

**People v Rivera**

2006 NY Slip Op 30380(U)

May 12, 2006

Supreme Court, New York County

Docket Number: 11727/91

Judge: Bruce Allen

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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART 45

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 THE PEOPLE OF THE STATE OF NEW YORK,

-against-

Ind. No. 11727/91

FELIX RIVERA,  
 Defendant.

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For the People: Steven Goldstein  
 For the Defendant: Bennet Goodman  
 JUSTICE BRUCE ALLEN:

In October, 1991, the defendant and two other men, Christopher Voytasko and William Cuadrado, attempted to rob a deli on 55<sup>th</sup> Street in Manhattan. A struggle ensued, and Cuadrado shot and killed an employee of the deli. The three men were indicted for Murder in the Second Degree, Robbery in the First and Second Degrees, and Criminal Possession of a Weapon in the Second and Third Degrees. In 1993, the defendant pled guilty to the fictional crime of Attempted Murder in the Second Degree under a felony murder theory and to Criminal Possession of a Weapon in the Third Degree. In return, he received a promised sentence of 8 to 24 years on the attempted murder count and a consecutive term of 2 to 6 years on the weapon possession count. Cuadrado had previously pled guilty to the same two crimes in exchange for the same promised sentence.

In 1999, the defendant filed a *pro se* motion pursuant to CPL §440.20. He contended that it was illegal for his sentences to run consecutively because the two crimes to which he pled were committed through a single act and because the counts shared material elements. In their response, the People asserted that Attempted Murder in the Second Degree and Criminal Possession of a Weapon in the Third Degree do not share essential elements. The People also disputed that the two crimes were not committed through a single act. In particular, the People

noted that the crime of Criminal Possession of a Weapon in the Third Degree was complete when the defendant entered the deli with intent to rob it, knowing that Cuadrado had a loaded gun, and thus had been fully committed before the shooting itself occurred. On June 10, 1999, Justice Martin Rettinger denied the defendant's motion. Judge Rettinger's decision stated simply "Denied. See People's response."

In 2002, co-defendant William Cuadrado filed a §440.20. He also argued that it was illegal under PL §70.25 because the two crimes were committed through a single act. The People again argued that on the facts of the case, there were two distinct acts, because Cuadrado possessed the weapon prior to the shooting. In a decision dated March 5, 2003, Justice John Cataldo granted Cuadrado's motion. Judge Cataldo noted that he could only consider the facts of the case as shown in the record. The only facts in the record were Cuadrado's "bare-bones" plea allocution to the two charges as described in the indictment, which did not establish that there were two separate acts. Citing cases such as People v. Williams, 251 AD2d 266 (1<sup>st</sup> Dept 1998) and People v. Ali, 188 AD2d 476 (2<sup>nd</sup> Dept 1992), Judge Cataldo modified the sentence to run the two terms concurrently.

The defendant, now represented by counsel, seeks reconsideration of the issue raised in his earlier motion. Specifically, he contends that since the two crimes were committed through a single act, the sentences must be concurrent.

Under CPL §440.20(3), a court may deny a motion if the issue raised therein was previously raised in a similar motion and determined on the merits. "Despite such determination, however, the court in the interest of justice and for good cause shown, may in its discretion grant the motion if it is otherwise meritorious."

As the People contend, the defendant was offered and accepted a very favorable plea

bargain in this case, and in that respect he is hardly in a position to warrant any special consideration or mercy. However, there are several factors that I find support allowing reconsideration of the issue raised in this motion. The Court of Appeals has noted that society has a special interest in ensuring that imposed sentences are legal. People v. Seaberg, 74 NY2d 1. The defendant's prior motion was made without the benefit of counsel, and failed to cite several of the relevant cases that Judge Cataldo relied upon in his decision on Cudrado. Because Judge Rettinger did not write out a decision other than referring to the People's response, his precise reasoning for denying the motion cannot be determined. Finally, it would be odd if the man who actually possessed the gun and did the shooting could not receive consecutive sentences but this defendant could.

Turning to the merits of the case, the People do not dispute the reasoning of Judge Cataldo's decision. However, they contend the cases are distinguishable because the defendant made a fuller factual allocution than did Cuadrado. In particular, they note that the defendant admitted that he entered the deli with the intent to carry out a robbery, and that he was aware that Cuadrado was carrying a loaded firearm. Thus, there was a time gap between the commission of Criminal Possession in the Third Degree and the shooting.

However, the First Department has held that such a time gap is irrelevant. Consecutive sentences for possession and use of a weapon are legal only if they involve separate and successive acts; that is, only if the weapon possession and the shooting involve different events. People v. Rosario, 26 AD3d 271 (1<sup>st</sup> Dept 2006).

Any time gap involved is also irrelevant for another reason. The shooting itself was not the act of the defendant in this case. The defendant did not plead guilty to, or admit to, shooting or attempting to shoot the deli employee. The theory under which the defendant pled was felony

murder, not acting in concert with Cuadrado to shoot the victim. In felony murder, a defendant's act is the underlying felony itself, not the killing. See People v. Riley, 309 AD2d 879 (2<sup>nd</sup> Dept 2003). While he is criminally liable for the killing, that does not mean that it is attributable to him as if he committed the act himself.

Here, the two crimes of which defendant was convicted were committed through the same act – attempting to rob the deli. Accordingly, the motion is granted. The sentence of 2 to 6 years for Criminal Possession of a Weapon in the Third Degree is modified to run concurrently with the 8 to 24 year term for Attempted Murder in the Second Degree.

May 12, 2006

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HON. BRUCE ALLEN