

NO. FST-CR19-0148554-T : **SUPERIOR COURT**
STATE OF CONNECTICUT : **J.D. of STAMFORD**
V. : **AT STAMFORD**
FOTIS DULOS : **JULY 24, 2019**

MOTION TO DISMISS

The defendant, through counsel, respectfully requests that the Court dismiss both of the charges against him on the grounds that there is insufficient evidence to warrant further proceedings. He raises this claim pursuant to Practice Book § 41-8(2), and § 41-8(8).

The defendant stands charged with two crimes that have no basis in the evidence or law. First, the charge of Hindering Prosecution is faulty on its face, there is simply no accompanying Felony charge that is statutorily required for the state to prove its case. Second, the charge of tampering with evidence finds no support in our caselaw, there is no evidence to support that the defendant knew that an official proceeding was imminent. Furthermore, the charge is logically inconsistent as the State has not charged the defendant with any underlying crime for which he was tampering evidence. This is telling, as the State, faced with a media firestorm, has clearly put the cart before the horse in charging the defendant.

The State's willingness to sacrifice the defendant's constitutional liberties in hopes of acquiring some evidence against him in the future simply cannot stand. Based on the lack of any supporting evidence produced by the State, the defendant respectfully requests that the charges against him be dismissed.

Factual Basis

The defendant, Fotis Dulos, was arrested pursuant to a warrant on June 2, 2019 and charged with one count of Tampering with Physical Evidence, pursuant to Conn. Gen. Stat. § 53a-155, and one count of Hindering Prosecution in the First Degree, pursuant to Conn. Gen. Stat. § 53a-165aa. Both counts relate to the alleged disposal of items believed to be associated with the disappearance of his wife, Jennifer Dulos, on May 24, 2019. He was arrested together with Michelle Troconis. Both parties have since been released on bond. The State's tawdry discovery compliance to date has forced the defendant to rely on press accounts, and a conclusory warrant affidavit¹ in order to prepare his defense.

A. The Disappearance of Jennifer Dulos

The discovery provided by the State has shown little more than the publicly available facts surrounding Mrs. Dulos' disappearance. Those facts are as follows: Jennifer Dulos was last seen on May 24, 2019, around 8:00 a.m., in the town of New Canaan, dropping her children off at school, a short distance from her home. She failed to attend one or more scheduled doctors' appointments later that day. At day's end, when Jennifer failed to return home, the New Canaan police were notified around 7:00 p.m. A search of Jennifer's residence showed potential signs of violence in the garage. There were bloodstains on the floor, blood splatter on one or more cars in the three-car garage, and evidence of an effort to clean up the blood. Officers located Jennifer's car

¹ For example, page 3 of the warrant application cites location data from the defendant's cell phone beginning at 1:37pm on 5/25/19 at his Farmington Residence, implying that the phone's prior whereabouts are unknown. Yet the State is fully aware that tracking data from earlier that same day was also gathered showing that Mr. Dulos' phone was at his residence all morning.

approximately 3 miles from her home, just North of the Meritt Parkway, near Waveny Park. Jennifer Dulos has not yet been located.

B. The Defendant's Alleged Conduct

The defendant was allegedly observed driving a pickup truck matching the description of one registered in his name on Albany Avenue in Hartford, on May 24, 2019 around 7:00 p.m. He was traveling with a woman matching Michelle Troconis' appearance. He is alleged to have been observed discarding several bags, at least one of which appeared to be blood stained, into trash receptacles along the road in that area. Additionally, he is alleged to have been observed placing a Fed Ex box into a storm drain. Police later retrieved these items. They contained blood stained clothing and a sponge. The blood therein was tested and matched Jennifer's. Inside the Fed Ex Box police found vehicle marker plates, last registered to Mr. Dulos in 2007, that appeared to have been altered to obscure the numbers.

C. Discovery Tendered on July 22, 2019

On July 22, 2019, the State provided undersigned counsel with discovery in the above captioned case. This discovery consisted of 26 separate CDs of surveillance videos, purporting to show the defendant. None of the discovery relates to events that may have taken place in the home of Jennifer Dulos on May 24, 2019. No evidence regarding additional co-defendants, or anyone related to the case, being charged with an A, B, or unclassified felony carrying a maximum penalty of ten or more years was disclosed by the State.

Legal Basis for Dismissal

Practice Book § 41-8(2) permits a motion to dismiss to be filed and considered by the Court prior to trial if there are, “[d]effects in the information including failure to charge an offense.” Practice Book § 41-8(8) permits a motion to dismiss to be filed and considered by the Court prior to trial if there is a “[c]laim that the law defining the offense charged is unconstitutional or otherwise invalid.”

As is set out in further detail below, the defendant contends that the State does not possess any evidence that he committed the crimes of Hindering Prosecution in the First Degree, in violation of Conn. Gen. Stat. § 53a-165aa, or Tampering with Physical Evidence, in violation of Conn. Gen. Stat. § 53a-155.

A. Hindering Prosecution in the First Degree, Conn. Gen. Stat. § 53a-165aa.

The defendant has been charged with Hindering Prosecution in the First Degree, pursuant to Conn. Gen. Stat. § 53a-165aa, which reads:

- (a) A person is guilty of hindering prosecution in the first degree when such person renders criminal assistance to another person who has committed a class A or B felony or an unclassified felony for which the maximum penalty is imprisonment for more than ten years and such other person committed such felony with intent to intimidate or coerce the civilian population or a unit of government.
- (b) Hindering prosecution in the first degree is a class C felony and any person found guilty under this section shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court.

Our statutes define “hindering prosecution” as follows:

As used in sections 53a-165aa, 53a-166 and 53a-167, a person “renders criminal assistance” when, with intent to prevent, hinder or delay the discovery or apprehension of, or the lodging of a criminal charge against, another person whom such person knows or believes has committed a felony or is being sought by law enforcement officials for the commission of a felony, or with intent to assist another person in profiting or benefiting from the commission of a felony, such person: (1) Harbors or conceals such other person; or (2) warns such other

person of impending discovery or apprehension; or (3) provides such other person with money, transportation, weapon, disguise or other means of avoiding discovery or apprehension; or (4) prevents or obstructs, by means of force, intimidation or deception, any person from performing an act which might aid in the discovery or apprehension of such other person or in the lodging of a criminal charge against such other person; or (5) suppresses, by an act of concealment, alteration or destruction, any physical evidence which might aid in the discovery or apprehension of such other person or in the lodging of a criminal charge against such other person; or (6) aids such other person to protect or expeditiously profit from an advantage derived from such crime.

Conn. Gen. Stat. § 53a-165.

Simply put, the State has failed to present evidence from which it can make a *prima facie* case for the crime of Hindering Prosecution. In this case, the State has presented no evidence that the defendant “render[ed] criminal assistance to another person who has committed a class A or B felony or an unclassified felony for which the maximum penalty is imprisonment for more than ten years.”

The co-defendant, Michelle Troconis, has been charged under docket number FST-CR19-0148553-T with the very same charges that the defendant stands charged: Tampering with Physical Evidence, a class D felony, and Hindering Prosecution, a class C felony. The State has not produced evidence of any other party being charged in the disappearance of Jennifer Dulos.

Because the State has failed to produce any evidence tending to show that he “render[ed] criminal assistance to another person who has committed a class A or B felony or an unclassified felony for which the maximum penalty is imprisonment for more than ten years,” they are unable to establish a *prima facie* case for the crime of Hindering Prosecution in the First Degree as a matter of law. As a result, the charge against him must be dismissed.

B. Tampering with Physical Evidence, Conn. Gen. Stat. § 53a-155

Connecticut General Statute § 53a-155 - Tampering with or Fabricating Physical

Evidence reads, in pertinent part:

(a) A person is guilty of tampering with or fabricating physical evidence if, believing that a criminal investigation conducted by a law enforcement agency or an official proceeding is pending, or about to be instituted, such person: (1) Alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such criminal investigation or official proceeding...

(b) Tampering with or fabricating physical evidence is a class D felony.

Conn. Gen. Stat. § 53a-155

1. The State has presented no evidence that the defendant “tampered with physical evidence”

In this case, the State has failed to present any evidence from which it could be found that the defendant tampered with physical evidence. Section 53a-155 is not meant to be used as a ballast for the State's rickety case, it requires proof and the additional charge of an underlying offense for which the “physical evidence” was proof of. Here the State is using the charge as a place holder, hoping that an underlying charge will turn up eventually. The charge of Tampering with Physical Evidence cannot stand on its own.

Mirriam-Webster defines evidence as: “1(a) an outward sign, 1(b) something that furnishes proof; (2) one who bears witness.” <https://www.merriam-webster.com/dictionary/evidence>. Connecticut Code of Evidence § 4-1 defines relevant evidence as: “evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence.”

While the State has alleged that the defendant disposed of bloodstained items at multiple locations while driving with his co-defendant, those bloody items are not evidence relevant to the criminal offenses that the State has charged. In other words, the charge of Tampering with Physical Evidence is necessarily concomitant to a second underlying offense, it cannot stand on its own. One must be “tampering” with evidence that points to another crime. Here, no other substantive crime has been charged. As a result, the charge against the defendant must be dismissed.

2. The State has provided no evidence that the defendant knew that an “official proceeding was pending,” or about to be instituted against him

The State has produced no evidence that the defendant knew that “an official proceeding was pending,” or about to be instituted against him. The State seemingly seeks to import “Consciousness of Guilt” evidence in a new and creative way in its charge of Tampering against the defendant. This runs contrary to established caselaw.

In *State v. Jordan*, 314 Conn. 354 (2014), the Supreme Court found that evidence was insufficient to sustain the defendant’s conviction for Tampering, where the defendant discarded a ski mask and jacket - used to conceal his identity during a bank robbery - immediately after being accosted by a police officer. In the case at bar, the defendant had far less reason to believe that any “official proceeding” was either pending or about to be instituted against him.

In *Jordan*, a bank employee witnessed the defendant attempt to rob the bank, and she alerted the police. *Id.*, at 359. A police officer near the bank heard the report over his radio and then observed the defendant. The officer called out, but the defendant ran. *Id.* When he lost sight of the police, the defendant disposed of his jacket

and mask. *Id.*, at 360. The Supreme Court concluded that because the defendant's clothing was the only evidence linking him to the attempted bank robbery, it would have been unreasonable for the jury to have inferred that the defendant believed that an official proceeding against him was probable when he disposed of the clothing. *Id.*, at 386. Rather, “the only reasonable inference from the facts in [*Jordan*] is that the defendant discarded his clothing to prevent its use in an investigation in order to escape detection and avoid being arrested by the pursuing police officer.” *Id.*, at 388–89.

In other words, “[t]he state ... must establish that the defendant (1) believed that an official proceeding was pending or about to be instituted, (2) discarded the evidence at issue, and (3) acted with the intent to prevent the use of the evidence at an official proceeding.” *State v. Jordan*, 314 Conn. 354, 377 (2014). With regard to the belief element, the statute applies “no matter what stage the police have *actually* reached in their investigation, as long as the defendant believes that it is *probable* that an official proceeding will arise.” (Emphasis in original.) *Id.* at 379; see also *State v. Foreshaw*, 214 Conn. 540, 550-51 (1990) (court rejecting defendant's argument that because defendant discarded gun prior to contact with law enforcement officers or judicial system, she could not have believed that official proceeding was about to be instituted - evidence showed multiple people witnessed defendant shoot victim); *State v. Guerra*, 167 Conn. App. 74 (2016) (court rejecting defendant's “no belief” argument based on evidence that defendant knew multiple people witnessed him in company of victim just prior to their death, defendant's brother had alerted their parents that victim had been

killed, defendant's comments to multiple witnesses that there was no evidence linking him to crime, defendant instructing people to ensure witness doesn't go to police.)

In this case, the State has presented no evidence whatsoever that the defendant had reason to believe that an official proceeding was pending or would ensue thereafter. Indeed, there is far less evidence of the defendant's "belief" in this case than there was in *Jordan*, a case overturned for lack of evidence. Here there is no evidence whatsoever that a trier of fact could conclude that the defendant should have believed that official proceedings would be brought against him. There is no evidence of witnesses, police involvement, or confidants. That State hasn't brought a charge for which the defendant should have anticipated official proceedings would be brought is telling. The State's apparent theory, that the defendant's actions displayed a consciousness of guilt, and that alone will support this charge simply doesn't hold water. The caselaw makes this clear.

There is a complete lack of evidence to support the State's charge of Tampering with evidence, and it must be dismissed.

Conclusion

The State does not know where Jennifer Dulos is. They do not know what has happened to her. In a rush to produce a suspect, they have pointed to the defendant and used circular logic to charge him with crimes - which are necessarily concomitant to other, underlying crimes - that they have not charged. They have put the cart before the horse and lack any evidentiary support for the crimes charged.

The defendant is unaware of any evidence in the possession of the state allowing them to make a *prima facie* case for either of the two offenses charged. Curtailing the

defendant's liberties and requiring him to prepare for trial in the face of a complete lack of evidence against him is constitutionally unjust and fundamentally unfair. As a result, the defendant respectfully requests that this Court dismiss the counts of Hindering Prosecution in the First Degree and Tampering with Physical Evidence.

The Defendant, Fotis Dulos

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ORDER

The foregoing motion having been heard, it is hereby ordered:

GRANTED / DENIED

_____, J

CERTIFICATION

This is to certify that a copy of the foregoing was faxed this 24th day of July, 2019 day of to:

State's Attorney – FAX 203-965-5791

/S/ NORMAN A. PATTIS /S/