

People v Cuadrado

2003 NY Slip Op 30149(U)

March 7, 2003

Supreme Court, New York County

Docket Number:

Judge: John Cataldo

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 70

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THE PEOPLE OF THE STATE OF NEW YORK,

DECISION AND ORDER

Indictment No. 11727/91

-against-

NILLIAM CUADRADO,

Defendant.

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CATALDO, JOHN, A.J.S.C.;

Defendant, by *pro se* motion, moves to set aside his sentence as illegally imposed to the extent that he contends the imposition of consecutive time on Counts One and Six violates the provisions of Penal Law §70.25(2). The People oppose the defendant’s motion.

The court, having reviewed the defendant’s moving papers, the People’s affirmation in opposition, the official court file, the minutes of the defendant’s plea (annexed to the People’s submission), defendant’s answer to the People’s affirmation’, and the relevant statutes and case law, makes the following findings of fact and conclusions of law.

On November 1, 1991, an indictment was filed charging the defendant, along with two co-defendants, with the crimes of Murder in the Second Degree (felony murder, PL §125.25[3]), Attempted Robbery in the First Degree, two counts of Attempted Robbery in the Second Degree, Criminal Possession of a Weapon in the Second Degree, and Criminal Possession of a Weapon in the Third Degree (PL §265.02[4]). The facts underlying the charges are set forth in the felony complaint. The complaint alleged that the defendant, with his two co-defendants, entered 133 East 55th Street, in New York County (a deli) armed with a loaded automatic pistol with the intent to

1. The court granted the People one additional adjournment for their response. as a reasonable period of time. Accordingly, defendant’s motion to preclude the court from consideration of the People’s response is denied.

commit a robbery and that in the attempted commission of the robbery the defendant, Mr. Cuadrado, drew a gun and shot two men, one of whom, Mr. Mohamed Gasem, died from his injuries.

On June 30, 1992, the defendant entered a plea of guilty, in full satisfaction of the indictment to Attempted Murder in the Second Degree (under count one of the indictment), and to Criminal Possession of a Weapon in the Third Degree (under count six of the indictment). At that time, he also agreed to plead guilty to Assault in the First Degree under a separate accusatory instrument, plead to one the date of sentence, under Superior Court Information # 15082/91.

The defendant was promised a sentence of eight to twenty-four years on the Attempted Murder conviction and two to six years on the Criminal Possession of a Weapon in the Third Degree conviction, with the two sentences to run consecutively. Additionally, a sentence of four to twelve years was to be imposed on the Assault conviction under SCI 15082/91 which was to run consecutive to the other sentences. On July 22, 1992, the defendant was sentenced in accordance with the promised plea (which also was to run concurrently with a one to three year violation of probation sentence in Suffolk County). The July 22, 1992 sentence totaled fourteen to forty two years.

Defendant now contends that his sentence was illegal in violation of Penal Law § 70.25(2) in that the sentences for Attempted Murder and Criminal Possession of a Weapon in the Third Degree must run concurrent by operation of law.

Penal Law 70.25(2) states:

When more than one sentence of imprisonment is imposed on a person for two or more of offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other, the sentences, except if one or more of such sentences is for a violation of section 270.30 of this chapter, must run concurrently.

Defendant asserts that his sentences for Attempt Murder and Criminal Possession of a Weapon in the Third Degree must run concurrently under the first clause of Penal Law 70.25(2), in that the two offenses were committed through a single act.

Pursuant to CPL 440.20(1) at any time after the entry of a judgment the sentencing court may set aside the sentence if it finds it to have been unauthorized, illegally imposed or otherwise invalid as a matter of law.² Pursuant to CPL 440.20(4), if a court finds a sentence was illegally imposed, the validity of the underlying conviction is not effected. The remedy is resentencing in accordance with the law.

Although neither party has included the post-conviction procedural history of the case, the defendant did file a direct appeal in this matter. *People v. Cuadrado*, 208 AD2d 1181 (1st Dept 1994). Leave to appeal was denied at *People v. Cuadrado*, 84 NY2d 934 (1994). Thereafter, the defendant filed a writ of habeas corpus in federal district court. *Cuadrado v. Stinson*, 992 F Supp 685 (SDNY 1998). That writ was denied for failure to exhaust state remedies. The District Court set forth the post-conviction history of the case in its decision. It noted that defendant's direct appeal had raised only one claim, that the defendant's sentence was "unduly harsh and severe" and should be reduced under the appellate court's discretionary powers. The defendant did not raise his current claim that his sentence was illegally imposed. Thus, the bar of CPL 440.20(2) is not applicable in this case. This court retains jurisdiction to decide the legality of the sentence. *Cuadrado v. Stinson*, *supra*, at 687.

The People, however, contend that the defendant's sentence cannot be reviewed by this court because at the time of his plea the defendant expressly waived his right to appeal the conviction and

2. Because the sentencing judge is deceased, the motion has been assigned to this court for decision

the sentence (see, plea minutes pp. 8-9).

While a defendant can waive the right to the review of a sentence as excessive, a defendant cannot waive the right to review a sentence as illegally imposed.

As noted by the Court of Appeals in *People v. Seaburg*, 74 NY2d 1, 9 (1989), there are some claims that are so fundamental to society's interest in maintaining the integrity of criminal proceedings that they cannot be waived. One of those claims is the challenge to the legality of a sentence. *See, also, People v. Francabandera*, 33 NY2d 429, 434, n. 2 (1974); *People v. Campbell*, 97 NY2d 532, 535 (2002); *People v. Laureano*, 87 NY2d 640, 643 (1996).

Therefore, the sole question before this court is whether the defendant's sentences for Attempted Murder and Criminal Possession of a Weapon in the Third Degree were imposed for two offenses committed through a single act, or whether they constitute separate and distinct acts for which consecutive sentences would be permissible.

At the time of his plea, the defendant allocuted to the first and sixth counts of the indictment as follows:

The Court: It's charged in the first count of indictment number 11727 of 91 that on October 16, 1991, County of New York, that you acting together and in concert with your named co-defendants Felix Rivera and Christopher Voytasko did engage in the Attempted commission of the crime of Robbery and in course of such crime and in furtherance thereof and immediate flight therefrom you caused the death of Mohammed Gasem Gharmad, not a participant in the crime; do you understand the charge.

The Defendant: Yes, Your Honor.

The Court: Is that charge true?

The Defendant: Yes Your Honor.

The Court: How do you plead to that charge guilty or not guilty?

The Defendant: Guilty.

The Court: In addition under the sixth count of this indictment in which you are offering to plead guilty to the crime of Criminal Possession of a Weapon in the Third Degree, it's charged that on October 16, 1991 County of New York that you acting together and in concert with your named co-defendants Felix Rivera and Chnstopher Voytasko, that you possessed a loaded firearm, to wit a pistol and that that possession was not at the time in either your home or your place of business; do you understand that charge?

The Defendant: Yes, Your Honor

The Court: Is that charge true?

The Defendant: Yes, Your Honor.

The Court: How do you plead to that charge, guilty of not guilty?

The Defendant: Guilty.

(Tr. pp. 9-10).

Defendant contends that the two counts to which he plead guilty stemmed from a single act that occurred on October 16, 1991. The People counter that the two crimes constituted distinct acts.

It is well established that where a defendant is convicted, whether at trial or by plea, of two offenses which are the result on a single act or omission, the sentences must run concurrently. *People v. Brown*, 80 NY2d 361,363-364 (1992). However, consecutive sentences may be imposed when separate offenses are committed through separate acts, though they are part of a single transaction. *Id.* In *Brown*, the Court distinguished the facts of that case (possession of a stolen automobile for two hours followed thereafter by driving in a manner which recklessly endangered others), from weapons possession cases where a single act constitutes the substantive crime, such as robbery, as

well as the criminal possession of a weapon itself. *People v. Sturkey*, 77 NY2d 979 (1991).

In determining whether consecutive sentences may be imposed, the burden is on the People to establish their claim that the crimes involved two separate and distinct acts. *People v. Laureano*, 87 NY2d 640,644 (1996); *People v. Smith*, 294 AD2d 822 (4th Dept 2002). If there was a trial, the People may meet their burden by offering facts from the trial record. Where the conviction is by guilty plea, the People may only rely on the allegations in the counts of the indictment to which the defendant has plead guilty, as well as the facts adduced at the plea allocution. Moreover, where a defendant has plead to a lesser included offense, the People may only rely on the facts in the indictment if the defendant actually plead to the count charged, otherwise they are limited to the facts admitted in the plea allocution. *Laureano, supra*, at 644.

In this case, the defendant, in his plea allocution, admitted to the facts as they were alleged in Counts One and Six of the indictment, and to no other facts. Thus, this court may only look to those admissions in determining whether consecutive time was legally imposed. The People have argued in their responding papers that the defendant, as well as his co-defendants, admitted in statements to the police that Mr. Cuadrado had possessed the gun at other times, both before and after the time of the murder. This court may not consider those alleged admissions in determining whether consecutive sentences may be imposed.

The law is well settled that where, as here, the defendant's conviction for murder arises out of the same act which constitutes the basis for his conviction for criminal possession of a weapon, consecutive sentences may not be imposed. *People v. Williams*, 251 AD2d 266 (1st Dept 1998), *lv denied* 92 NY2d 1030 (1998); *People v. Porter*, 256 AD2d 363 (2d Dept 1998), *lv denied* 93 NY2d

976 (1999); *People v. Reyes*, 239 AD2d 524 (2d Dept), *appeal denied* 90 NY2d 909 (1997); *People v. Jackson*, 226 AD2d 476 (2d Dept), *appeal denied* 88 NY2d 987 (1996); *People v. Abdullah*, 298 AD2d 623 (3d Dept 2002).

In *People v. Ali*, 188 AD2d 476 (2d Dept 1992), the transcript of the plea demonstrated that the manslaughter and criminal possession of a weapon convictions were based on the same act, and there were no facts in the record to support the People's speculation to the contrary. Therefore, the sentence was modified to run the sentences concurrently. Likewise, in *People v. Ellis*, 139 AD2d 662 (2d Dept), *appeal denied* 72 NY2d 918 (1988), the sentence was modified to run the sentences for criminal possession of a weapon concurrent with those for manslaughter and assault as there was no support in the record to substantiate the People's assertion that the defendant possessed the weapon at any time other than during the commission of the assault and manslaughter.

Where the necessary facts are admitted, however, consecutive time may be imposed. In *People v. Gaskin*, 220 AD2d 768 (2d Dept 1995), *appeal denied* 87 NY2d 1019 (1996), the defendant acknowledged in his plea allocution that he criminally possessed a handgun for approximately one week before he committed the crime of attempted robbery. Where such an admission appeared on the face of the plea minutes, the same act did not provide the basis for his convictions of both crimes, and the imposition of consecutive sentences was not prohibited.

In order to support consecutive time, the possession of a weapon must be shown to have been distinct in time or place from its use during the substantive crime. *People v. Salcedo*, 92 NY2d 1019 (1998); *People v. Seabrook*, ___ AD2d ___, 2003 NYSlipOp 11463 (1st Dept, February 27, 2003). In *Salcedo, supra*, the defendant's possession of the weapon, though continuous, was shown to have been committed in two distinct time periods: initially he used the weapon with the intent to force his

former girlfriend to come with him; when she refused to come with him after his repeated demands he then used the gun to kill her. Likewise, most recently in *People v. Seabrook, supra*, the facts demonstrated that the defendant first assaulted the victim by stabbing him with a knife, and then, after the victim fled, the defendant chased him while continuing to wield the knife, constituting the separate possession of the weapon in the third degree.

Therefore, based upon a review of the case law, I find the admissions in this defendant's plea allocution, which mirror the allegations in Counts One and Six of the indictment, constitute only a single act. While the facts underlying these crimes might have supported distinct acts had the People required the defendant to allocute to the additional facts they say existed, those facts are outside the record which this court is allowed to review, by operation of law. Accordingly, the court is constrained to grant the defendant's motion.

Conclusion

The defendant's motion is granted to the extent that the sentence for Criminal Possession of a Weapon in the Third Degree, of 2 to 6 years, is modified to run concurrently with the other sentences imposed. Accordingly, the defendant's total sentence is reduced from 14 to 42 years, to 12 to 36 years.

This constitutes the decision and order of the Court.

A copy of this decision shall be forwarded to the defendant at the institution where he is now incarcerated.

Dated: March - , 2003
New York, New York

MAR 07 2003



JOHN CATALDO, A.J.S.C.