

People v Brunson

2007 NY Slip Op 31007(U)

April 24, 2007

Supreme Court, Kings County

Docket Number: 0008809/2005

Judge: Vincent M. Del Giudice

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS - CRIMINAL TERM - PART 25**

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PEOPLE OF THE STATE OF NEW YORK

IND. NO. 8809/2005

vs.

DONAL BRUNSON,

**DECISION
AND ORDER**

Defendant.

-----X
VINCENT M. DEL GIUDICE, J.

Following a jury trial, the defendant was found guilty of Criminal Possession of a Weapon in the Fourth Degree (2 counts), Criminal Possession of Marihuana in the Fourth Degree, Criminal Possession of a Controlled Substance in the Fifth Degree, and Criminally Using Drug Paraphernalia in the Second Degree.

In this case, the defendant was charged with the constructive possession of drugs and two loaded handguns recovered, pursuant to a valid search warrant, in a locked bedroom and in a locked safe contained in that room, inside a second floor apartment at 263 Vernon Avenue, in Brooklyn (hereinafter, the apartment). Thus, the issue of the defendant's residence at the time of the execution of the search warrant was essential to the People's case.

Defendant now moves, pursuant to CPL Section 330.30(1), to set aside the verdict on the ground that the record contains grounds that would require reversal of a judgment of conviction as a matter of law by an appellate court. Specifically, the defendant alleges that

this court erred in denying defense counsel's pre-trial application for disclosure of the dates of alleged drug sales to a confidential informant, made in the apartment by individuals other than the defendant, as well as the name of the confidential informant who purchased those drugs, and a Darden Hearing regarding the confidential informant. The defendant also alleges that the People did not provide defense counsel with notice of the name of the one rebuttal witness called by the People, nor of the People's intention to offer into evidence the CJA interview report prepared by the rebuttal witness when she interviewed the defendant. Finally, the defendant alleges that this court erred in denying defense counsel's application to recall the defendant in sur-rebuttal.

For the reasons stated below, this motion is denied.

Initially, as conceded in the moving papers herein, there was no allegation that the defendant was present at the time that the drug transactions set forth in the search warrant application occurred. Thus, the defendant has presented no basis in law for disclosure of the exact dates of those transactions and the name of the confidential informant involved therein, nor for the granting of a Darden hearing. In this connection, this court notes the defendant's "belief", as stated in the motion papers herein, that at least one of the alleged drug sellers described in the search warrant application was the defendant's adult son, Mickey, and that if the confidential informant's name was disclosed, and he or she was compelled to testify herein, such testimony would have confirmed that, at the time the drug sales occurred, the individuals in the apartment had access to the bedroom that the police found locked at the time of the execution of the search warrant. As ruled by this court, such anticipated testimony would be irrelevant to the specific issue of the defendant's constructive possession

of the items recovered from the locked bedroom at the time of the execution of the search warrant. Further, defendant concedes specifically, in oral argument on this motion, that the validity of the search warrant was never in question. In all of the circumstances presented, the defendant's application for a Darden Hearing was properly denied.

The defendant's allegation that the People failed to give notice of the name of the rebuttal witness, or their intention to offer into evidence the CJA report that had been prepared by the witness when she interviewed the defendant, is belied by the record. In this connection, the record indicates that the defense received notice of the proposed rebuttal witness, who would sponsor admission of the CJA report, and that trial counsel in fact reviewed the report in question, at least one day prior to the witness being called.

Regarding the defendant's claim that this court erred in denying defense counsel's application to recall the defendant in sur-rebuttal, the record indicates as follows.

The People offered testimony on their direct case that the defendant was not present in the apartment at the time the search warrant was executed, but that the defendant's two adult children (Sedona and Mickey), her three minor children, and one juvenile were then present. The People offered additional testimony that the defendant arrived at the apartment during the execution of the search warrant, following a telephone call to defendant from her adult daughter, Sedona.

Following this court's ruling that defense counsel had "opened the door", on redirect examination of the arresting officer, the People elicited that, upon her arrival at the apartment, defendant told the police, inter alia, that she lived in the apartment and that the locked bedroom and safe were hers. Other evidence introduced by the People offered

support to that testimony.

The defendant testified in her own behalf. As relevant to the issues presented herein, defendant testified on direct examination that she was not living at the apartment at the time the search warrant was executed and had never told the police that it was her apartment; that she had previously lived in the apartment but had moved to an address across the street, where she took up residence with her fiancé and her two minor children; that she had left the apartment to her adult son and his then-pregnant fiancé, but had retained the lease for the apartment in her name and paid utility bills for the apartment; that her adult daughter Sedona had not lived in the apartment while the defendant had lived there; that she went to the apartment at the time the search warrant was being executed after receiving a telephone call from her daughter Sedona (who had picked up the defendant's two minor children from school), and receiving advice that her two minor children were then at the apartment; that she had never been asked by the police if she maintained a bedroom in the apartment; that when asked by the police about a safe in the apartment, she had denied any knowledge of it; and that following her arrest she had been asked by an interviewer if she then lived at the apartment and had responded negatively, specifying that she then lived at an address across the street.

On cross-examination, the defendant again denied that she lived in the apartment at the time the search warrant was executed. The defendant acknowledged that she had given pedigree information to a CJA interviewer, but denied that she had told the interviewer that her then-current address was the apartment, where she lived alone with her four children.

Defense counsel did not conduct redirect examination of the defendant, and thus did

not explore further the particular issue of the defendant's residence at the time of the execution of the search warrant, as raised during cross-examination.

Upon the People's offer of proof that the CJA interviewer who had conducted the interview of the defendant on the day following her arrest herein would testify to a prior inconsistent statement made by the defendant regarding her then-current residence, the People were permitted to call the CJA interviewer on rebuttal. As pertinent herein, that witness testified that pursuant to her report of her interview of an individual named "Donal Brunson" on the date in question, the interviewee had reported her then-current address as the apartment, where she had lived alone for five years, with her four children.

On cross-examination of the CJA interviewer, defense counsel elicited only that the interviewee had given the name Sedona Vaughan as a person she lives with, and that the interviewer did not recall if she had asked if the interviewee was the mother of Sedona Vaughan.

The jury was instructed, both sua sponte at the time the testimony was admitted, and during the final charge, that the defendant's alleged prior inconsistent statement was not evidence of its own truthfulness, but that the jurors might consider any prior consistency or inconsistency only as bearing on the weight or credibility the jurors wished to give to the testimony presented at the trial.

After the People rested on their rebuttal case, defense counsel made an application to recall the defendant in sur-rebuttal. Initially, that application was denied on the ground that the defendant had already testified and there was no basis in law for such sur-rebuttal. However, upon reflection, this court reconsidered the initial ruling, recognizing its error, and

requested an offer of proof from defense counsel regarding the proposed testimony.

In an offer of proof, defense counsel argued that there had been no testimony regarding “what happened when this document was prepared” and proposed to recall the defendant, in sur-rebuttal, to testify regarding a CJA interview of Sedona Vaughan that allegedly had occurred prior to the interview of the defendant, and whether the interviewer had ascertained from the defendant her relationship to Sedona Vaughan. Defense counsel proposed to elicit further from the defendant, in sur-rebuttal, whether the CJA interviewer had asked the defendant specifically whether she was then living at the apartment, noting that the defendant had acknowledged, both to the CJA interviewer and at trial, that the apartment was hers.

Following consideration of defense counsel’s offer of proof, this court noted that defense counsel could make his argument to the jury, but in its discretion denied the application for the proposed sur-rebuttal.

It is well settled that a proper foundation must be laid for the presentation of rebuttal evidence (see, e.g., People v. Harris, 57 NY2d 335, cert denied 460 US 1047). Here, the People laid the proper foundation for the rebuttal testimony by eliciting from the defendant on cross-examination her acknowledgment that, following her arrest, she had given pedigree information to a CJA interviewer, as well as her denial that she had told the CJA interviewer that her then-current address was the apartment, where she lived alone with her four children. Although defense counsel had the opportunity to explore that particular issue on redirect examination of the defendant, as well as on cross-examination of the rebuttal witness, counsel did not do so, but rather chose to make application to recall the defendant, in sur-


rebuttal, apparently to somehow tie the issue of the defendant's then-current residence into the CJA interview of the defendant's adult daughter Sedona, as well as to ask the defendant what specific question or questions were asked by the CJA interviewer regarding defendant's relationship to the apartment. As noted by defense counsel in argument offered to support the sur-rebuttal application, the defendant had already testified extensively regarding her relationship to the apartment. In this connection, and as noted above, the record indicates that the defendant testified on direct examination that she had been asked specifically by the CJA interviewer if she then lived at the apartment and she had responded negatively, giving an address across the street from the apartment.

It is a proper exercise of the court's discretion to deny the recall of a defendant for sur-rebuttal where the defendant has already testified in direct contradiction to the testimony of the People's rebuttal witness (see, e.g., People v. Thompson, 30 AD3d 198), and that was the basis for this court's ultimate denial of the application herein.

Based upon all of the above, the instant motion is denied in all respects.

This constitutes the Opinion, Decision and Order of the court.

Dated: Brooklyn, New York
April 24, 2007



Vincent M. Del Giudice
Judge of the Court of Claims
Acting Supreme Court Justice