

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART K-19

THE PEOPLE OF THE STATE OF NEW YORK : BY: STEPHEN A. KNOPF
: :
: DATED: 6/26/06
: :
-against- : :
: INDICTMENT NO. 1432/05
: :
WILLIE PAYNE : :
: :
Defendant : :
-----:

The defendant moves to set aside the verdict of guilty rendered herein and requests that this court order a new trial pursuant to CPL §§ 330.30, 330.40 and 330.50. The People oppose this motion.

FACTUAL BACKGROUND

This case arose out of an incident on April 13, 2005 at about 7:15pm at 153-32 119th Road in Jamaica, Queens. The complainant allegedly observed the defendant smash the rear window of his car. When the complainant attempted to apprehend the defendant, the defendant slashed the complainant's left check with what appeared to be a shiny knife or a box cutter causing a

laceration requiring 32 stitches to close. The defendant fled the scene but was subsequently arrested.

On May 8, 2005, the defendant was arrested after the complainant recognized him in the same neighborhood and pointed him out to the police. It should be noted that the complainant was the only person to witness the event, and therefore this is a one-witness identification case.

The defendant was indicted for assault in the first degree, assault in the second degree, criminal possession of a weapon in the fourth degree and criminal mischief in the fourth degree.

Before commencement of the trial a Sandoval hearing was held before the court. The defendant has a rather lengthy criminal record exceeding in duration the past thirty years.

Starting with the defendant's most recent conviction, the People sought to introduce evidence of the defendant's January 4, 1999 conviction for criminal sale of a controlled substance in the third degree (a class B felony). The Court ruled the prosecutor may inquire about the conviction and underlying facts

and circumstances of this case, as well as defendant's use of the alias William Walker.

The People sought to introduce evidence of the defendant's January 19, 1996 conviction for criminal sale of a controlled substance in the fifth degree; a class "D" felony. In a Sandoval compromise the Court limited the prosecutor's inquiry to the fact that the defendant was convicted of a felony and the defendant's use of the alias William Walker, but the prosecutor was not permitted to inquire as to the underlying facts and circumstance of the conviction.

The People also sought to introduce evidence of the defendant's October 24, 1994 conviction for criminal possession of a controlled substance in the seventh degree, a class "A" misdemeanor. In a Sandoval compromise, the Court limited the prosecutor's inquiry to the fact that the defendant was convicted of a misdemeanor and defendant's use of the alias William Walker.

As to defendant's December 3, 1993 conviction for criminal possession of a controlled substance in the seventh degree, the Court precluded any questioning about this conviction at all,

ruling that it was too remote in time and that to allow it would permit too much focus on drugs.

Also precluded from use on cross-examination was the March 10, 1992 conviction for unauthorized use of a vehicle (class A misdemeanor) as the case was too remote in time and the facts were too similar to the facts of the case as bar. The Court also ruled that the August 5, 1991 conviction for attempted criminal sale of a controlled substance in the third degree was precluded for being too remote in time.

As to defendant's December 15, 1995 conviction (stemming from a July 1989 arrest) for unauthorized use of a vehicle, in a Sandoval compromise the Court limited the prosecutor's inquiry to the fact that the defendant was convicted of a misdemeanor. The Court further ruled the People may question the defendant about the period of time that he warranted in this case and his use of the alias Robert Smith.

All of the defendant's previous out of state convictions were deemed too remote in time to be relevant.

The evidentiary portion of the trial commenced the afternoon of January 25, 2006. Both sides summed up during the morning session of January 30, 2006. The Court's charge was completed later that afternoon.

The jury began deliberations in the late afternoon of January 30, 2006 and were excused at 5p.m. that evening. Deliberations resumed on January 31, 2006, where upon the jury requested a read back of the complainant's testimony. At 4:36pm the jury sent a note stating that they were unable to reach a unanimous verdict. The Court gave the jury a deadlock instruction. The jury was excused at 5:07pm.

In the afternoon of February 1, 2006, the Court received a note at 2:04p.m. stating that "Juror # 4 has past experience that is influencing his verdict". At that point, defense counsel made a motion for a mistrial on the ground that the jury had still not reached a verdict and that the note implies that there is certain misconduct on behalf of one of the jurors; that the conduct of one juror had tainted the deliberations and that it seems like there was a breakdown in the jury deliberations due to this one

juror. Defense counsel further argued that anything the Court did would only highlight the problem.

After conferring with both sides, the Court decided to give the entire jury a specific charge on special knowledge or experience of a juror adapting a charge addressed to juror expertise, see People v Maragh 94 NY2d 569 (2000), to this specific case.

The defense objected to the charge, arguing that whether juror # 4 was signaled out or not, everyone would know that it was juror # 4 being referred to in the charge. The defense further argued that such a charge would be coercive to juror # 4 and any verdict after it would be a compromised verdict. Additionally, counsel stated the charge was too vague.

After much discussion and to avoid speculation the Court decided to speak directly to juror # 4. The juror was brought before the court and the attorneys. The Court asked the juror to state his name, which he did.

Then the Court said:

"Mr. Sang, I have a communication from the jury. Are you aware that they sent out a note concerning you."

The Juror:

"Yes"

The Court:

"So this comes to no shock to you. The note is dated today and the time is 2:04 signed by the foreperson and the note says to me, Juror Number 4 has past experience that is influencing his verdict. I am going to merely ask you whether you believe that this is the case, just yes or no?"

The Juror:

"No, I don't believe it"

The Court:

" Is there a specific past experience of yours that you believe is being referred to in this note?"

The Juror:

"Yes"

The Court:

" I think that you are going to have to tell me what that is. Again, we will deal with everything after he leaves. Tell me what that is."

The Juror:

"I told the jurors that, actually - -"

The Court:

"You have to say it in front of the lawyers, we can appreciate this is a very delicate stage"

The Juror:

"All right. In the past when I was much younger there was a case where I was with a friend of mine

where someone else had a vehicle that was broken into. I don't know this person, but we were at a park and he came by with a police officer and said that my friend was the person that broke into his vehicle."

The Court:

"And it wasn't your friend who -"

The Juror:

"No, it was not."

The Court:

"You know that."

The Juror:

"Yes, sir I was with him."

The Court:

"You were with him and you know that he did not do it."

The Juror:

"Yes."

The Court:

"So my question to you and you mentioned this obviously when you were in the room deliberating, otherwise the other jurors would not know that?"

The Juror:

"Right."

The Court:

" All right. We are all agreed on that. You do not believe that is influencing your verdict?"

The Juror:

"I do not believe it."

The Court:

"I do want not to know what your verdict is, you do not believe that is influencing you?"

The Juror:

"I don't believe it."

The Court:

"All right, we are going to leave it at that. You can go back to the juror room. I appreciate you being candid."

After the juror left the courtroom, the defense reiterated their position, that any additional instruction by the Court would further highlight the juror and forcing the jury to deliberate further would be coercive on the hold out juror. The People withdrew their application for a mistrial.

The Court denied defendant's motion for a mistrial. After further discussion with both parties, the Court determined that this was not a dead lock situation and brought into the courtroom the entire jury. The Court then gave the jury the modified Juror Expertise charge.

The following is the charge the court gave to the jury:

The Court:

"Hello, ladies and gentlemen of the jury, all right, I am going to give you the following instruction and after I give you this instruction I am going to send you back at least one more time to continue your deliberations and we are going to take it from there."

All right, ladies and gentlemen of the jury, in evaluating the evidence and the issues presented you should use your common sense and knowledge and experience just as you would in making decisions in daily life.

Now, when I speak of knowledge and experience in this context I mean the sort of knowledge and experience that an average person would acquire in life. Indeed, when you were selected we all told you to use your common sense and you certainly can, you know, you are in your common sense relying on your past experience. We do not tell you to leave that at the door.

Some of you, however, may have something more than ordinary knowledge or experience in a certain area. Indeed, it may be that you have developed a special knowledge or experience in a certain area that would be well beyond what the average person would have. If you have such a special knowledge or experience and it relates to some material issue in this case it would be wrong for you to rely on such to interject that into your deliberations, either as a fact that is not in evidence or inferable from the evidence, or an opinion that could not be drawn from the evidence by a person without that special knowledge or experience.

The reason that it would be wrong to do so is that you must decide this case only on the evidence presented to you in the courtroom. So any particular specialized experience that happened to anyone of you is not the evidence in this case.

Therefore, with respect to any material issues in this case, again, you must not use any special knowledge or experience you have to insert into the deliberations evidence that has not been presented in the courtroom during the trial.

Well, I hope that instruction is helpful so I am going to ask you one more time to continue your deliberations and please let us know if you have any further questions."

After the jury left the courtroom, the defense renewed their application for a mistrial. Defense counsel argued that it was a error to charge the jury that they are wrong to rely on special prior experience; that the Court was in essence communicating to juror # 4 that he is wrong to rely on his special prior experience while at the same time telling the jurors they should use common sense, knowledge and experience.

The People opposed the defendant's application for a mistrial and supported the Court's charge to the jury. The Court,

while recognizing counsel's arguments regarding the claimed inconsistencies in giving such a charge, stood by the charge insofar as it properly communicated to the jury the concept that if anyone on the jury had such a special knowledge or experience, and if it related to some material issue in the case, it would be wrong to rely on such to inject into the deliberations either a fact that is not in evidence or inferable from the evidence, or an opinion that could not be drawn from the evidence by a person without that special knowledge or experience.

At 4:47pm that day, the jury rendered a verdict. The jury found the defendant not guilty of the top count of assault in the first degree, but guilty of the next two counts assault in the second degree and criminal possession of a weapon in the fourth degree. The defendant was acquitted of the last count of criminal mischief in the fourth degree.

LEGAL ARGUMENTS

In this motion to set aside the verdict, the defendant claims that the Court's questioning of juror # 4 was improper, that the Court's supplemental charge to the jury was erroneous,

coercive and unbalanced; that the prosecutor improperly vouched for the credibility of her witness on summation, the Court's Sandoval ruling prevented the defendant from testifying and was an abuse of discretion and the verdict was against the weight of the evidence. In response, the People assert that the defendant's motion should be denied in its entirety because the questioning of the single juror and subsequent charge given to the panel was necessary and proper to ensure a fair and impartial verdict, that the Court did not abuse its discretion in making its Sandoval ruling nor did it prevent the defendant from testifying, that the People's summation comments were proper and that viewing the evidence "in the light most favorable to the prosecution", the jury verdict should not be disturbed.

LEGAL ANALYSIS

THE QUESTIONING OF JUROR # 4

The defendant claims that the questioning of juror # 4 was improper; that he was singled out for non-compliance with the majority. The People respond that indeed, it was not the Court that singled out the juror, but rather the jury itself that

singled out juror # 4 in the note delivered to the Court stating that juror # 4 has past experience that is influencing his verdict.

The initial issue that must be addressed by this Court is whether or not the communication with juror # 4 was appropriate and lawful. When the note was received from the jury, this Court needed to investigate the accuracy of defense counsel's argument that the jury note implied certain misconduct on behalf of one of the jurors and that his conduct tainted the deliberations. Indeed, the issue that needed to be resolved was whether or not juror # 4 was at that point qualified to remain as a juror and whether or not it was appropriate to then declare a mistrial.

CPL § 270.35 (1) states in pertinent part: "If at any time after the trial jury has been sworn and before the rendition of its verdict.....the court finds, from the facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve in the case or has engaged in misconduct of a substantial nature, but not warranting the declaration of a mistrial, the court must discharge such juror". A juror is deemed

to be "grossly unqualified" only "...when it becomes obvious that a particular juror possesses a state of mind which would prevent the rendering of an impartial verdict". See also People v West, 92 AD2d 620,622 (1983)62 NY2d 708 (1984), (Mahoney, P.J. dissenting) revd on dissenting opinion below. People v Buford, 69 NY2d 290 (1987)." The disqualification determination is to be made on a case-by-case basis after a "probing and tactful inquiry", into the 'unique facts'. (People v Buford, *supra*, at 299) and great deference is to be given to the trial court's findings. People v Matiash, 197 AD2d 794, 795 (1993). "The Trial Judge generally is accorded latitude in making the findings necessary to determine whether a juror is grossly unqualified under CPL § 270.35, because that judge is in the best position to assess partiality in an allegedly biased juror (see, People v Michael, 48 NY2d 1,10)." People v Rodriguez, 71 NY2d 214, 219 (1988).

This court gave much consideration to the issue of whether or not the most prudent course of action was to bring out juror # 4 for the sole purpose of determining what was being referred to

in the jury note related to his past experience that was influencing his verdict. Considerable discussion with counsel took place before the Court decided which way to proceed. In the final analysis, both the court and counsel would only be forced to speculate as to what the issue was without making this inquiry of juror # 4.

While the defendant cites the case of People v Perfetto, 96 Ad2d 517 (1983) for the proposition that a private discussion with an individual juror during deliberations has a coercive effect on the juror, one must look at the totality of circumstances surrounding the situation. In the case at bar, the court was only addressing the situation created by the jury. The discussion between the judge and the juror was merely for the purpose of information gathering on the part of the Court. This discussion out of the presence of the other jurors was entirely neutral in nature, and "...not inherently improper or coercive..." People v Rivera, 225 AD2d 638 (1996).

After hearing the juror's direct and unequivocal answers the Court did not try to change the juror's view or get him to

capitulate. Under the circumstances of the facts of this case, and after carefully listening to all ideas and suggestions on the part of both attorneys, the Court exercised extreme sensitivity, and utmost discretion in making its inquiry of this juror in the most non-coercive, non-threatening manner possible.

After questioning juror # 4, it was clear to this Court that there was no legal basis for removal of the juror. The juror unequivocally denied that his specific past experience was influencing his verdict. This Court further concluded that while this juror's discussion of this specific past experience with the other jurors did not equate with juror misconduct warranting the declaration of a mistrial, the Court did need to address this situation with the jury as a whole.

THE SUPPLEMENTAL CHARGE

After sending juror number 4 back to the jury room, the Court brought the entire jury into the courtroom to give them a further instruction. The Court gave a modified version of a jury instruction related to juror expertise. See People v Maragh, 94 NY2d 569 (2000); People v Arnold, 96 NY2d 358 (2001). The charge

was modified in that whenever the term "special expertise" was used, the Court substituted the term "special knowledge or experience". The defense objected to this charge on the grounds that it was erroneous to tell the jurors, specifically juror # 4, to disregard his prior experience and render a verdict. The People contend the Court's charge addressed the issue in an appropriate fashion.

As noted in People v Arnold, 96 NY2d 358, 362 in considering a defendant's right to a fair trial before an unbiased fact finder, "While the goal is utter impartiality, each juror inevitably brings to the jury room, a lifetime of experience that will necessarily inform her assessment of the witnesses and the evidence. This is a reality that we simply cannot deny. Nor would we want a jury devoid of life experience, even if it were possible...."

As held in People v Arnold, *supra*, it is those experiences that give jurors the ability to evaluate the evidence but, jurors are expected to come in with an open mind and decide the case only on the evidence presented and the law.

In another case involving "juror expertise" a defendant's conviction was reversed because a juror had revealed during jury selection that she might not be able to be impartial on a domestic violence case because she studied domestic violence in college. People v Arnold 96 NY2d 358 (2001). As held in that case, a jury must reach its verdict solely on evidence received in open court, not from outside independent sources.

While it is clear that in the case before this Court, what is present is not an expert juror situation, the note from the jury expressed a concern that juror # 4 had specific past experience that was influencing his verdict and the juror, upon being questioned by the court, admitted that he had discussed this situation with the other jurors in the process of jury deliberations. The concern of this Court was that it was the apparent perception of the other jurors as evidenced by their note that this juror was taking such specialized knowledge and experience that he had developed in a particular area and was relying on such knowledge and experience to inject into the deliberations facts that were not in evidence. While the juror

specifically denied that this specialized knowledge was influencing his verdict, the other jurors expressed their concern in the jury note that such was influencing his verdict.

Accordingly, this Court determined that the most prudent course of action was to deliver its supplemental instruction to the jury. The jury was instructed that they should use their common sense, knowledge and experience in evaluating the evidence but that if any of the jurors had any special knowledge or experience in a certain area, it would be wrong to rely on such to inject into their deliberations either a fact that was not in evidence or inferable from the evidence, or an opinion that could not be drawn from the evidence by a person without that special knowledge or experience. Again, while this was not an expert juror situation, it was appropriate and proper for this Court to instruct the jury as a whole in the manner that it did to effectively address the note presented by the jury. There is no basis for defense counsel's assertions that juror # 4 was a lone juror who was deadlocking the jury and that this Court's instruction to the jury was unbalanced and coercive so as to

deprive him of a fair trial. Furthermore, there is no basis for the defense argument that the instruction to the jury directed them to disregard their past knowledge and experience. The instruction, as a whole, was fair and balanced and cannot be viewed as to have the effect of directing juror # 4 to abandon his view. In its original final instructions and in its jury deadlock charge that preceded this instruction, the juror was specifically told that no juror should surrender his or her honest view about the evidence solely because the jury wants the trial to end or the juror is outvoted.

THE PROSECUTOR'S SUMMATION

The defendant contends that the People's summation was improper and the defendant's conviction should be reversed as a result of such improprieties. Specifically, the defendant contends that the Assistant District Attorney vouched for the credibility of her sole identifying witness, eventually becoming an unsworn witness arguing facts not in the record in her summation. The prosecutor contends that her remarks during

summation were proper, that they were fair comment on the evidence and in response to the defendant's summation.

The first example of impropriety the defendant gives is when the District Attorney is discussing the identification made by the witness and notes that she herself is 5'7". That information is certainly not in evidence. However, her height is something the jury can observe for themselves and make their own conclusions. The District Attorney's height is irrelevant to the case, but not prejudicial to the defendant. Therefore it is nothing more than harmless error. See People v. Crimmins 36 NY2d230 (1975).

The thrust of the defendant's main argument is that the District Attorney vouched for the credibility of her sole identifying witness. It is well settled that it is totally inappropriate for the prosecutor to vouch for the credibility of any witness. The examples given include the comment that the witness was an electrician for ten years as opposed to thirty years. The District Attorney did state that in her summation. However, that fact is so insignificant that it could not have had

any real impact on the trial. The District Attorney commenting on the witness coming into her office before the trial to prepare is apparently commenting on what the witness already testified to at trial, which is perfectly permissible. The District Attorney goes on to say "when you're telling the truth there is no need to prepare". While this may be viewed as an instance where the prosecutor implicitly vouched for the credibility of her witness, such remark need to be viewed in the context of. It being responsive to the defense summation and the issues raised by the defense. See People v Galloway, 54 NY2d 396 (1981); People v Torres, 171 AD2d 583 (1991).

Lastly, the defendant implies the District Attorney did something wrong by saying she told the witness only to identify the person if you recognize him. Once again this isn't vouching for the credibility of the witness. On the contrary, those are the proper, common sense instructions prosecutors give to witnesses before testifying at any proceeding.

All in all, the comments the defense alleges were improper, were in totality, for the most part, fair comment on the

evidence. In criminal trials both the prosecutor and defendant's counsel alike have the right during summation to comment upon every pertinent matter of fact bearing upon the questions the jury have to decide See People v. Ashwal, 39 NY2d 105 (1976). Here, the prosecutor's remarks, did not deprive the defendant of a fair trial or improperly prejudice the jury. At most, any error in the prosecutor's comments in the context of the entire summation and the trial was harmless error. See People v. Galloway, *supra* at p401.

THE SANDOVAL RULING

Defense counsel argues that the Sandoval ruling of the Court was an abuse of discretion and prevented the defendant from testifying, maintaining that the defendant was the only source of material testimony in support of his defense. He further argues that this error deprived the defendant of a fair trial warranting setting aside the verdict. The People contend that the jury verdict should not be disturbed as the Court's Sandoval ruling was not an abuse of it's discretion, but a fair balance between probative value and risk of unfair prejudice. The People argue

that the defendant's decision not to take the witness stand was a strategic maneuver, unrelated to the Court's ruling.

A Sandoval determination rests within the discretion of the trial court. See People v. Mackey 49NY2d 274 (1980). The court when making a Sandoval ruling must balance the probative value of defendant's prior criminal conduct on the issue of his credibility against the risk of unfair prejudice to the defendant. This is measured both by the impact of such evidence if admitted after his testimony, and by the effect its introduction may have in discouraging him from taking the stand in his own defense. See People v. Sandoval, 34NY2d 371 (1974); People v. Mitchell 209AD2d 443 (1994).

In this case the Court's Sandoval ruling properly balanced the probative value of the defendant's prior convictions against any potential for undue prejudice. The court permitted the People to cross-examine the defendant fully regarding the existence and underlying facts of only his most recent conviction, the 1999 conviction for criminal sale of a controlled substance in the third degree, insofar as this crime was a serious recent felony

conviction and it bore no similarity to the case at bar. As to three of the defendant's remaining convictions, the Court very reasonably ordered a Sandoval compromise. Such a compromise, properly balances the probative value of the defendant's prior convictions against potential prejudice by only permitting the People to inquire about whether a conviction was a misdemeanor or felony, precluding any inquiry about the nature of the offense or any of the underlying details. See People v Long, 269 AD2d 694 (2000), lv. denied 94 NY2d 950 (2000). As to all of the defendant's numerous remaining convictions both in this state and out-of-state, this Court precluded any inquiry whatsoever.

Lastly, the Court's ruling allowing inquiry into the defendant's use of aliases is clearly proper. "Manifestly, a suspect's use of a false name or other inaccurate pedigree information is an indication of dishonesty that goes to the very heart of the question of that individual's testimonial credibility... Common sense suggests that individuals who give false information in such situations are usually motivated by a desire to gain some unwarranted benefit or to avoid some deserved

penalty or liability..." People v Walker, 83 NY2d 455, 461-462 (1994).

It is clear from all the above that this Court exercised appropriate discretion in its Sandoval ruling. Defense counsel's claim that this Court abused its discretion in its Sandoval ruling is without merit.

THE JURY'S VERDICT

The defendant's contention that the jury's verdict was against the weight of the evidence is not the proper subject of a CPL § 330.30 motion such as the defendant made before the court.

CPL § 470.15 (5) in dealing with the scope of review by intermediate appellate courts, states in pertinent part:

"The kinds of determinations of reversal or modification deemed to be on the facts include, but are not limited to, a determination that a verdict of conviction resulting in a judgement was, in whole or in part, against the weight of the evidence".

A motion to set aside a verdict as against the weight of the evidence is only proper on an appeal to a higher court after a

judgement of conviction, not to the state court that heard the case. See People v. Alam, 180 AD2d 689 (1992). The Appellate Division has the exclusive authority to review the weight of the evidence in criminal cases. See People v Bleakley, 69 NY2d 490 (1989).

It is this Court's obligation to determine whether or not legally sufficient evidence was presented to establish defendant's guilt beyond a reasonable doubt. In determining the legal sufficiency of the evidence this Court "... must determine whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial". People v Bleakly, supra at p495. The applicable standard of review for the trial court is to view the evidence in a light most favorable to the People. People v Alam, supra. "Resolution of issues of credibility is primarily and appropriately determined by the jurors, who saw and heard the witness". People v Phillips, 11 AD3d 406 (2004).

In this case, there is no support for any argument on behalf of the defendant that the evidence was legally insufficient as a matter of law and therefore, this Court sees no basis to disturb the jury's verdict.

Accordingly for all of the reasons discussed herein, defendant's motion to set aside the verdict of guilty and requesting that this court order a new trial is denied.

The foregoing constitutes the opinion, decision and order of this Court.

Hon. Stephen A. Knopf
Justice of the Supreme Court