

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D18585
M/nl

_____AD3d_____

WILLIAM F. MASTRO, J.P.
REINALDO E. RIVERA
DAVID S. RITTER
HOWARD MILLER, JJ.

1998-05880
1998-11393

DECISION & ORDER ON MOTION

The People, etc., respondent, v Julio Borrell, a/k/a Julio Cesar Borrell, appellant.

(Ind. Nos. 3794/94, 4841/94)

Motion by the appellant, among other things, for leave to reargue his application for a writ of error coram nobis to vacate, on the ground of ineffective assistance of appellate counsel, a decision and order of this court dated June 21, 2004 (*People v Borrell*, 8 AD3d 583), affirming two judgments of the Supreme Court, Queens County, rendered June 11, 1998, under Indictment No. 3794/94, and December 10, 1998, under Indictment No. 4841/94, respectively. The application was determined by decision and order dated April 24, 2007. The appellant's prior motions for leave to reargue were determined by decisions and orders on motion dated June 20, 2007, and September 14, 2007.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the branch of the motion which is for leave to reargue the appellant's application for a writ of error coram nobis to vacate, on the ground of ineffective assistance of appellate counsel, a decision and order of this court dated June 21, 2004 (*People v Borrell*, 8 AD3d 583), affirming two judgments of the Supreme Court, Queens County, rendered June 11, 1998, under Indictment No. 3794/94, and December 10, 1998, under Indictment No. 4841/94, respectively, is granted, and the motion is otherwise denied; and it is further,

ORDERED that upon reargument, the decision and order dated April 24, 2007, is recalled and vacated, and the following is substituted therefor:

Application by the appellant for a writ of error coram nobis to vacate, on the ground

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of ineffective assistance of appellate counsel, a decision and order of this court dated June 21, 2004 (*People v Borrell*, 8 AD3d 583), affirming two judgments of the Supreme Court, Queens County, rendered June 11, 1998, under Indictment No. 3794/94, and December 10, 1998, under Indictment No. 4841/94, respectively.

ORDERED that the application is granted and the decision and order of this court dated June 21, 2004, is recalled and vacated, and the following is substituted therefor:

Andrew S. Worgan, Kew Gardens, N.Y. (Anne J. D'Elia, of counsel), for appellant, and appellant pro se.

Richard A. Brown, District Attorney Kew Gardens, N.Y., (John M. Castellano, Jeanette Lifschitz, and Ushir Pandit of counsel), for respondent.

Appeals by the defendant from (1) a judgment of the Supreme Court, Queens County (Eng, J.), rendered June 11, 1998, convicting him of robbery in the first degree (three counts), burglary in the second degree, criminal possession of a weapon in the third degree (three counts), criminal possession of a controlled substance in the third degree, and criminal possession of a weapon in the fourth degree (two counts) under Indictment No. 3794/94, upon a jury verdict, and imposing sentence, and (2) a judgment of the same court (Roman, J.), rendered December 10, 1998, convicting him of robbery in the first degree (six counts), assault in the first degree, criminal possession of a weapon in the second degree, and criminal possession of a weapon in the third degree under Indictment No. 4841/94, upon a jury verdict, *and imposing sentences of: 12½ to 25 years for each of the defendant's convictions of robbery in the first degree on counts one, two, three, four, five, and six of the indictment; 7½ to 15 years for his conviction of assault in the first degree on count seven of the indictment; 7½ to 15 years for his conviction of criminal possession of a weapon in the second degree on count eight of the indictment; and 3½ to 7 years for his conviction of criminal possession of a weapon in the third degree on count nine of the indictment, with the sentences on counts one, two, four, five, six, seven, and eight of the indictment to run concurrently with each other but consecutively to the sentence imposed on count three.* The appeals bring up for review the denial, after a hearing (Cooperman, J.), of that branch of the defendant's omnibus motion which was to suppress physical evidence.

ORDERED that the judgment rendered June 11, 1998, is modified, on the law, (1) by vacating the conviction of criminal possession of a weapon in the third degree under count 8 of Indictment No. 3794/94, and the convictions of criminal possession of a weapon in the fourth degree under counts 9 and 10 of Indictment No. 3794/94, and dismissing those counts of that indictment, and (2) by vacating the convictions of robbery in the first degree and burglary in the second degree under counts 1, 2, 3, and 4 of Indictment No. 3794/94; as so modified, the judgment rendered June 11, 1998, is affirmed, that branch of the defendant's omnibus motion which was to suppress physical evidence seized from his apartment is granted, and a new trial is ordered on the charges of robbery in the first degree and burglary in the second degree under counts 1, 2, 3, and 4 of Indictment No. 3794/94; and it is further,

ORDERED that the judgment rendered December 10, 1998, *is modified by providing*

that the sentences imposed on counts three and six of Indictment No. 4841/94 shall run concurrently with each other and consecutively to the sentences imposed under the remaining counts of that indictment; as so modified, the judgment is affirmed.

Contrary to the defendant's contention on appeal, the Supreme Court properly admitted evidence seized from his person and his vehicle at the time of his arrest (*see People v Knapp*, 52 NY2d 689, 694-695; *People v Hughes*, 138 AD2d 523, 524). Moreover, the Supreme Court properly found that, under the circumstances, the marital privilege did not apply to the defendant's communications with his wife (*see Matter of Vanderbilt*, 57 NY2d 66, 73; *People v Patterson*, 39 NY2d 288, 304, *affd* 432 US 197; *cf. People v Fediuk*, 66 NY2d 881).

However, the Supreme Court should have granted that branch of the defendant's omnibus motion which was to suppress the physical evidence seized from his apartment. The police were not authorized to conduct a warrantless search of the defendant's apartment when the key provided to them by the defendant's estranged wife proved to be non-functioning (*see People v Yalti*, 76 AD2d 847). Thus, the evidence obtained as a result of the search should have been suppressed (*id.*). Accordingly, the convictions supported by this evidence must be vacated, and the counts of Indictment No. 3794/94 relating to possession of weapons recovered from the search of the defendant's apartment must be dismissed (*see CPL 470.20[3]*; *People v Rossi*, 80 NY2d 952; *cf. People v Perkins*, 189 AD2d 830).

Furthermore, since the evidence of distinctive clothing recovered during the search should also have been suppressed, and the clothing provided significant support for the identification of the defendant as the masked man responsible for the robberies and burglary charged under Indictment No. 3794/94, the convictions with respect to those counts must be vacated, and a new trial is required on those counts.

The Supreme Court erred when it directed that the sentence imposed on count three of Indictment No. 4841/94, run consecutively to the sentence imposed on count six. Since the convictions under those counts both arose from a single transaction, the sentences imposed on those counts must run concurrently with each other (see People v Ramirez, 89 NY2d 444, 451). Nonetheless, we deem it appropriate to direct that the concurrent sentences imposed on counts three and six run consecutively to the sentences imposed on the remaining counts of that indictment (id. at 454).

The defendant's remaining contentions, including those raised in his supplemental pro se brief, are without merit.

MASTRO, J.P., RIVERA, RITTER and MILLER, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court