

People v Fowle

2007 NY Slip Op 30222(U)

March 7, 2007

Supreme Court, Kings County

Docket Number: 0001644

Judge: Plummer E. Lott

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MEMORANDUM

SUPREME COURT : KINGS COUNTY

(Criminal Term, Part 37)

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PEOPLE of the STATE of NEW YORK,

By: LOTT, J.

- against -

Dated: March 7, 2006

JAHBIR FOWLE,

Indictment No. 1644/05

Defendant.

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The defendant moves to set aside the verdict on the grounds of prosecutorial misconduct and jury tampering.

In deciding this motion, the court has considered the motion papers, the affirmation in opposition and the court file.

The defendant has been tried and convicted of reckless manslaughter of an eight-year boy. A sentence has not been imposed.

Prosecutorial Misconduct

The defendant alleges that Mr. Lawrence Malik, a witness for the prosecution, committed perjury when he took a plea before another justice of this court. The defendant alleges that the government did not correct the perjury before the other justice and has not prosecuted the witness for that perjury.

The defendant does not explain how perjury in another part of this court not on this trial affected the defendant's rights.

The defendant lacks standing to allege violations that do not affect his rights.

The motion to set aside the verdict based on prosecutorial misconduct is denied.

Juror Tampering

The defendant alleges that during trial an article appeared in the New York Post about the case. He alleges that notwithstanding that the government denied any involvement with the story, the court should now conduct a hearing to determine whether the People were involved in the “planting” of the story.

During the trial when the story appeared, the defendant had a full opportunity to voir dire the jury about what if any was the impact of the story, but took no steps in this regard.

CPL 330.30 (1) and (2) read as follows:

“At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds:

“1. Any 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.

“2. That during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict;”

While the defendant labels the claim as juror tampering, there is no claim that there was misconduct *by a juror*. The claim is misconduct by the government. Thus, subdivision 2 is not applicable.

Under subdivision 1, a claim must appear on the record. Matters that are not on

the record are not recognizable under CPL 330.30 (1).¹ The defendant's claim that the government was responsible for the newspaper article is a matter that does not appear on-the-record since the People's responsibility for the article is not a recorded fact.

Therefore, they cannot be raised on a CPL 330.30 motion.

The motion is denied on this basis.

Further, the issue must be preserved for appeal.² Since the defendant had the opportunity to voir dire the jury and failed to properly object, the issue is not preserved. Thus, a CPL 330.30 motion is improper.

This provides an additional ground for denying the motion.

It is important to remember that there is no proof that any juror read the articles or was influenced by them.

The motion is denied.

This constitutes the decision and order of the court.

E N T E R ,



Hon. Plummer E. Lott
Justice of the Supreme Court



¹ *People v Wolf*, 98 NY2d 105, 118-119 (2002); *People v Villegas*, 298 AD2d 122, 123 (2002); *People v Demeritt*, 291 AD2d 726, 728-729 (2002).

² *People v Everson*, 100 NY2d 609, 610 (2003); *People v Thomas*, 8 AD3d 303, 303 (2004).