

MEMORANDUM

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS : CRIMINAL TERM : PART L-1**

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THE PEOPLE OF THE STATE OF NEW YORK : **HON. ROBERT J. McDONALD**
:
: **DATE: October 3, 2002**
:
: **INDICTMENT NO. 3482/00**
:
-against- :
:
JERMEL HARDY, :
:
Defendant :
-----X

Defendant, originally charged with two counts of Murder in the Second Degree (Penal Law §125.25[1] and Penal Law §125.25[2]), Criminal Possession of a Weapon in the Second Degree and Third Degree (Penal Law §265.03(2) and Penal Law § 265.02(4)), and Reckless Endangerment in the First Degree (Penal Law §125.25), was found guilty after a jury trial of the two weapon possession charges.

Defendant brings the instant motion to set aside the verdict on the ground that the acquittal of defendant for the murder and reckless endangerment charges, coupled with the failure of the People to produce the weapon and the circumstantial nature of the evidence, obliges this court to set aside the verdict (CPL 330.30; CPL 330.40; CPL 330.50).

STATEMENT OF FACTS

The evidence demonstrated that on October 15, 2000, the defendant Jermel Hardy was in the courtyard of an apartment complex with his friend Earl Fyffe when at around 3:00 P.M. they saw Luis Rivera, the decedent. Defendant had told him that “Pelico,” the name by which the decedent was known to both men, had robbed him the previous day. Then, as decedent walked toward them, he attempted to pull a gun from his waistband. The

gun, however, got “stuck,” giving defendant the opportunity to draw his own gun. There followed a chase across the courtyard, down the stairs to the parking lot, to an outside alleyway behind a large garbage dumpster where shots were fired and where Rivera was found dead, with his gun still in his waistband.

A retired school teacher, Ms. Grace Ellis, testified that she was sitting in her car with full view of the parking lot where she observed Rivera run down the stairs, past the dumpster, into an alleyway, being chased by the defendant, who had a gun in his hand. After both men had gone past the dumpster, she heard “pops.” After the “pops,” only the defendant came back out of the alleyway, passing directly in front of her car with the gun still in his hands, and from seven feet away stared at her, after which he proceeded into the garage.

The ballistics expert, Detective Robert Freese, testified that although the gun was not recovered, the ballistics tests conducted indicated that the shells he examined were consistent with the use of a “Tech 9 semi-automatic” pistol. Detective Freese was able to say, with a reasonable degree of scientific certainty, that 6 of the twelve casings recovered were fired from the same gun, and the markings were consistent with their having been fired from a “Tech 9” semi-automatic pistol. The remaining 6 also had similar class characteristics to the other 6 casings, but, the detective was unable to state, with a reasonable degree of scientific certainty, that they were fired from the same gun. Detective Freese further testified that he had tested the victim’s gun but found that none of the ballistic evidence recovered were fired from that gun. It is noted that Detective Freese’s description of a “Tech 9” was consistent with the description given by the eyewitnesses of the gun the defendant was holding.

CONCLUSIONS OF LAW

Defendant moves to set aside the verdict pursuant to CPL 330.30; 330.40; and

330.50. It appears from defendant's motion that the only ground under which he can move is CPL 330.30(1) which requires a demonstration of fact which would entitle defendant to a new trial as a matter of law. Specifically, defendant challenges the verdict on the ground that the conviction for the two counts of criminal possession of a weapon can not be sustained without a conviction for either murder or reckless endangerment, and his failure to timely object is not fatal. In effect, that the verdict of guilt is inconsistent with his acquittal of the murder or reckless endangerment charges.

Repugnancy, often referred to as inconsistency, exists where an acquittal as to one charge is conclusive proof as to the non-existence of a fact which is a necessary element of a charge as to which defendant has been found guilty (*People v Loughlin*, 76 NY2d 804, 806; *People v Fitzpatrick*, 171 AD2d 972 *lv denied* 78 NY2d 1075).

Defendant does not argue that the form of the verdict was incorrect or improper, nor that it was not duly recorded and accepted by the court (CPL 310.50; *People v Salemmo*, 38 NY2d 357).

The grounds posited by defendant to set aside the verdict were not raised until after the jury had been discharged. Without such objection there is a failure to preserve any "question of law" (*People v Padro*, 75 NY2d 820, 821 *reconsideration denied* 75 NY2d 1005 *rehearing denied* 81 NY2d 989; *People v Satloff*, 56 NY2d 745; *People v Chatman*, 135 AD2d 551 *lv denied* 70 NY2d 1005; *People v Hankinson*, 119 AD2d 506; *People v Addison*, 174 Misc2d 873 *reversed* 259 AD2d 410).

The verdict acquitting defendant of murder or reckless endangerment did not preclude a finding of guilt as to criminal possession of a weapon in the second and third degree (*People v Gatling*, 222 AD2d 606; *People v Purpera*, 81 AD2d 1007 *lv denied* 54 NY2d 688; see

People v Coleman, 123 AD2d 440; *People v Taylor*, 121 AD2d 581 *lv denied* 68 NY2d 760). In *Purpera*, the conviction for possession of a loaded and operable gun which “was never located” was based on the circumstantial evidence of a witness having seen “only the flash of the gunshot” (*People v Purpera, supra*). Further, the verdict was in accord with the court’s instructions to the jury, to which defendant raised no specific objection (*People v Fitzpatrick*, 171 AD2d 972 *lv denied* 78 NY2d 1075). In order to preserve a claim such as the one presented, defendant must raise the issue prior to the jury’s being discharged (*People v Pelligrino*, 60 NY2d 636).

Penal Law §265.03(2) provides, *inter alia*, that person is guilty of criminal possession of a weapon in the second degree when “with intent to use the same unlawfully against another: [[2] He possesses a loaded firearm.”

Penal Law §265.02(4) provides, *inter alia*, that a person is guilty of criminal possession of a weapon in the third degree when “[4] He possesses any loaded firearm” outside his home or place of business.

In the instant case, defendant was observed chasing the decedent with a gun, and the jury could reasonably have found that the People were unable to demonstrate that any of the shots fired from the weapon defendant possessed struck the decedent. This is because the weapon was never recovered. It was, nevertheless, demonstrated circumstantially to be operable and used unlawfully against another. This court finds that the adoption, by the jury, of this set of facts is legally sufficient to sustain the conviction and such facts were reasonable and consistent with the evidence presented.

When, in a multi-count indictment there is a claim of repugnancy, the verdict shall be viewed in light of the elements of each crime charged, considered solely from the legal

perspective as opposed to the factual context, because any attempt to divine a jury's collective wisdom and mental processes is inappropriate, if not impossible (*People v Tucker*, 55 NY2d 1 rearg denied 55 NY2d 1039; *People v LaPella*, 135 AD2d 735 lv denied 71 NY2d 898 later proceeding 185 AD2d 861 lv denied 81 NY2d 842). Therefore, a verdict must be set aside only when an acquittal as to one count is conclusive as to defendant's innocence on the counts where there has been a verdict of guilt (*People v Alfaro*, 66 NY2d 985, 987; *People v Granston*, 259 AD2d 760 lv denied 93 NY2d 925). Each guilty count must be considered separately, and setting a guilty verdict aside is appropriate only if there is no rational theory to support the findings as to that count of the indictment (*People v Gibson*, 65 AD2d 235 cert denied 444 US 861; *People v Gross*, 51 AD2d 191).

Despite the overwhelming evidence that the defendant was present at the scene, and chased the victim with a gun into a dead end alleyway with no one else present, where the victim was shot 9 times, the jury chose to convict him only of the two criminal possession of a weapon charges. This is a circumstantial evidence case because no one actually observed anyone shoot the decedent in the alleyway. Following the high standard of proof required in a circumstantial evidence case, which requires proof of guilt to a moral certainty, a jury could find that the People were unable to prove all the elements necessary to demonstrate defendant's guilt beyond a reasonable doubt as to either of the two murder charges or the reckless endangerment charge.

This is not the case with the two counts of criminal possession of a weapon, where there was direct evidence of the defendant's statement to Fyffe, his drawing of a gun, chasing the victim, shots being fired, and his fleeing from the scene. The two counts of criminal possession of a weapon in the second and third degrees were established by both direct and

circumstantial evidence. The proof required to establish defendant's guilt as to any of the two murder counts or reckless endangerment counts was almost entirely circumstantial and was, therefore, found not to have been established. However, a reasonable jury could find that there was sufficient evidence of defendant's possession of the gun and circumstantial evidence that the gun was operable.

Defendant claims that the proof presented, as a matter of law, fails to support the weapon convictions because the acquittal for the murder and reckless endangerment charges, without introduction of the weapon, can not support the necessary element that the gun was either loaded or operable. Defendant cites two cases for that proposition: *People v McInnis* [179 AD2d 781 *lv denied* 79 NY2d 997] and *People v Smith* [152 AD2d 610 *decision recalled and opinion substituted* 155 AD2d 704 *lv denied* 75 NY2d 776]. It is noted that the defendant in *McInnis* failed to object to the verdict until after the jury had been released, and that an issue such as the one raised here may be considered by the appellate court "in the interest of justice" (*People v McInnis, supra*, 179 AD2d 781, 783). This court is not moved to exercise such discretion.

Neither case is apposite. In *McInnis*, "the People failed to present legally sufficient proof that any of the guns, except the one actually used in the shooting, was loaded or operable" (*People v McInnis, supra*, 179 AD2d 781, 783). That is, that the defendant, in *McInnis*, actually possessed a deadly weapon as defined by Penal Law §10.00(12) (*People v Ferguson*, 155 AD2d 598 *lv denied* 93 NY2d 873). Without the introduction of a weapon, the People must offer evidence of its operability to support a conviction (*People v Robles*, 251 AD2d 20 *lv denied* 92 NY2d 904 *writ of habeas corpus dismissed sub nom, Robles v Kuhlmann*, ___F Supp 3d___ (SDNY, 12.22.00) [2000 US Dist Lexis 18448]). In *Smith* "the evidence was

legally insufficient to establish that the defendant possessed” the gun which was recovered (*People v Smith, supra*, 155 AD2d 704, 705). Here, the evidence most assuredly demonstrated that the defendant possessed a loaded and operable gun.

In this case the jury found that there was sufficient evidence to support defendant’s conviction for criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree. That finding was consistent with the facts proven.

Accordingly, defendant’s motion is denied.

Order entered according.

The clerk of the court is directed to mail a copy of this decision to the defendant and to the District Attorney.

ROBERT J. McDONALD, J.S.C.