

MEMORANDUM

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART K-6

THE PEOPLE OF THE STATE OF NEW YORK : BY Arthur J. Cooperman, JSC

against : **DATED** November 9, 2005

RALPH ROMANO, : **IND. NO.** 3673/99
Defendant

On June 3, 2005, following a jury trial before this Court, defendant was convicted of one count of Murder in the Second Degree. Prior to sentence, he moved for an order setting aside the verdict pursuant to CPL 330.30 (1) upon the ground that his federally and state guaranteed rights to a fair trial were violated by evidentiary rulings of the Court.

The People opposed the motion in its entirety arguing that the claims were either partially unpreserved for appellate review or wholly without merit, and would not compel reversal of the conviction as a matter of law if raised on direct appeal (CPL 330.30[1]).

THE DEFENDANT'S CONTENTIONS

Defendant contends that the Court's rulings permitting the People to introduce into evidence (1) a document purporting to be a Parking Violations Bureau computer record indicating a premature license plate change on a red Corvette, and (2) six civil judgments against College Point Carting, and to adduce (3) the testimony of Ben Ianniello describing an insurance fraud that he and defendant had committed together, require a reversal of the judgment as a matter of law by an appellate court (CPL 30.30[1]).

THE BACKGROUND OF THE CONTESTED TRIAL EVIDENCE

Defendant was charged with the fatal shooting of John Spensieri in his Queens County home during the evening hours of June 7, 1989.

The People's theory at trial was that the murder was financially motivated: The defendant's company, College Point Carting, was undergoing financial difficulties in 1989. After defendant learned that one of his key employees, Frank Ziti, was leaving his employ to work for a company owned by John Spensieri, a man with whom his mother lived --- but in separate quarters of the house --- defendant grossly over-reacted to this perceived defection and fatally shot Spensieri.

As part of their direct case, the People called their "star" witness, Ben Ianniello, the defendant's erstwhile trusted friend and employee. Ianniello testified that although he was an employee in defendant's company, he and defendant shared more than a working relationship. They were close and faithful friends who spent their "off-hours" together, often accompanied by their wives.

Ianniello testified that on the night of the homicide, he drove defendant to Spensieri's house in a red Chevrolet Corvette registered to his wife, Linda J. Ianniello. Once inside, the three men spoke in the kitchen before defendant and Spensieri went downstairs to the basement to talk privately.

Ianniello testified that he heard gunshots. Defendant reappeared in the kitchen and they both fled the scene in the red Corvette. Ianniello stated that while attending Spensieri's funeral services, defendant directed him to change the license plates on the Corvette.

Ianniello was permitted to testify about a plan that he, defendant and others concocted in 1989 to intentionally destroy defendant's boat in order to file an insurance claim and collect money. He stated that defendant bought the boat in 1988, and after it had sustained heavy damage, he was unable to repair it due to financial difficulties.

Defendant asked Ianniello to put the boat in his name and to insure it, after which they would destroy the boat, Ianniello would declare it damaged and file for the insurance money. Ianniello testified that on June 6, 1989, one day before Spensieri's murder, he applied for an insurance policy on the boat in his name. Subsequently, he had it destroyed and reported it stolen.

Ianniello stated that their scheme was exposed and, in 1990, he and defendant, as co-defendants, pleaded guilty in Nassau County to Attempted Grand Larceny in the Second

Degree.

The People called defendant's former wife, Debra Samuel, who testified that she and defendant married in 1987. After defendant began his business -- College Point Carting -- Samuel assisted him by doing company billings and performing administrative duties. She testified that during the early evening hours of June 7, 1989, Frank Ziti spoke to her on the telephone and stated that "he was tired of Ralph and begging for his money and he was going to work for John."¹ Samuel testified that shortly after Spensieri's death in 1989, defendant's company went out of business.

The People called Mary Gotsopoulos, the custodian of records for the Department of Finance and Deputy Chief Administrative Law Judge for the Parking Violations Bureau, who certified a computer record generated by the Department of Finance, Parking Violations Bureau, and marked in evidence as Exhibit No. 26. She stated that the record had been generated on November 12, 1998, and set forth a license plate history of the red Corvette registered to Linda Ianniello. The record indicated "eff date: 10/20/88" and "exp date: 10/19/89" for the license plate, number XBF877. Gotsopoulos stated that this exhibit also demonstrated that a second license plate, 2ER523, was issued to Linda J. Ianniello for the same Corvette listed for plate number XBF877, showing "eff date: 6/13/89" and "exp date: 10/19/91." Interpreting Exhibit No. 26, Gotsopoulos testified that on June 13, 1989, with four months remaining on the then current registration, the license plate of the red Corvette had been changed.

The People called Senior Investigator George Harrison, a custodian of records assigned to the Criminal Frauds Bureau of the New York State Department of Motor Vehicles (hereinafter DMV). Harrison, using Exhibit No. 27, Registration Plate History, and Exhibit No.28, Vehicle Title Record, demonstrated the accuracy of the information contained within Exhibit No.26.

The People introduced, as Exhibits Nos. 48-53, certified copies of six civil judgments obtained against College Point Carting to demonstrate that the company was in financial distress.

¹Trial transcript p. 1468.

CONCLUSIONS OF LAW

Criminal Procedure Law §330.30(1) provides that, after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside the verdict upon “[a]ny ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court.”

The power granted a trial judge pursuant to CPL 330.30(1) is limited to questions of law (*People v Carter*, 63 NY2d 530, 536 [1984]). A question of law includes, but is not limited to, a ruling duly protested by the defendant at the time of such ruling or any subsequent time when the court had an opportunity of effectively changing the same (CPL 470.05[2]).

The contentions raised in this motion were previously raised by defendant during trial. This Court, outside the presence of the jury, entertained extensive oral argument by counsel prior to issuing its rulings. Upon revisiting the issues, the Court makes the following conclusions of law:

The Computerized Record of the License Plate History Inquiry of the Red Corvette
(Exhibit No.26)

Defendant claims that the Court erred in permitting the People to introduce into evidence on their direct case, Exhibit No.26, the computerized record of a license plate history from the Department of Finance, Parking Violations Bureau, and the Department of Motor Vehicles. He argues that the database that generated this record, Summons Tracking Accounts Receivable System, or STARS, was inherently unreliable, that the document itself did not satisfy the foundational requirements of CPLR 4518 (a), and that the record violated the confrontation clause of the Sixth Amendment pursuant to *Crawford v Washington* (541 US 36 [2004]).

The codification of the New York business records exception to the hearsay rule --- CPLR 4518 --- applies to civil and criminal cases (*People v Cratsley*, 86 NY2d 81 [1995]). The 2002 amendment to CPLR 4518 (a) provides that “An electronic record...used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record. The court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record. *All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility*” (CPLR 4518 [a], as amended by L 2002 ch 136) (emphasis supplied).

The Court of Appeals in *Cratsley* summarized the three foundational requirements of CPLR 4518 (a). “[F]irst, the record must be made in the regular course of business --- reflecting a routine, regularly conducted business activity, needed and relied on in the performance of the functions of the business. Second, it must be the regular course of business to make the record --- in other words, the record was made pursuant to established procedures for the routine, habitual, systematic making of such a record. Finally, the record must have been made at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter, assuring that the recollection is fairly accurate and the entries routinely made” (86 NY2d at 89).

Satisfying the foundational requirements of the statute can be accomplished by

calling, as a sponsoring witness, someone from within the particular business, such as a records custodian or other employee, who can testify as to the nature of the record-keeping practices of the business (*Vermont Commissioner of Banking and Insurance v Welbilt Corp.*, 133 AD2d 396 [2d Dep't 1987], *appeal dismissed* [70 NY2d 1002 [1988]]).

The sponsoring witness need not be familiar with the facts contained within the record; it is sufficient that the witness knows the habits and customary practices and procedures for the making of such records. The record must be intelligible either on its face or through interpretive testimony (see *Wilson v Bodian*, 130 AD2d 221 [2d Dep't 1987]).

At trial, Mary Gotsopoulos testified as the custodian of records for the Department of Finance. She stated that STARS is the Department of Finance database on which the Department relies to acquire millions of dollars in revenue from the adjudication of parking summonses. She described the process by which information in People's No. 26, generated by STARS, originated from the DMV.

Gotsopoulos stated that the information put into the database is entered contemporaneously with the receipt of the information by the Department of Finance, and that the individuals who input that information are under a business duty to do so accurately and contemporaneously. Her testimony that some of the information in STARS, specifically license plate changes in 1989, was obtained from the DMV, that the Department of Finance has an on-going account with the DMV, and that this information is regularly obtained from the DMV on a weekly basis was sufficient to justify the record's admission (see, *People v Miller*, 150 AD2d 910 [3d Dep't 1989], *lv denied* 74 NY2d 815 [1989]; CPLR 4518 [a]). It was not necessary for Gotsopoulos to be familiar with the facts contained within the record; rather, what sufficed was that she knew the habits and customary practices and procedures for the making of such record.

The testimony of Gerald Harrison, as a custodian of records assigned to the Criminal Frauds Bureau of the DMV, established that the license plate information contained within People's Exhibits No.27 and No.28 --- and relied upon by STARS in the creation of Exhibit No. 26 ---- was DMV information made in the regular course of business reflecting a routine, regularly conducted business activity, which was regularly kept in the course of business and which was placed into the system contemporaneously

with its availability.

For these reasons, the foundational requirements of CPLR 4518 (a) were satisfied for the admission into evidence of Exhibit No. 26, the computerized record of the license plate history of the red Corvette.

In 1970, CPLR 4518 (c) was added to the business record rule. This section provides a means of dispensing with foundational testimony as a prerequisite to the admission of certain types of business records, including those of governmental agencies. This section is intended to eliminate the “troublesome inconvenience” of laying a foundation through testimony (see 1970 N.Y. Jud’l Conf. Rep. on the CPLR, p. 47, reprinted in McKinney’s N.Y. Session Laws, 1970, Vol. 2, p. 2796).

In order to take advantage of CPLR 4518 (c), the proponent must ensure that the certification of the record in question is properly made. The person authorized by the statute to make the certification can be any employee of the organization to whom the task of certification has been delegated. The certificate will serve to authenticate the record, i.e., establish its genuineness, but the contents of the certification must also demonstrate that the requirements of CPLR 4518 (a) have been met: that the record was made in the regular course of business, that it was the regular course of the business to make a record of this type and that the record was made at or about the time of the occurrence of the event recorded.

Records admissible pursuant to CPLR 4518 (c) are prima facie evidence of the truth of the facts contained in the record (*LaDuke v State Farm Insurance Co.*, 158 AD2d 137 [4th Dep’t 1990]).

The computer printout of the license plate history of the red Corvette was a business record from a government agency, the Department of Finance. Gotsopoulos was authorized by that agency to make the certification of that record. Therefore, the computer record also was conclusively admissible pursuant to CPLR 4518 (c) (*Rodriguez v Triborough Bridge and Tunnel Authority*, 276 AD2d 769 [2d Dep’t 2000], *appeal dismissed* 96 NY2d 814 [2001]).

Defendant’s argument that the STARS computer program which retrieved and generated the license plate history was inherently unreliable in 1989 is without merit. In support of this contention, he submitted on this motion newspaper accounts and

government audits at the time the information was entered into STARS to attest to its unreliability. However, any criticism of STARS as it existed in 1989 does not go to the question of the document's admissibility, but rather to its weight (see, *Rodriguez v Triborough Bridge and Tunnel Authority, supra*).

Defendant's contention that the DMV document violated the holding in *Crawford v Washington* (541 US 36 [2004]) is unavailing. The *Crawford* Court stated that no testimonial statement may be admitted at trial unless the declarant is unavailable to testify and the defendant has had a prior opportunity to cross examine the declarant. In determining whether a statement or document is testimonial or non-testimonial, courts have placed great emphasis on the declarant's expectation that the statement will be used in a future judicial proceeding (see, *United States v Saget*, 377 F. 3d 223 [2d Cir. N.Y. 2004]).

While the *Crawford* Court specifically excluded business records, noting that by their nature they are not testimonial (541 US at 56, 76), subsequent cases interpreting *Crawford* seem to suggest that a report prepared in anticipation of a criminal prosecution, even if technically within the business records exception, might fall within the *Crawford* definition of "testimonial," thereby warranting its excludability at trial (see, *People v Rogers*, 8 AD3d 888 [3d Dep't 2004]). The key to the *Crawford* inquiry is why the record was created, not why it was printed out or photocopied.

The computerized record of the Department of Finance, Parking Violations Bureau, listing the effective date and the expiration date of the license plate of the red Corvette registered to Linda J. Ianniello, is a routine a business record, not made for the purpose of litigation, and not in violation of *Crawford*. The fact that this document was generated at the request of law enforcement officers investigating a homicide, does not change the nature of the record keeping, which was a database system on which the Department of Finance relies to acquire revenue.

The Six Civil Judgments Against College Point Carting (Exhibits 48-53)

Defendant contends that the Court erred in permitting the People to admit into evidence the certified copies of six civil judgments against College Point Carting. He argues that the evidence of the civil judgments violated both *People v Ventimiglia* (52

NY2d 350 [1981]) and *People v Molineux* (168 NY 264 [1901]) and served to prejudice the jurors against him by demonstrating that while his company was drowning in debt, he was enjoying a lavish lifestyle.

The People sought admission of this evidence to show that defendant's company was in financial straits at the time of Spensieri's murder and to explain and place in context defendant's extreme reaction upon learning that Ziti, his former employee with access to, and contacts with, his customers, "defected" and joined Spensieri's company.

Evidence of a defendant's conduct that does not form the basis of a chargeable crime does not require adherence to *Molineux* (see *People v Perez*, 191 AD2d 285 [1st Dep't 1993]; *People v Avincola*, 162 AD2d 288 [1st Dep't 1990], *lv denied* 76 NY2d 937 [1990]). Non-payment of a debt incurred under a contract for services is not a chargeable crime.

The *Ventimiglia* decision has no application here, as well. That case requires the court to determine "whether the alleged prior bad acts of the defendant can be used by the prosecution as *direct evidence* of defendant's guilt" (52 NY2d, *supra* at 359-360 [emphasis supplied]; *People v Spottford*, 85 NY2d 593 [1995]). The civil judgments against College Point Carting cannot reasonably be construed as direct evidence to establish defendant's guilt of the Spensieri murder.

Defendant's claim that the belated admission of the civil judgments constituted "trial by ambush" is unavailing. In the People's opening statement, reference was made to the fact that the defendant's business was in financial turmoil, underpinning the economic motive for Spensieri's homicide. The People's witnesses, Ben Ianniello and defendant's former wife, Debra Samuel, testified that defendant and his company were experiencing financial difficulties. In any event, there is no requirement that upon a retrial, the People rely on the identical evidence and arguments as those initially employed.

In his Reply Brief defendant argues that there was no relationship between the six civil judgments against College Point Carting and the Spensieri homicide, contending that the introduction of this evidence violated his right to a fair trial. In support of this contention, he relies upon *People v Heiss* (221 AD2d 562, 563 [2d Dep't 1995], *lv denied* 87 NY2d 1020 [1996]) and *People v Tucker* (291 AD2d 663 [3d Dep't 2002], *lv denied* 98

NY2d 703 [2002]). His argument is unpersuasive as is his reliance on these cases.

While evidence of a significant debt or civil judgment may be relevant to establish motive and intent (see *People v Bent*, 160 AD2d 1176, 1177 [3d Dep't 1990], *lv denied* 76 NY2d 937 [1990]; see also *People v Alvino*, 71 NY2d 233, 241-242 [1987]), some relationship between the debt and the pending charge is required (*People v Tucker*, *supra* at 664; *People v Heiss*, *supra* at 563).

Here, such a relationship existed. The six civil judgments against defendant's carting company were directly related to the People's theory that Spensieri's murder was financially motivated. The judgments corroborated Samuel's testimony regarding the financial problems in defendant's company and explained why Ziti's defection and employment by Spensieri became the impetus for Spensieri's murder.

Defendant claims that the prejudicial effect of the admission of these civil judgments was further exacerbated by the Court's refusal to permit him to elicit evidence that other people had a motive to kill Spensieri. This third-party culpability argument was raised prior to the first trial and decided in accordance with standards enunciated in *People v Primo* (96 NY2d 351 [2001]). In any event, reference to it in the context of the civil judgments has no relevance and is without merit.

Ben Ianniello's Testimony Concerning The Insurance Fraud

Defendant contends that the Court committed error by permitting the People to adduce testimony through Ben Ianniello concerning the insurance fraud to which he and defendant pleaded guilty.

This testimony was permitted pursuant to *People v Molineux* and its progeny. While evidence of crimes not charged in the indictment is inadmissible if it is introduced for the sole purpose of establishing criminal propensity (*People v Alvino*, *supra* at 241), such evidence may be introduced to complete a witness' narrative and to assist the jury in its comprehension of the crime (see, *People v Hudy*, 73 NY2d 40 [1988]; *People v Delgado*, 233 AD2d 338 [2d Dep't 1996], *lv denied* 89 NY2d 942 [1997]; *People v Mendez*, 165 AD2d 751 [1st Dep't 1990], *lv denied* 77 NY2d 880 [1991]). Such testimony is also admissible to explain a unique relationship that existed between the defendant and the witness (*People v Oliver*, 19 AD3d 512 [2d Dep't 2005]; *People v Bernard*, 224

AD2d 192 [1st Dep't 1996], *lv denied*, 88 NY2d 964 [1996]).

Evidence of the participation of Ianniello and defendant in the insurance fraud was permitted to assist the jury in its comprehension of Ianniello's narrative of the crime. It demonstrated the existence of the unique relationship of trust and alliance between the two men. As previous partners in crime, they were confidants, comfortable in each other's presence, and privy to each other's misdeeds.

This Court balanced the probative value of the contested evidence against its potential prejudicial effect and determined that it was more probative than prejudicial (*People v Alvino, supra* at 247; *People v Bailey*, 21 AD3d 383 [2d Dep't 2005]).

Appropriate curative instructions were provided to the jury both at the time the evidence was admitted and in the Court's final charge (*People v Newby*, 291 AD2d 460 [2d Dep't 2002], *lv denied* 98 NY2d 679 [2002]; *People v Herrera*, 287 AD2d 579 [2d Dept 2001], *lv denied* 97 NY2d 705 [2002]; *People v Pacheco*, 265 AD2d 347 [2d Dep't 1999], *lv denied* 94 NY2d 827 [1999]).

Defendant's argument raised during trial, and alluded to repeatedly in his moving papers and in his Reply Brief, is that the People's real purpose in seeking the admission of the underlying facts of the insurance fraud --- as well as the six civil judgments --- was to prejudice defendant in the eyes of the jury by demonstrating that he enjoyed a "lavish lifestyle."

That argument is unavailing. The People's theory at trial was that defendant had a financial motive for fatally shooting Spensieri. In the development of that theory, whether by testimony or documentary evidence, the fact that otherwise relevant testimony suggested that defendant had a penchant for material possessions and expensive acquisitions is of no moment and does not require reversal of the judgment.

Based upon the foregoing, this Court finds that there was no evidentiary ruling compelling a reversal of the conviction as a matter of law if raised on direct appeal (CPL 330.30[1]).

Accordingly, defendant's motion to set aside the verdict pursuant to CPL 330.30(1) is denied.

Order entered accordingly.

The Clerk of the Court is directed to forward a copy of this memorandum and

order to the attorneys for the defendant and to the District Attorney.

ARTHUR J. COOPERMAN. J.S.C.