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May 16, 2014

BY HAND

Hon. Ronald Zweibel
Supreme Court of the State of New York
100 Centre Street
New York, NY 10013

Re: People v. Cecily McMillan
Ind. 3627/12

SENTENCING MEMORANDUM

Dear Justice Zweibel:

This memorandum is submitted in support of the defendant's position that a sentence of incarceration beyond what Ms. McMillan has already served is unwarranted.

Sentencing Scope

The Court has several options in considering an appropriate sentence, after trial, for a conviction for the Class D violent felony of Assault 2°:

1. Imposition of a determinate sentence, the minimum for which is a term of two years imprisonment in a state facility;
2. Imposition of a definite sentence of one year or less in a local facility;
3. Imposition of a "split" sentence, with a definite term of 6 months or less followed by a period of probation of up to 5 years with appropriate conditions;
4. Imposition of an intermittent sentence.

(See *People v. Endresz*, 1 AD 3d 888, 767 NYS2d 732 (4th Dep't. 2003)).

Options 2 and 3 are available pursuant to P.L. § 70.00(4) where the Court is of the opinion that “a sentence of imprisonment is necessary but that it would be unduly harsh to impose an indeterminate or determinate sentence”, where the Court, “having regard for the nature and circumstances of the crime and the history and character of the defendant” takes those factors into account.

Nature and Circumstances of the Crime

By the jury's verdict, the defendant is convicted of assaulting a police officer with the intent to interfere with his lawful duties, in this case escorting her out of Zucotti Park on the night of March 17, 2012.

As the result of that assault, the officer suffered a black eye, a bruise on his cheekbone near the eye and immediate, if temporary, pain. The injury resulted in a visit to an optometrist to check the eye and several visits to a NYPD doctor who authorized an absence from duty for a period of two weeks, after which the officer was back on duty and fully functioning. He suffered what can best be described as a “sports” injury of the type often sustained in the heat of play in basketball or soccer where an elbow is thrown, intentionally or not, and strikes the orbital area of the eye. The injury was a soft-tissue one with no permanent damage or harm resulting.

The assault was committed in the course of the NYPD's clearing out Zucotti Park of the people who had gathered throughout the day to celebrate the 6 month anniversary of the short-lived Occupy Wall Street encampment which had been set-up there. With a claim that the Park needed to be cleaned at about midnight, a force estimated at 200 police officers began evicting the Park's occupants. Ms. McMillan, who was in the Park for other purposes, was caught up in this process and stands convicted of assaulting the officer who was escorting her out of the park, an officer who was also caught up in the eviction process.

Based on the officer's testimony, he interceded in a verbal argument Ms. McMillan was having with an unknown female police officer about whether she had to leave the park. Officer Bovell's intervention somehow calmed Ms. McMillan down and convinced her to accompany him out of the Park. One the way out, for no apparent reason, Ms. McMillan asked a bystander to film her as she delivered an elbow to the officer's face. The contact between the elbow and the face is captured on a grainy, low-quality video recording.

History and Character of the Defendant

Ms. McMillan testified at the trial and her background, education and accomplishments are part of the record. The salient sentencing facts are that she is a 25 year-old graduate student at the New School with no prior record of criminal convictions. She had a difficult childhood as the offspring of divorced parents, growing up in less than middle-class circumstances.

At approximately age 16 she became “emancipated” and transferred to high school in Atlanta, Georgia where she was active in theater, cheerleading, and political activity as a supporter of socially conscious elected officials. After High School, she went to college in Wisconsin receiving a BA in four years from Appleton College. In the summer of 2011 she came to New York City to pursue her graduate degree, sustaining herself by taking out educational loans and working as a nanny. She became an active participant in Occupy Wall Street activities in August 2011.

At OWS meetings and conferences she was outspoken in her advocacy of non-violent protest as a means of social change, putting forth electoral and legislative solutions to the myriad problems caused by income inequality identified as part of the OWS agenda. Her proposed solutions, impelled by her belief in the program and methods of the Democratic Socialists of America organization, were not adopted or accepted by the OWS General Assemblies, the policy making entity of the movement.

Her character as an advocate of non-violent solutions to social and political problems was supported by several witnesses at the trial as well as by the defendant herself. No serious challenge was or can be mounted to this central aspect of her character.

A Determinate Sentence Would Be Unduly Harsh

The sole penological purpose of sentencing Ms. McMillan to a determinate term of imprisonment would be to punish her for her unprovoked assault on a New York City Police Officer. But she has already been sufficiently punished for her transgression!

Testimony of both the prosecution and defense witnesses showed that as soon as the elbow was delivered to Officer Bovell’s eye, Ms. McMillan was violently arrested with several officers landing on top of her, including the assaulted officer. Her head hit the pavement several times in the effort to subdue her (video supports this conclusion) and she was put into a semi-conscious state by the force of the arrest. The video evidence shows that she was then forcibly removed to a detention area where she was seen (by unimpeached witnesses) as being in a state of shock and unresponsive to surrounding stimuli. Everyone who saw her in this area was

convinced that they were seeing a woman in serious distress, a conclusion supported by video and photographic evidence.

From the detention area where she remained handcuffed and untreated, she was placed on an MTA bus for transportation to a police precinct for processing. Shortly after being placed on the bus, she began “shaking”, causing the police to remove her from the bus and place her on the ground near the front door of the bus. There, she continued “shaking” for several more minutes, an event recorded on video and witnessed by many who concluded that she was having a seizure.

When the shaking stopped, she was still unresponsive and was carried across the street where she was placed on the ground, still unresponsive, and waited at least 10 minutes for emergency medical help to arrive, administer oxygen and eventually transport her to the Beekman Downtown emergency room.

Most of the foregoing description is documented on video evidence placed before the Court as Defense Exhibits H, I, K, L, and M. Some of these were admitted into evidence and some not, but the Court has had the opportunity to view them almost in their entirety. They should be taken into account.

After being released from arraignment some 40 hours after her arrest (and following another hospital visit) her injuries were photographed and documented: she had bruising all over her legs, arms and back, the results of her arrest process and the not unexpected responses of the police officers who had arrested her, obviously upset that one of their own had been assaulted.

A subsequent visit to her own Doctor at the Family Health Clinic in Manhattan confirmed the nature and extent of her soft-tissue injuries, which appear in the medical records of the clinic as well as photos taken of them. Her subsequent course of treatment at the clinic included a diagnosis of Post-Traumatic Stress Disorder and the beginnings of treatment for the disorder, a course of treatment which has not yet concluded.

Thus, punishment in the form of physical and psychic injury has already been given to Ms. McMillan. It was delivered in connection with her arrest, prior to the commencement of criminal proceedings, delivered in a summary fashion and must be considered as punishment for the criminal act which led to her arrest.

In short, because Ms. McMillan has already been severely punished, additional incarceration would be unduly harsh.

Sentencing Letters

A number of individuals have written to the Court expressing their opinions on the appropriate level of punishment for this case. They come from family members, close friends and those in a position to know who the defendant is and where she comes from. They also include a number of letters in the form of petitions from the general public who have read about the case and have chosen to publicly make their feelings known to the Court. While the Court is “independent” in the finest tradition of the American judiciary, these expressions of concern may be factored into the ultimate sentence delivered.

One additional letter delivered to the Court deserves special mention, the one from 9 of the 12 trial jurors who, upon learning that the defendant they had convicted was facing a substantial jail term, wrote to the Court to express their collective opinion that a jail term is not warranted. While their legal standing to make such a request is no greater than any other person, their collective wisdom, having heard all of the evidence in the case, should be given substantial weight. They write:

“We feel that the felony mark on Cecily’s record is punishment enough for this case and that it serves no purpose to Cecily or to society to incarcerate her for any amount of time.”

By this defense submission, we concur with the jurors. A sentence which does not involve additional incarceration is a just and proper one.

Submitted by,

Martin R. Stolar

cc: Erin Choi, Esq.

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Letters to the Court in Connection with Sentencing

Exhibit 1 - Family, School and personal contact attached to Sentencing Memorandum)

- The Jury
- The President and Provost of The New School
- Atlanta State Senator Nan Grogan Orrock
- James McMillan, father
- Tammy McMillan, step-mother
- Barbara Joye, ex-wife of Grandfather
- Martin Morand, oldest family friend
- Lynn Bender Max, wife of thesis mentor
- William Milberg, New School Dean and Professor of Economics
- Robert J. Croghan, Chairperson, Organization of Staff Analysts

Exhibit B - Letters from individuals with personal contact with Ms. McMillan
(19)

Exhibit C - Letters from interested people, individually written
(48)

Exhibit D - Petition signatures of approximately 500 people

Exhibit E - letters from Rikers Island Inmates
(4, although more were sent)

Large bound petition from Change.org - 43,000 signatories

Support for leniency publicly announced on May 12, 2014 Press Conference

City Council Persons: Robert Cornegy, Jr. (Ms. McMillan's district)

Helen Rosenthal

Mark Levine

Ydanis Rodriguez

Juumanee Williams

Ret. Episcopal Bishop George Packard