People v Braham
2008 NY Slip Op 33750(U)
August 4, 2008
County Court, Westchester County
Docket Number: 07-1077
Judge: James W. Hubert

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COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

CARLOS JEAN-BAPTISTE a/k/a "C.J."
LLOYD BRAHAM; WARREN DAVIS a/k/a STONE
ANDREW CREWE a/k/a "KILLER"

Defendants.

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DECISON & ORDER

Ind. No. 07-1077

Hubert, J.

On May 20, 2008, defendant Lloyd Braham was convicted after a four-week jury trial (with co-defendant Warren Davis) of criminal possession of a weapon in the second degree. He was acquitted of two counts of murder in the second degree, six counts of robbery in the first degree, and three counts of burglary in the first degree. The trial evidence established that on June 29, 2007, the defendants went to the apartment of Michael Brett at 138 West 4th Street in Mount Vernon, New York, and robbed him and others present at gun-point. Defendant Baptiste shot and killed Brett during the course of the robbery and burglary. The evidence included, *inter alia*, the testimony of two surviving victims, as well as the testimony of police officers, forensic scientists, and medical examiners. In video-taped and oral statements admitted into evidence, Braham admitted that the defendants had planned the robbery, that one of the co-defendants arranged to get the guns, and that he helped force one of the victims, who was initially outside, back into Brett's apartment.

The defendant now moves pursuant to Criminal Procedure Law § 330.30 (1) to set aside the verdict on the grounds that (1) the count of criminal possession of a weapon, as contained in

the indictment, was duplicitous; and (2) the Court erred in allowing "his jury" to hear the trial testimony of Warren Davis, despite the fact that partial severance had been previously ordered by the Court. For the reasons set forth below, the defendant's motion is denied.

Discussion

The basis for vacating a jury verdict prior to sentencing is strictly circumscribed by CPL § 330.30. CPL § 330.30 (1) provides that "[a]t 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 . . .[a]ny 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."

It is well-settled that this Court is limited to deciding matters of law that have been preserved and that would require reversal of the conviction when appealed. *People v. Hines*, 97 N.Y.2d 56, 61, 736 N.Y.S.2d 643 (2001) (on post-verdict motion § 330.30 motion, an insufficiency argument may not be addressed unless it has been properly reserved for review during trial"); *People v. Hector*, 295 A.D.2d 212, 744 N.Y.S.2d 370 (1st Dep't 2002); *app. den.* 98 N.Y.2d 730, 749 N.Y.S.2d 480 (2002) (claim that assault count erroneously submitted was unpreserved and thus there was no ground that would require reversal or modification of judgment as a matter of law); *People v. Armstrong*, 237 A.D.2d 452, 655 N.Y.S.2d 545 (2d Dep't 1997)(reversal of judgment of conviction based on legally insufficient evidence is not "mandated on appeal as a matter of law" unless the issue has been preserved for appellate review by a timely motion to dismiss); *People v. Sadowski*, 173 A.D.2d 873, 571 N.Y.S.2d 77 (2d Dep't 1991) ("only a claim of error that is properly preserved for appellate review may serve as the basis to

set aside the verdict).

This statutory procedural limitation is strictly construed. Neither a general motion to dismiss nor a post-verdict motion is sufficient to preserve an issue for appeal. *People v. Finger*, 95 N.Y.2d 894, 716 N.Y.S.2d 34 (2000)(general motion to dismiss insufficient to preserve argument for review); *People v. Gray*, 86 N.Y.2d 10, 19, 629 N.Y.S.2d 173 (1995)(motion to dismiss must be "specifically directed" at the legal insufficiency to preserve issue for appeal). Thus, the Court may not reach an issue raised for the first time in a CPL § 330.30 motion if it has not been specifically raised during trial.

Here, the defendant argued at the close of the People's case that the trial evidence was insufficient as a matter of law, but at no time sought dismissal of the weapon possession count on the basis of duplicity, or otherwise objected to its submission to the jury. Nor did the defendant raise the issue in his omnibus motion or prior to trial. Hence, the Court is without the authority to set aside the verdict on this basis. See *People v. Clark*, 858 N.Y.S. 2d 847, 2008 N.Y. Slip. Op. 4957, 2 (3d Dep't 2008)(defendant failed to preserve argument that several counts of the indictment were duplicitous, since he did not move to dismiss the counts on that ground or object to the submission of those counts to the jury); *People v. Swackhammer*, 260 A.D.2d 939, 692 N.Y.S.2d 177 (3d Dep't 1999), *lv. den.* 93 N.Y.2d 1028, 697 N.Y.S.2d 587 (1999)(defendant's claim that two counts of indictment were duplicitous is unpreserved for review since he never moved to dismiss the indictment on that basis, sought particularization of the charged conduct, or objected to submission of those counts); *People v. James*, 238 A.D.2d 606, 657 N.Y.S.2d 961 (2d Dep't 1997)(defendant failed to preserve for appellate review his contention that trial testimony and court's charge rendered counts of felony murder and robbery in the first degree

duplicitous); *People v. Fisher*, 223 A.D.2d 493, 494, 637 N.Y.S.2d 382, 383 (1st Dep't 1996), *lv. den.* 88 N.Y.2d 936, 647 N.Y.S.2d 169 (1996) (claim that charges in indictment are duplicative unpreserved where not raised before the trial court), *app. den.* 88 N.Y.2d 936, 647 N.Y.S.2d 169 (1996); *People v. Morey*, 224 A.D.2d 730, 637 N.Y.S.2d 500 731 (3d Dep't 1996), *lv den.* 87 N.Y.2d 1022, 644 N.Y.S.2d 156 (1996)(defendant failed to preserve his arguments that two counts of the indictment are duplicitous or multiplicitous through a timely pretrial motion to dismiss for facial invalidity); *People v. Anders,* 192 A.D.2d 392, 393, 597 N.Y.S.2d 590 (1st Dep't 1993), *app. den.* 81 N.Y.2d 1069, 601 N.Y.S.2d 588 (1993)("Defendant's claim that the indictment was duplicitous is unpreserved for review as a matter of law, defendant having failed to make a pretrial motion to dismiss the indictment or to object to the submission of the count to the jury"); *People v. Webb*, 177 A.D.2d 524, 525, 575 N.Y.S.2d 913, 913-14 (2d Dep't 1991)(defendant's claim that charges were duplicitous unpreserved for appellate review; proper method to challenge the facial validity of an indictment is by a pretrial motion to dismiss). Accordingly, the

Even assuming that Braham had timely raised this argument, the Court would find it to be without merit. Each count of an indictment may charge only one offense. CPL § 200.30 (1). An indictment is duplicitous if it charges two or more distinct crimes in a single count. The requirement that separate counts of an indictment charge only one offense serves to ensure that a defendant is provided with "fair notice of the charges against him so that he can defend himself and establish the defense of double jeopardy if an attempt is made to reprosecute him after acquittal or conviction of those charges." *People v. Davis*, 72 N.Y.2d 32, 38, 530 N.Y.S.2d 529 (1988). Prohibiting duplicitous counts also prevents the possibility that individual jurors might

vote to convict a defendant of one count on the basis of different offenses, avoiding the risk that the jurors may not have been unanimous as to any one of the crimes charged. *Id.* at 38; *People v. Keindl*, 68 N.Y.2d 410, 417-418, 509 N.Y.S.2d 790 (1986).

Here, the defendant was charged with acting in concert to possess a loaded firearm. The offense of criminal possession of a weapon in the second degree is committed when a defendant possesses a loaded and operable firearm and such possession takes place outside of the persons' home or place of business. Penal Law § 265.03(3). Although there was evidence in this case that more than one weapon was used during the course of the robbery, the proof at trial was that only one of the weapons–the murder weapon–was loaded and operable. Thus, the count charging criminal possession of a weapon in the second degree was not duplicitous because it charged a single crime based on a single weapon.

Similarly, there was no risk of jury confusion or a verdict which was not unanimous. *Cf. People v. Archer*, 238 A.D.2d 183, 656 N.Y.S.2d 237 (1st Dep't 1997)(where indictment charged three identical counts of criminal possession of a weapon in the third degree and did not specify which gun, of the three recovered by the police, pertained to which count, and the jury returned a verdict of guilty on one count, and acquitted defendant of the other two weapon possession counts, it was impossible to conclude from the verdict which of the three guns defendant was convicted of possessing); *People v. Jones*, 233 A.D.2d 342, 649 N.Y.S.2d 471 (2d Dep't 1996)(conviction vacated where defendant was convicted of one count of criminal possession of a weapon in the second degree, and acquitted him of a second, identical count; although two weapons were used in the shooting, the court failed to link a particular weapon to a specific count, hence it was impossible to determine which weapon the defendant was convicted of

possessing); *People v. Jackson*, 174 A.D.2d 444, 572 N.Y.S.2d 891 (1st Dep't 1991)(finding it "impossible to conclude with certainty from this verdict which of the four guns appellant was convicted of possessing" where defendant and accomplices were charged in a single indictment with murder and four identical counts of criminal possession of a weapon and defendant was acquitted of the murder but convicted of one weapons count). Accordingly, the count of criminal possession of a weapon, under the facts of this case, is not duplicitous.

Braham next argues that he was convicted solely on the testimony of his co-defendant, Warren Davis, and that the fact that "his" jury was allowed to hear this testimony was reversible error since he had been afforded a partial severance prior to trial. This claim is similarly without merit. As part of the defendant's pre-trial omnibus motion, he moved for a severance from each of his co-defendants based on *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) and on the grounds of an unspecified "conflict" of defenses. The motion was denied as pre-mature pending resolution of the admissibility of each of the defendants' statements. Having ruled that each of the four defendant's statements was admissible, this Court resolved the *Bruton* problem by ordering a partial severance. Two juries were impaneled to hear the evidence against Davis and Braham, and each defendant's jury was removed from the courtroom when the other defendant's statements were introduced. Neither defendant argued that their defenses were antagonistic to one another, although both defendants were given the opportunity to raise this issue and offer proof in support thereof. At trial, Braham specifically declined to proffer any proof of antagonistic defenses, or to even posit a legal theory in support of such a claim.

Following the People's direct case, each defendant indicated that he wished to testify. The court determined, over the defendants' objections, that both juries could properly hear each

defendants' testimony because (1) counsel failed to elaborate or demonstrate how the defendants positions were antagonistic to each other, or how one defendant could essentially become a second prosecutor; and (2) the reason for a partial severance under *Bruton* was no longer applicable since each defendant would have the right of confrontation.

In order to effectuate a severance on the grounds of antagonistic defenses, the movant must first demonstrate by "concrete evidence" that the defendants' positions are antagonistic to one another. *See People v. Bornholdt*; 33 N.Y.2d 75, 350 N.Y.S.2d 369 (1973); *People v. Martin*, 154 A.D.2d 554, 546 N.Y.S.2d 394 (2nd Dep't 1989); *People v. Larkin*, 135 A.D.2d 834, 523 N.Y.S.2d 131 (2d Dep't 1987). When the possibility of one defendant testifying in a manner antagonistic to another defendant is merely colorable or speculative, the court has discretion to deny the severance motion. *People v. Johnson*, 124 A.D.2d 1063, 508 N.Y.S.2d 728 (4th Dep't 1986). "Where proof against the defendants are supplied by the same evidence only the most cogent reasons warrant a severance." *Bornholdt*, 33 N.Y.2d at 87.

Here, Braham moved to exclude his jury from his co-defendant's testimony on the grounds that it was not "evidence" in his case, and because there were "inconsistencies" between the statements of Davis and Braham. However, he never argued that his defense was antagonistic to that of his co-defendant, or offered any proof as to what the testimony at trial would be. Thus, his failure to articulate any antagonistic defenses between Braham and Davis prevented the Court from assessing the "strategies and evidence as forecast by the parties." *Mahboubian*, 74 N.Y.2d at 184-85. Although the Court specifically raised the issue several times, Braham failed to state sufficient facts to demonstrate how his position was antagonistic to defendant Davis. *People v. Martin*, 154 A.D.2d 554, 546 N.Y.S.2d 394 (2d Dep't 1989).

Moreover, since each defendant testified at trial, the reasons for partial severance under *Bruton* were no longer at issue. In *Bruton*, the Supreme Court held that the admission of a confession made by one defendant, who does not testify, and which contains references implicating his codefendant, violates the latter's right of cross-examination under the confrontation clause. The court noted that there is a substantial risk that the jury, even with limiting instructions, may consider the implicating references in determining the codefendant's guilt. Unless the implicating references can be effectively deleted, the statement is not admissible unless separate trials are had.

The crux of *Bruton*, however, was the inability of the implicated defendant to cross-examine his codefendant as to the content of the statement, since the codefendant did not take the stand and testify at the trial. In the present case, defendant Davis, whose statements tended to implicate Braham in the commission of the crime, did take the stand and testified as to the contents of the statements he had made and the circumstances under which he made them. Thus, there was no reason to exclude Braham's jury from the proceedings. *People v. Griffin*, 48 N.Y.2d 998, 425 N.Y.S.2d 547 (1980)(no error was committed in denying defendant's motion to sever; any objection based on *Bruton* was obviated when the codefendant testified); *People v. Anthony*, 24 N.Y.2d 696, 301 N.Y.S.2d 961 (1969)("the evil sought to be obviated by *Bruton* is not present where the codefendant who made the statement takes the stand and thereby provides the defendant with the opportunity to exercise his Sixth Amendment right to confrontation"); *People v. Halstead*, 180 A.D.2d 818 (2d Dep't 1992)(trial court did not improvidently exercise its discretion in denying defendant's motion for severance made upon ground that codefendant made a statement inculpating the defendant because the codefendant testified at trial)

People v. Levine, 174 A.D.2d 757, 571 N.Y.S.2d 795 (2d Dep't 1991)(defendant's right of confrontation was not infringed by admission of codefendant's confession since the codefendant took the stand at trial); *People v. Cuesta*, 177 A.D.2d 639, 576 N.Y.S.2d 342 (2d Dep't 1991)(defendant failed to establish that there was a "significant danger" that a conflict between the defenses offered by the defendant and the codefendant would lead the jury to infer the defendant's guilt; any prejudice to defendant was mitigated because codefendant took the stand, thereby preserving defendant's right to confrontation and to cross-examine him). Thus, contrary to Braham's argument, the Court's decision not to exclude "Braham's jury" during the testimony of co-defendant Warren Davis was not improper.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
August 4, 2008

James W. Hubert
County Court Judge

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