

People v Vandermeulen
2006 NY Slip Op 30824(U)
May 16, 2006
County Court, Sullivan County
Docket Number: 267-04
Judge: Frank J. LaBuda
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COUNTY COURT: COUNTY OF SULLIVAN
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION AND ORDER

Indict. #267-04

THERESA VANDERMEULEN and WAYNE
VANDERMEULEN,

Defendants.

-----X

APPEARANCES: Rosenberg Calica & Birney LLP
100 Garden City Plaza, Suite 408
Garden City, N.Y. 11530
By: Judah Serfady, Esq., of counsel
Attorney for defendant Theresa Vandermeulen

Newberg Law Offices
33 North Street
Monticello, N.Y. 12701
By: Richard Newberg, Esq., of counsel
Attorney for Defendant Wayne Vandermeulen

Hon. Stephen F. Lungen
Sullivan County District Attorney
Sullivan County Courthouse
Monticello, N.Y. 12701
By: James R. Farrell, ADA, of counsel
Attorney for the People

LaBuda, J.

Defendants move by joint Order To Show Cause (OSC) with
affidavit of Defendant Theresa Vandermeulen for CPL 330 relief to
vacate conviction.

The People submit affirmation in opposition.

Defendants submit jointly memorandum of law in support of
330 motion, post hearing memorandum of law in support of 330
motion and pre-sentence memorandum.

Defendant Wayne Vandermeulen submits supplemental memorandum of law in support of 330 motion.

The People submit post hearing argument (memorandum of law).

Defendants were indicted under Sullivan County Indictment #267-04 charging both defendants jointly under Count I with grand larceny in the second degree [PL 155.05(1)] and defendant Theresa Vandermeulen charged singularly under counts II, III and IV with grand larceny in the fourth degree, forgery in the second degree and identity theft in the third degree respectively.

Jury trial resulted in convictions under all counts.

Defendants now, after conviction but prior to sentencing, seek 330 relief as follows:

1. Vacate conviction and dismiss Count I under the theory that a taking by a joint bank account holder can not be a larceny and that the jury was not charged with larceny by false promise.

2. Vacate convictions and dismiss counts II and III as there was no legally sufficient evidence to support a guilty verdict.

3. Vacate conviction and dismiss count IV as there was no legally sufficient evidence to support a guilty verdict.

4. Vacate convictions and dismiss Indictment #267-04 as there was no legally sufficient evidence to support a guilty verdict.

5. Set aside convictions and dismiss Indictment #267-04 pursuant to prosecutorial misconduct.

6. Vacate convictions and dismiss Indictment #267-04 pursuant to defendants being provided with ineffective assistance of counsel.

Pursuant to said OSC this Court scheduled a post verdict fact finding hearing in regard to the assertion in point 6 above that defendants received ineffective assistance of counsel.

Said post verdict fact finding hearing commenced on February 9, 2006, continued on February 10, 2006 and concluded on February 23, 2006.

Post hearing arguments and memorandums of law were thereafter submitted by both defendants and the People at the direction of the court.

Based the evidence adducted at trial and the arguments herein the defendants OSC is denied.

The defendants are charged with stealing monies from defendant Theresa Vandermeulen's elderly, blind and seriously ill grand mother and converting said monies to their own use including, but not limited to, opening a joint bank account between Theresa Vandermeulen and her grand mother, paying their own bills, purchasing a corvette, purchasing a house and forging and cashing checks.

A court may set aside a verdict after conviction and prior to sentencing upon any ground appearing on the record which, if raised upon appeal, would require reversal or modification by an appellate court as a matter of law. CPL 330.30(1).

A trial court is limited under CPL 330 to examining the evidence as a matter of law whereas an appellate court may delve in matters of law or fact. See, People v Carter, 63 NY2d 530 (1984).

A trial judge may set aside a verdict under CPL 330 when the evidence was not legally sufficient to sustain a guilty verdict (matter of law) but may not set aside a verdict under a theory that the finding of guilt was against the weight of the evidence (matter of fact). See, CPL 330.30; CPL 470.15.

After reviewing the trial evidence, the arguments herein and after due deliberation had herein, this Court finds that there was legally sufficient evidence adducted at trial to sustain the guilty verdict regarding counts II, III and IV. Thus, said portion of the within OSC listed above as points 2, 3 and 4 is denied.

This Court has also examined the People's conduct herein, especially at closing argument, and finds that the District Attorney strongly argued his view of the evidence and did not cross the line of prosecutorial misconduct.

Defendants arguments in point 1, that the court erred in failing to charge larceny by false promises and that a joint bank account holder can not steal property from the account she is a joint holder in, are without merit. Thus, said portion of the OSC as to Count I is denied.

In deciding a 330 motion, every instance must be judged in favor of the People. People v Floyd, 176 AD2d 554 (J.th Dept., 1991) lv denied 79 NY2d 829 (1992).

The standard of appellate review in cases of legal sufficiency is whether the evidence adduced at trial could lead to the conclusion reached by a rational person sitting as the finder of fact, when viewed in the light most favorable to the People. People v Hines, 97 NY2d 56 (2001).

PL 155.05(1) defines larceny. PL 155.05(2) defines several types of larceny including larceny by false promise.

The creation of a joint bank account by the defendant is a larceny under PL 155.05(1) when it is created by any means listed in PL 155.05(2) including larceny by false promise under PL 155.05(2)(d). See, People v Gbohou, 186 Misc2d 324 (Bronx Sup Ct., 2000).

It is not the taking of monies from a joint bank account which constitute a larceny it is the fraudulentl creating the joint bank account which is the larceny. People v Antilla, 77 NY2d 853 (1991); People v Gbohou, 186 Misc2d 324 (Bronx Sup Ct., 2000).

This Court did not include a specific jury charge as to larceny by false promise without objection from the defense. Nor did the defense request such a charge. Not only was there no need for a larceny by false promise charge needed herein but since the defense did not request one or object to the absence of one, this matter was not preserved.

Lastly, defendants argue for ineffective assistance of counsel in point 6. Said argument is without merit.

The main attorney at trial testified at the post verdict fact finding hearing herein as did her second seat.

It can be unquestioned that a full and complete defense strategy was outlined between the defense team and the defendants leading up to and in preparation for trial.

Evidence at the fact finding hearing showed the defense attorneys originally wanted to have one or both defendants testify. However, it was decided that neither defendant would or could testify. Said decision was made in consultation with the defense team and the defendants. As a matter of fact, it was the defendants who pushed their attorneys not to testify.

There was a major conflict for the defense attorneys to consider, i.e., the substantial risks between defendants testifying as to the spending of the money and the many large gaps in the spending of the defendants without adequate explanation.

This Court finds that the defense attorneys had a comprehensive defense plan in defending this matter, they kept the defendants apprized of said plans, discussed strategies with the defendants and executed their defense in a competent and professional manner.

"An Attorney who presents a well grounded but unsuccessful defense will not later be held to have provided ineffective assistance of counsel, and thus a defendant will not be entitled to a vacatur of his conviction on such basis. People v Taylor, 1 NY3d 174 (2003) citing People v Baldi, 54 NY2d 137 (1981).

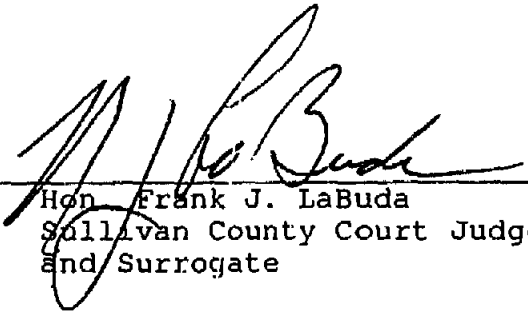
Based upon the above, it is

ORDERED, that defendants Order To Show Cause for CPL 330 relief is denied and dismissed, and it is further

ORDERED, that the Court Clerk shall schedule sentencing of the defendants for May 30, 2006 at 10:00 in the forenoon.

This shall constitute the Decision and Order of this Court.

DATED: May 16, 2006
Monticello, N.Y.



Hon. Frank J. LaBuda
Sullivan County Court Judge
and Surrogate