in the misdemeanor information. Therefore, the information is insufficient and must be dismissed.
8. **Trespass**: On February 18 at 8:45 AM Mr. Murtari was walking back and forth outside a public building. It is not alleged that he was acting disorderly, that he was creating a disturbance

or that he was creating a hazardous condition. He was peacefully present on public property. Mr. Murtari was arrested for Trespass under PL 140.05 as a violation.

9. There must be some valid reason alleged to exclude a citizen from a public building, and failure to express a reason in the charging documents results in a defective information which must be dismissed. See People v. Wolff, 63 Misc.2d 178, 312 N.Y.S.2d 721. There is no condition or judicial order that prohibits Mr. Murtari from being on the premises of the County Court building. Therefore, there was no trespass and the charging documents are insufficient and must be dismissed.

10. In addition, even though Deputy Aunkst has checked a box indicating that the allegations were made on personal knowledge and belief, it appears that he did not have first hand knowledge of the allegations. No supporting deposition is attached with respect to the trespass charge. Therefore the charging document is insufficient and must be dismissed.

CONCLUSION

11. The informations do not lay an adequate factual foundation. Therefore, all the informations must be dismissed.

Hereby affirmed on the
26th day of February, 2010.

ANDREW D. CORREIA
Attorney for Defendant