

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART K-4

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THE PEOPLE OF THE STATE OF NEW YORK :
: BY: WILLIAM M. ERLBAUM, J.
:
-against- : DATE: APRIL 4, 2006
:
BENJAMIN LINO, : INDICT. NO. 2215/05
DEFENDANT. :

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The defendant, Benjamin Lino, is charged with multiple counts of Criminal Contempt in the First and Second Degrees. He has submitted a motion, dated December 27, 2005, seeking an order of examination pursuant to CPL §730.30, claiming that his mental condition has "clearly degenerated to the degree that he cannot assist in his own defense" (Defendant's motion, p4). In his initial motion papers, defense counsel contends that there has been a "progressive debilitation of the defendant's faculties" (id.) and that although the defendant appears to understand "the functions of the court, counsel, prosecutor and jury", he "fails to understand the criminality of the allegations" (id.). Counsel also asserts that a social worker who has experience with mental hygiene problems and who has interviewed the defendant "appear[s] to

support" his position "that the defendant cannot assist in his own defense because of a mental disease or defect (id p. 5). Finally, he cites as additional support for his position the fact that the defendant was referred for "psychiatric assessment" by the Department of Corrections. In a supplemental motion, dated March 6, 2006, defense counsel claims that the defendant "appears to be delusional", and that the defendant's letters to the complainant in this case are "disorganized and obsessive" and "display a preoccupation with religious matters" which "can be a symptom of a mental health disorder" (Supplemental motion p. 11). The People, in an Answering Affirmation dated January 6, 2006, take no position with respect to the motion.

Criminal Procedure Law §730.30(1) provides, in pertinent part, that a court in which a criminal action is pending "must issue an order of examination when it is of the opinion that the defendant may be an incapacitated person". The term "incapacitated person" is defined in CPL §730.10(1) as "a defendant who, as a result of mental disease or defect, lacks capacity to understand the proceedings against him or to assist in his own defense". However, ordering a competency examination pursuant to CPL §730.30(1) "lies within the sound discretion of the trial court" (People v Morgan, 87 NY2d 878, 879 (1995)). A defendant is "presumed competent", and the court "is under no obligation to issue an order of examination

unless it has reasonable grounds to believe that the defendant is an incapacitated person" (id. p. 880).

In the opinion of the Court, there is no reasonable ground to believe that the defendant is incapacitated, as that term is defined by New York Law. The moving papers submitted by defense counsel are, for the most part, conclusory in nature, devoid of factual support as to in what way the defendant is unable to assist in his own defense or is otherwise incapacitated by virtue of a mental disease or defect. The sole support for his position is a memo from defense social worker Anne Pentola, dated December 21, 2006 and submitted along with defendant's initial motion, which the court finds to be insufficient to demonstrate that the defendant is incapacitated. In the memo, the defendant's attitude was characterized as alternating "between cooperative, hostile, and angry", evinced by standing up, raising his voice, and walking out of the cubicle, and his mood "ranged from normal to irritable to angry, then sad", crying about his wife when asked questions. He was described as appearing "fixated on his wife's mental illness" and seemed to have impaired judgment, as evidenced by his statement, when confronted with the amount of jail time he was facing, that he was "willing to go to jail to 'save' his wife" and that while in jail he could "work on his career as an architect". However, there is no indication that notwithstanding the

defendant's attitude, mood, or affect that he would be unable to rationally assist in his defense or that he lacks the capacity to understand the proceedings against him. A defendant may be delusional, but nevertheless not incapacitated under Article 730 (See, People v Ciborowski, 302 AD2d 620 [3d Dept 2003], appeal denied 100 NY2d 579 (2003); see also, People v Shiffer, 256 AD2d 818 (3d Dept 1998), appeal denied 93 NY2d 878 (1999)). The same is true for being hostile and cynical (People v Shiffer, supra), over-emotional (People v Harris, 109 AD2d 351 (2d Dept 1985)), or suffering from other psychological problems (see, People v Surdis, 23 AD3d 841 [3d Dept 2005]; People v Stonis, 246 AD2d 911 [3d Dept 1998], appeal denied 92 NY2d 883 [1998]). Furthermore, not only were the characterizations not necessarily indicative of incapacitation, but Ms. Pentola noted in her memo that the defendant "presented as oriented to person, time and place", had an adequate attention span, "denied suicidal or homicidal indication", agreed to speak to a psychiatrist "for support in the burden he is carrying", and refused to take psychotropic medications, which the court finds tends to rebut a finding that he was incapacitated. In addition, although Ms. Pentola's memo referred to a letter written to her by the defendant, which she claimed was "rambling", "delusional", and "obsessive", no copy of this letter was provided for this court's consideration. The memo also cited a psychiatric

evaluation held at GMDC, but again, no copy was provided to the court. The court would point out that it did not demand production of these documents, as claimed in defendant's supplemental motion (p.4), but merely noted for the record that although Ms. Pentola's memo indicated that they were appended to the memo, they were not and therefore cannot be considered by the court in making its determination.

The court further notes that not only are the papers submitted in furtherance of the defendant's motion for a competency hearing inadequate to lead the court to reasonably believe that the defendant is an incapacitated person, but that the interaction the court has had with the defendant clearly leads to the opposite conclusion.

On December 8, 2005, the court questioned the defendant, who told him that he was being housed on Rikers Island, that he was not in a mental observation unit, and that he knew who the parties in court were and that he had been charged with a crime. On January 3, 2006, the defendant advised the court that although he was being held in a mental observation unit, he was not offered, nor did he feel he needed, medication. On January 11, 2006, the defendant advised the court that he had not been getting medical attention for his legs and back because he had been placed in a mental observation unit at Rikers Island. He told the court that he did

not want any medication, claiming that there was nothing wrong with him. He then said,

I don't think I need psychiatric evaluation because I have never been mentally psychiatric or whatever. I am a sound individual. I know everything that's happening around me, your Honor, and I know that I have already been charged for this crime once, and I am here to say that I am, you know, going through what I understand. You are the same judge that sentenced me to this crime before and I came back and it's the same element so I don't think I need any psychiatric evaluation...

(Calendar Call Minutes, 1/11/06, p. 8). When the court asked the defendant if he had sentenced him on a prior case, the defendant stated that it was a "prior case, same charge" (*id.*). On February 7, 2006, the defendant advised the court that he was no longer in the psychiatric unit but was back in the general population. He then asked the court, "Why is this taking so long, your Honor. I asked for a speedy trial. I ask for my lawyer to put in all the motions." (Calendar Call Minutes, 2/7/06, p. 4). On March 14, 2006, in response to the court's query as to whether the defendant was in the mental observation unit, the defendant replied that he "had been transferred" from that unit a month or two months earlier and was in the general population. He indicated that he was not being offered any medication, that he was doing all right, and knew who the parties in court were. The defendant then advised the court that he opposed the 730 examination and that he was "still

trying to figure out" why he was not getting his speedy trial, claiming that he had been ready for trial since September 13th. Finally, on March 23, 2006, the defendant once again advised the court that he was not in a psychiatric unit, that he was not having any problems in the general population, that he was not being offered medication, and that no one was bothering him. He described his morning ritual at the prison and again indicated that he understood the parties in court and the roles they played. The defendant then conferred with this attorney about the speedy trial issue, indicating to the court that he understood his lawyer. Defense counsel also indicated at this time that he had no trouble understanding the defendant.

It is settled law that a judge determining whether a competency hearing is necessary may consider his "progressive personal observations of the defendant" (People v Gensler, 72 NY2d 239 [1988]; People v Tortorici, 92 NY2d 757 [1999], cert denied 528 US 834 [1999]; People v Morgan, supra), and it appears to the court that on the basis of its interaction with the defendant, there are no reasonable grounds upon which to make a determination that he is incapacitated. The defendant gave appropriate responses to the court's inquiry. His communication with the court was lucid and responsive. He seemed to know why he was in court, who the parties to the litigation were, and their roles in the adjudicative

process. He understood the nature of the Article 730 procedure and opposed it, claiming to be a "sound individual". He also knew that he had been charged with the same crime before and had been sentenced by this court in connection with that charge. In short, he does not appear to be incapacitated, so that a competency hearing need not be ordered.

In People v Russell, 74 NY2d 901 [1989], the Court of Appeals held that the trial court did not abuse his discretion when he refused to grant defense counsel's request for a mental competency examination of the defendant. In so holding, the Court cited the trial court's "direct encounters with the defendant" and his "overall ability to observe the defendant" in court, which gave him "ample opportunity to assess the defendant's ability..." (see, People v Morgan, supra).

In People v Yoho, 24 AD3d 1247 [4th Dept 2005], the Appellate Division held that the court did not abuse its discretion in failing to order a competency hearing, despite the fact that the defendant was being treated for a mental disability, noting that the defendant "responded appropriately to questioning by the court".

In People v Surdis, supra, the Appellate Division upheld the trial court's failure to order an Article 730 hearing, holding that although the trial court "was aware of the defendant's past

psychological problems", this knowledge "is not dispositive, especially in light of defendant's cogent and lucid communication with the court".

In People v Jordan, 21 AD3d 1039 [2d Dept 2005], appeal denied 5 NY3d 885 [2005], the Second Department held that "[c]ontrary to the defendant's contentions", the court was entitled to rely "on its own observations of and interactions with the defendant", and "providently exercised its discretion in denying the defendant's repeated applications for competency examinations".

In People v Stonis, supra, the Third Department held that although it was "clear that defendant suffered from a long history of mental illness", the court "did not abuse its discretion" by failing to order a competency examination. It found that notwithstanding the defendant's psychiatric history, there was "nothing to suggest" that the defendant was incapacitated, noting that the defendant's responses to the court's inquiries "were at all times appropriate".

In the case at bar, there is no indication that the defendant has a history of psychiatric problems and in any event, it appears clear that this is not dispositive of whether or not he is incapacitated. Accordingly, the court finds that there is no basis upon which to order an Article 730 competency hearing.

Based upon the foregoing, the defendant's motion for an order

of examination pursuant to CPL §730.30 is denied.

This constitutes the decision and order of the Court.

The Clerk of the Court is directed to distribute copies of this decision and order to the attorney for the defendant and to the District Attorney.

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WILLIAM M. ERLBAUM, J.S.C.