

People v Barnes

2007 NY Slip Op 32427(U)

July 16, 2007

Supreme Court, Kings County

Docket Number: 0006963/2002

Judge: Patricia DiMango

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MEMORANDUM

SUPREME COURT : KINGS COUNTY

(Criminal Term, Part 30)

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PEOPLE of the STATE of NEW YORK,

By: DI MANGO, J.

- against -

Dated: July 16, 2007

DERRICK BARNES,

Indictment Nos. 3380/02, 6963/02

Defendant.

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The defendant, pro se, has moved to renew and reargue his previous motion to vacate his judgments of conviction, which motion was denied in its entirety by this court's decision and order dated March 29, 2006. The People oppose the current application on the ground that the defendant has not established any proper basis for reargument, and they urge that the court's prior decision was correctly decided on the merits as to all issues and that this motion be denied.

This court finds that the instant motion is not properly deemed an application for renewal in that the defendant has not proffered any new grounds or information that were not previously raised or available, or could not have so been with due diligence and thus denies renewal. Turning to the heart of this application, the reargument branch, this court further finds that the defendant has not demonstrated that the court overlooked or misapprehended either critical facts or the law, or was otherwise mistaken in reaching any of its prior conclusions. Thus, this court finds no basis for disturbing any aspect of its prior decision and order and herein determines to adhere to same. Nevertheless, this court finds it appropriate

to discuss several of the points raised and highlighted by the defendant upon this motion, in further explication of its prior determination.

In deciding this motion, the court has considered the moving papers and exhibits,¹ the affirmation in opposition (and its exhibits), and the court file.

Background

The court will not extensively summarize the factual and procedural background of these cases. It suffices to state that the defendant was charged under Indictment No. 6963/2002 with various counts of larceny for unauthorized ATM withdrawals during the month of April, 2002, with the top count being Grand Larceny in the Third Degree. Under Indictment No. 3380 the defendant stood charged with the top counts of Attempted Murder in the First Degree, Assault in the First Degree, and Attempted Robbery in the First Degree for having shot a woman in the thigh (while she was holding her one-year child in her arms) after she refused to give the defendant the keys to her automobile. On May 20, 2002, in full satisfaction of all charges in both indictments, the defendant entered pleas of guilty to the offenses of Attempted Murder in the First Degree and Grand Larceny in the Third Degree in exchange for the promise of concurrent sentences of incarceration of 15 years to Life and one to three years, respectively. The defendant was so sentenced on April 2, 2003.

¹ The exhibits include this court's decision of March 29, 2006 and all of the papers submitted by the defendant upon his original motion to vacate (notice of motion, affidavit, memorandum of law, and attached papers comprised of police reports, the defendant's written statement to the police, the plea and sentencing minutes, and transcribed minutes of other court proceedings held herein).

The defendant now seeks again to attack the validity of these convictions on various grounds upon this renewed motion to vacate, which, however, raises no new grounds or facts, and fails to demonstrate that any of the court's prior findings were erroneous in any respect.

Nevertheless, this court will address and discuss several of the defendant's issues.

Among the arguments raised herein, the defendant maintains that his conviction for Attempted Murder in the First Degree was invalid because one cannot be convicted of a non-existent crime, to wit, attempted felony murder. The defendant is quite correct in his assertion that there is no such crime as "attempted felony murder" (or attempted felony assault) (see, respectively, People v Buress, 122 AD2d 588, 589, lv. denied, 68 NY2d 810, habeas corpus dismissed, 814 F.Supp 313; Matter of Maldonado, 131 AD2d 367, lv. denied, 70 NY2d 608) for one "cannot be convicted of the crime of attempting to bring about an unintended result" (People v Campbell, 72 NY2d 602, 604).

However, this argument is based upon a false premise. The defendant was NOT convicted of attempted felony murder, and Attempted Murder in the First Degree is not the equivalent of attempted felony murder. Rather, Murder in the First Degree pursuant to Penal Law Section 125.27(1)(a)(vii) is an intentional murder committed during the course of a felony as enumerated in the statute, or during an attempt to commit such a felony. Thus, one can attempt to (intentionally) cause the death of another during the course of committing or attempting to commit and in furtherance of a robbery (or in the course of and in furtherance of immediate flight after committing or attempting to commit a robbery) under Penal Law §§ 110.00 and 125.27(1)(a)(vii) and such would constitute the real and prosecutable crime

of Attempted Murder in the First Degree (see also, People v Gabbidan, 172 Misc.2d 226, 227-229).

The defendant is also mistaken in his assertion that the underlying facts of this offense could not support a prosecution for the offense of Attempted Murder in the First Degree and that his attorney should not have allowed him to plead guilty thereto and the court should not have accepted such a plea thereon. Upon his plea allocution, the defendant stated that he did, with the intent to cause the death of [the complainant], “attempt[] to cause the death of [the complainant] by shooting [her] while [he] w[as] armed with a handgun, and [he] attempted to forcibly steal property from her.” Further, in his statement to the police, the defendant had indicated that after the complainant refused to give him her car keys he “got angry” and “shoot her in the leg and ran,” thereby admitting that he intentionally shot the female victim.

Accordingly, upon a trial a jury *could* have found that the defendant intended to kill the victim (whether during the course of a felony, or as a separate, discrete act) and such a finding would not be irrational or unsupported by any reasonable view of the evidence. Of course, a jury might have contrarily concluded that the defendant only wished to injure the victim and thus might have convicted him of Assault in the First Degree. However, there is no point in speculating as to how a jury might have found. Neither the defendant’s plea allocution nor the underlying facts cried out for the court to refuse to accept the defendant’s guilty plea. Moreover, while the defendant characterizes the victim’s wound as a “grazing leg wound,” there is nothing anywhere in the record (namely, documents in the court file or any of either parties’ exhibits) to support this trivializing characterization of the

complainant's gunshot wound to the thigh. On the contrary, the Grand Jury found that the victim had sustained a "serious physical injury." In any event, one can shoot at another, intending to kill that person, and completely miss one's target, and still have committed attempted murder.

While advising a defendant of his maximum exposure might seem coercive, it is an appropriate component of plea negotiations and helps ensure that a plea was knowingly made. As the court correctly observed, upon a conviction for Attempted Murder in the First Degree, the defendant faced a maximum sentence of 25 years to life imprisonment. Moreover, even if, upon trial, the jury found the defendant only guilty of the lesser charge of Assault in the First Degree, if the jurors further found that the assault was a separate act from, and not a continuation of, the attempted robbery, the defendant would have faced the potential of consecutive sentences upon each discrete crime, together with the possibility of consecutive time for the grand larceny and the Endangering the Welfare of a Child count. Again, this court is not in a position to speculate as to whether the trial judge would have so sentenced the defendant, but the judge certainly would have had the right and the power to do so. Thus, there was no coercion by either the court or defense counsel in bringing these matters to the defendant's attention during plea bargaining. Furthermore, given all of these circumstances, it cannot be said that the defendant's attorney did not provide the defendant meaningful representation in "permitting" or counseling the defendant to take the plea offer, notwithstanding his relative youth and lack of a criminal record.

Finally, the court will briefly address the defendant's claims that the court and his attorney "encouraged" him to execute a waiver of the right to appeal and then failed to advise him of his right to appeal from his judgment of conviction and that therefore, regarding the latter impropriety, the case must be remanded for re-sentencing.

The record, namely the plea minutes, reflects that the defendant knowingly and voluntarily signed the waiver of his right to appeal after conferring with counsel, thereby belying the defendant's intimation that his waiver thereof was coerced. Furthermore, such a waiver was a condition of the plea.

Regarding the alleged non-advisement of the defendant's right to appeal, while the record does reflect that the court did not advise the defendant of such right, since the defendant was represented by counsel, it was the duty and responsibility of defense counsel to so inform the defendant and assist him in serving and filing his notice of appeal and any application for poor person relief in order to prosecute an appeal (see, 22 NYCRR 606.5). While the defendant denies having been so advised, he has not established this as fact. Regardless, this issue did not and does not require a fact-finding hearing as to whether or not defense counsel fulfilled this duty with respect to the defendant, because, even if such claim were true, it is too late for any legal recourse thereon. CPL 460.30 expressly provides that, under these circumstances, a defendant may seek an extension of time for taking an appeal, but that "[s]uch motion must be made with due diligence after the time for the taking of such appeal has expired, **and in any case not more than one year thereafter**" (emphasis supplied). Since the defendant was convicted on April 2, 2003, the time to make such an

application had already expired prior to the defendant's first (original) motion to vacate herein. Thus, this claim affords the defendant no entitlement to the relief requested.

Having reconsidered the most salient of the defendant's arguments raised anew in support of vacatur, this court must again conclude that there is no legal basis for disturbing either the defendant's guilty pleas or the sentences imposed thereon.

Accordingly, upon reargument, the defendant's motion is, respectfully denied in its entirety, upon the merits, without a hearing, and the court adheres to its prior determination hereunder.


This constitutes the decision and order of the court.

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, NY 11201 for a certificate granting leave to appeal from this determination. This application must be made within 30 days of service of this decision. Upon proof of financial inability to retain counsel and to pay the costs and expenses of the appeal, defendant may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing.

Application for poor person relief will be entertained only if and when permission to appeal or a certificate granting leave to appeal is granted.²

E N T E R ,

J. S. C.



22 NYCRR § 671.5.
HON. PATRICIA M. DIMANGO

ENTERED
JUL 30 2007
NANCY T. SUNSHINE
COUNTY CLERK