

People v Fortunato

2007 NY Slip Op 33875(U)

November 20, 2007

Supreme Court, Kings County

Docket Number: 0008607/2006

Judge: Jill Konviser

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 26

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THE PEOPLE OF THE STATE OF NEW YORK,	:	
	:	
-against-	:	Ind. No. 8607/06
ANTHONY FORTUNATO,	:	
	:	
Defendant.	:	

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JILL KONVISER, JUSTICE:

On October 11, 2007, after a jury trial, the defendant was convicted of acting-in-concert to commit the crimes of manslaughter in the second degree as a hate crime and attempted petit larceny. On November 13, 2007, defense counsel made a motion to set aside the verdict pursuant to Criminal Procedure Law §330.30(1). The People filed a written response to the motion on November 14, 2007. The defense filed a reply memorandum on November 19, 2007, in which, for the first time, a claim is raised under C.P.L. §330.30(2) based upon an allegation of juror misconduct. For the reasons that follow, the motion to set aside the verdict is denied.

Issues Raised Under C.P.L. §330.30(1)

The claims raised by the defendant under C.P.L. §330.30(1) must justify reversal or modification by an appellate court as a matter of law to be sustained. Under the law, a claim cannot be reviewed by the trial judge under C.P.L. §330.30 unless a proper objection was made at trial to preserve the claimed error. People v. Everson, 100 N.Y.2d 609, 610 (2003); People v. Hines, 97 N.Y.2d 56 (2001); People v. Patino, 259 A.D.2d 502 (2d Dept.), lv. denied, 93 N.Y.2d 976 (1999); People v.

Tillman, 273 A.D.2d 913 (4th Dept.), lv. denied, 95 N.Y.2d 939 (2000); People v. D'Alessandro, 184 A.D.2d 114, 118 (1st Dept. 1992), lv. denied, 81 N.Y.2d 884 (1993).

The defendant has raised the following three claims in support of his motion to set aside the verdict pursuant to C.P.L. §330.30(1):(1) that the evidence was legally insufficient to support his conviction for manslaughter in the second degree as a hate crime in that the People "did not prove beyond a reasonable doubt the requisite state of mind of recklessness as defined in Section 15.05(3) in the N.Y. Penal Law;" (2) that his conviction of manslaughter in the second degree as a hate crime should be reduced to criminally negligent homicide; and, (3) that this Court's earlier written ruling sustaining the application of the hate crimes statute to the charges in this case was incorrect. Defendant's Motion at 1-2.

1. The Defendant's Claim Regarding the Legal Sufficiency of the Manslaughter in the Second Degree as a Hate Crime Charge.

To preserve a challenge to the legal sufficiency of the evidence, the claim must be raised with specificity before the trial court in order to be sustained. People v. Lawrence, 85 N.Y.2d 1002, 1004-05 (1995); People v. Gomez, 67 N.Y.2d 843, 845 (1986); People v. Dekle, 56 N.Y.2d 835, 836-37 (1982); People v. Polk, 284 A.D.2d 416 (2d Dept.), lv. denied, 96 N.Y.2d 923 (2001); People v. Udzenski, 146 A.D.2d 245, 250 (2d Dept.), lv. denied, 74 N.Y.2d 853 (1989). A general challenge to the legal sufficiency of the evidence is insufficient to preserve the claim. People v. Gray, 86 N.Y.2d 10, 19 (1995); People v. Cona, 49 N.Y.2d 26,

33 n.2 (1979); People v. James, 35 A.D.3d 762 (2d Dept. 2006). Instead, the defendant must identify at trial the particular charge claimed to be not supported by the evidence and the precise basis of the claimed deficiency. See People v. Gray, 86 N.Y.2d at 19; People v. La Guerre, 29 A.D.3d 820 (2d Dept.), lv. denied, 7 N.Y.3d 814 (2006).

Here, at the close of the People's case, defense counsel argued as follows:

At this time, I would move to dismiss the charges against my client based upon the fact and looking at the evidence in a light most favorable to the prosecution that they have not made out each and every count, specifically, Judge, I would bring to your attention their argument with regard to the hate crime charges. The evidence is uncontested that at the time of the selection that there was no robbery planned, that what was planned was a larceny by false promise. Without a plan to rob, with all of the charges, all of the hate crime charged [sic], that were laid out and are based upon the robbery, should fall because when he was selected, even looking in the case [in] the light most favorable to the prosecution, there was no crime of robbery contemplated.

The prosecution's case seems to be that this robbery was a spontaneous act that happened at the scene way after the person was selected. Therefore, the hate crime dependent upon the robbery plan and the selection, therefore, would have to fall, and I ask the Court to dismiss all the charges but, specifically, all of the hate crime charges that have robbery as the underlying lynch pin.

Thank you, Judge.

Trial Transcript at 1384-85. The motion to dismiss was denied by the Court. Id.

In addition, at the close of the defense case, defense counsel renewed his motion to dismiss by stating: "Judge, before we go on, I

would renew my motion to dismiss for the same grounds as put on the record at the end of the prosecutor's case." Trial Transcript at 2059. This Court again denied the defendant's motion to dismiss. Id.

Defense counsel's challenge to the legal sufficiency of the evidence did not raise the specific claims that he has included in his current motion to set aside the verdict. Indeed, the only specific claims that defense counsel raised at trial with respect to the sufficiency of the evidence concerned the attempted robbery charges. No specific arguments were made with respect to the legal sufficiency of the manslaughter as a hate crime charge. Due to these infirmities, the defendant's current challenge to the legal sufficiency of his manslaughter conviction is not preserved for appellate review and, therefore, this Court is without jurisdiction to review the defendant's C.P.L. §330.30(1) claim. People v. Hines, 97 N.Y.2d at 61 (A trial court may not review a legal insufficiency argument under C.P.L. §330.30 "unless it has been properly preserved for review during the trial[.]"); People v. Thomas, 242 A.D.2d 281 (2d Dept.), lv. denied, 90 N.Y.2d 1014 (1997) (C.P.L. §330.30 motion based upon the legal sufficiency of the evidence was properly denied by the trial court as "the defendant's motion for a trial order of dismissal was not specific enough to preserve the issue of legal sufficiency for appellate review."); see People v. Tillman, 273 A.D.2d at 914 ("Because defendant's contention concerning the legal sufficiency of the evidence was not preserved for appellate review by a timely motion to dismiss directed at the specific deficiency in the proof . . . the trial court was without authority to set aside the verdict" under C.P.L. §330.30(1)

(citations and internal quotations omitted). Accordingly, the defendant's motion to set aside his conviction for manslaughter in the second degree as a hate crime is denied.

In addition, to the extent that the defendant may be seeking to set aside the verdict on the ground that the defendant's conviction of manslaughter in the second degree as a hate crime is against the weight of the evidence, such claim is also beyond this Court's jurisdiction. A trial court is not empowered to set aside the verdict as against the weight of the evidence under C.P.L. §330.30(1) as such power is reserved exclusively for the Appellate Division. See People v. Brown, 141 A.D.2d 657 (2d Dept. 1988).

2. The Defendant's Claim that the Manslaughter in the Second Degree as a Hate Crime Conviction Should be Reduced to Criminally Negligent Homicide.

The defendant claims that the verdict should be set aside on the ground that his conviction of manslaughter in the second degree as a hate crime should be reduced to criminally negligent homicide. As the defendant failed to raise this claim at trial, it is not preserved as a matter of law for appellate review and, thus, cannot be reviewed by this Court under C.P.L. §330.30(1). People v. Everson, 100 N.Y.2d at 610; People v. Patino, 259 A.D.2d at 502. Accordingly, the defendant's motion to set aside the verdict on this ground is denied.

3. The Defendant's Challenge to the Application of the Hate Crimes Statute.

The defendant claims that the verdict should be set aside under C.P.L. §330.30(1) by renewing his challenge to the application of the hate crimes statute to the charges in this case. This argument was rejected by this Court in a written decision issued on August 2, 2007. This Court adheres to its earlier ruling. Thus, the defendant's motion to set aside the verdict on this ground is denied.

Issues Raised Under C.P.L. §330.30(2)

The defendant, in his reply memorandum to the People's opposition to his motion to set aside the verdict under C.P.L. §330.30(1), asks this court, for the first time, to hold a hearing to determine "the extent to which juror misconduct affected the verdict." Defendant's Reply Memorandum at 2. The only support in the reply affirmation for this contention is a reference to a letter written to this Court by juror number one, a copy of which the defendant attached as Exhibit B to his sentencing memorandum.

A motion to set aside the verdict based on juror misconduct under C.P.L. §330.30(2) is required to be in writing and must be based upon sworn allegations of fact essential to support the motion. C.P.L. §330.40(2)(a). A motion under C.P.L. §330.30(2) may be denied if sworn allegations "essential to support the motion" are absent. See C.P.L. §330.40(2)(e)(ii). As the defendant's motion under C.P.L. §330.30(2) is based solely on the

unsworn allegations of juror number one, as set forth in the undated letter attached to the defendant's sentencing memorandum, the defendant's motion to set aside the verdict under C.P.L. §330.30(2) is denied without a hearing. See §330.40(2)(e)(ii); People v. Busreth, 35 A.D.3d 965 (3d Dept. 2006), lv. denied, 8 N.Y.3d 920 (2007) (motion to set aside verdict under C.P.L. §330.30(2) denied due to absence of affidavit from juror); see also People v. Grant, 43 A.D.3d 800 (1st Dept. 2007) (motion to set aside verdict under C.P.L. §330.30(2) was "procedurally defective, in that it was not supported by sworn allegations of fact.").

In any event, even if juror number one's allegation had been set forth in a sworn affidavit, the defendant's motion to set aside the verdict under C.P.L. §330.30(2) would still be denied. The law is well-settled that a "jury verdict may not be impeached by statements going to the tenor of the jury's deliberations." People v. Lehrman, 155 A.D.2d 693 (2d Dept. 1989); see People v. Brown, 48 N.Y.2d 388, 393 (1979). Thus, a claim that a juror was bullied, coerced, or intimidated by other jurors into rendering a particular verdict will not require a verdict to be set aside on the ground of juror misconduct. See People v. Anderson, 249 A.D.2d 405 (2d Dept.), lv. denied, 92 N.Y.2d 877 (1998); People v. Lehrman, 155 A.D.2d at 693; People v. Liguori, 149 A.D.2d 624 (2d Dept.), lv. denied, 74 N.Y.2d 813 (1989); People v. Etheridge, 142 A.D.2d 593 (2d Dept. 1988); People v. Maddox, 139 A.D.2d 597, 598 (2d Dept.), lv. denied, 72 N.Y.2d 862 (1988); People v. James, 112 A.D.2d 380 (2d Dept.

1985); see also People v. Karen, 17 A.D.3d 865 (3d Dept.), lv. denied, 5 N.Y.3d 764 (2005); People v. Redd, 164 A.D.2d 34 (1st Dept. 1990).

Accordingly, in this case, the defendant's claim that juror number one was essentially bullied, coerced or harassed into rendering his verdict provides no basis to set aside the verdict as it improperly seeks to impeach the verdict by delving into the tenor of the deliberative process. See e.g. People v. Liguori, 149 A.D.2d at 626 (Although . . . [a] deliberating juror stated that he voted guilty only because he capitulated to the pressure placed on him by the other jurors, a jury verdict may not be impeached by statements going to the tenor of the jury deliberations;" therefore, the motion to set the verdict under C.P.L. §330.30(2) was denied); People v. Maddox, 139 A.D.2d at 698 ("The postconviction application, supported by an affidavit executed by . . . [a] juror in which she sought to impeach her verdict by reference to matters occurring during the deliberation process, specifically, that having been 'personally attacked, harassed and intimidated by other members of the jury panel,' she 'capitulated and agreed to vote guilty' was incompetent as a matter of law" to require the verdict to be set aside under C.P.L. §330.30(2); see also People v. Goode, 270 A.D.2d 144 (1st Dept. 2000), lv. denied, 95 N.Y.2d 835 (2000) ("The [trial] court's denial, without a hearing, of defendant's motion to set aside the verdict alleging juror misconduct was proper. The post-trial statements by a juror complaining of 'coercion' by other jurors were not a proper basis for impeaching the verdict[.]").

Significantly, this Court notes that after the verdict was announced, the jury was polled and the foreperson confirmed his guilty verdict. See People v. Karen, 17 A.D.3d at 867; People v. Goode, 270 A.D.2d at 144 ("The post-trial statements by a juror complaining of 'coercion' by other jurors were not a proper basis for impeaching the verdict . . . especially in light of her confirmation that it was her verdict upon polling of the jury."). Juror number one's "belated misgivings and second thoughts" provides no basis for this Court to set aside the verdict. People v. Karen, 17 A.D.3d at 867.

As the defendant has not satisfied the high threshold required in order to obtain a hearing with respect to juror misconduct, see People v. Rodriguez, 71 N.Y.2d 214, 218 n.1 (1988); People v. Goode, 270 A.D.2d at 144; People v. Brown, 269 A.D.2d 539, 540 (2d Dept.), lv. denied, 95 N.Y.2d 851 (2000), his motion to set aside the verdict under C.P.L. §330.30(2) is denied without a hearing.

Conclusion

The motion to set aside the verdict under C.P.L. §§330.30(1), (2) is denied without a hearing. This constitutes the Decision and Order of the Court.

Dated: Brooklyn, New York
November 20, 2007

HON. J. KONVISER

J.S.C.

