

People v Borrell

2009 NY Slip Op 32563(U)

October 27, 2009

Supreme Court, Queens County

Docket Number: 4841-94

Judge: Robert C. McGann

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Short Form Order

SUPREME COURT - STATE OF NEW YORK
CRIMINAL TERM PART K-22 QUEENS COUNTY
125-01 Queens Boulevard Kew Gardens New York

P R E S E N T :

HON. ROBERT C. McGANN,
Justice Supreme Court

THE PEOPLE OF THE STATE OF NEW YORK	:	Ind. No. 4841-94
	:	
-against-	:	Motion: Vacate
	:	
JULIO BORRELL,	:	Submitted: October 27, 2009
Defendant.	:	Argued
	:	Hearing
	:	

The following papers numbered
1 to 3 submitted in this motion

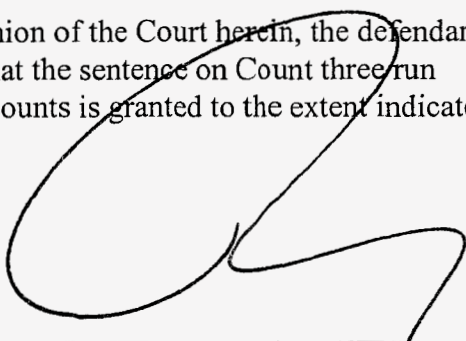
Robert C. Newman, Esq.
For the motion

A.D.A. Edward D. Saslaw
Opposed

Notice of Motion and Affidavits Annexed	Papers Numbered
Answering and Reply Affidavits	1-2
Exhibits	
Grand Jury Minutes	
Affirmation in Opposition	3

Upon the foregoing papers and in the opinion of the Court herein, the defendant, Julio Borell's motion to delete this Court's direction that the sentence on Count three run consecutively to the sentences on the remaining counts is granted to the extent indicated in the accompanying memorandum of this date.

GRANTED:
Date:



Robert C. McGann, J.S.C.

MEMORANDUM

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART K-22

THE PEOPLE OF THE STATE OF NEW YORK	: By: Robert C. McGann, J.S.C.
-against-	: Dated: October 27, 2009
JULIO BORRELL,	: Ind. No.4841-94
Defendant.	:
	:

The defendant, Julio Borrell, moves before this Court for an order deleting this Court’s direction that the sentence on Count Three of the indictment run consecutively to the remaining counts.

In this indictment, the defendant was charged with the armed robbery of the Starting Gate Pub. on May 14, 1994. It was alleged that the defendant and an accomplice entered the bar wearing masks and brandishing weapons. They took money from the cash register and from one of the patrons named Jerry Kelly and fled. One of the patrons, Patrick McGinley, followed the defendant but stopped when the defendant fired the gun in his direction. McGinley was struck in the left arm and was hospitalized for these injuries.

TRIAL AND SENTENCING

The defendant was tried and convicted of six counts of robbery as well as other crimes. It is the conviction and sentence on two of those robbery counts which form the basis of this

motion.

Under count three of that indictment, the defendant is charged with Robbery in the First Degree alleging that the defendant forcibly stole certain property from Jerry Kelly, and in the course of the robbery was armed with a deadly weapon.

Under count six of that indictment, the defendant is charged with Robbery in the First Degree alleging that the defendant forcibly stole certain property from Jerry Kelly and that in immediate flight therefrom, the defendant caused serious physical injury to Patrick McGinley.

The defendant was also indicted separately and tried separately for another robbery on another date, under Indictment number 3794-94.

At the sentencing under Indictment 4841-94, the defendant was sentenced to 12 ½ to 25 years under count three, and was sentenced to 12 ½ to 25 years under count six. The Court stated “All counts are concurrent with one another except for count three. Counts one, two, four, five, six, seven eight and nine will be concurrent but consecutive to 12 and a half to 25 years for count three . . .”

POST-JUDGMENT LITIGATION

The defendant appealed his convictions on both indictments to the Appellate Division on Fourth Amendment grounds. No appeal was taken of the defendant’s consecutive sentence in this indictment.

In *People v. Borrell*, 8 A.D. 3d 583, the Appellate Division concluded that the defendant’s Fourth Amendment claim was valid and reversed the defendant’s conviction under

the other Indictment 3794-94. At the same time the Appellate Division affirmed the defendant's conviction under this indictment 4841-94.

An application for leave to appeal to the Court of Appeals was denied on March 11, 2005.

The defendant moved *pro se* before the Appellate Division for reargument of that portion of their decision which affirmed his conviction under Indictment 4841-94. This motion was denied by the Appellate Division on April 11, 2005.

By a motion filed before the Appellate Division and dated April 22, 2006, the defendant argued for the first time that he was illegally sentenced to consecutive prison terms. Characterizing the defendant's motion as "in effect, for leave to reargue" the appeal, the Appellate Division denied the motion. *People v. Borrell*, 2006 NY Slip Op 74528 (U) (2d Dept. August 28, 2006, amended 2006 NY Slip Op 74730 (U) (2d. Dept. August 30, 2006). An application for leave to appeal to the Court of Appeals from the order of August 20, 2006 was dismissed on October 3, 2006, *People v. Borrell*, 7 N.Y. 3d 865.

The defendant then wrote to the Appellate Division to object to the manner by which it disposed of his motion and added an attack on Appellate Counsel. The Court Clerk calendered the defendant's letter as a motion for a writ of error *coram nobis*.

The Appellate Division denied the motion on April 24, 2007, holding that the defendant "failed to establish that he was denied effective assistance of counsel." *People v. Borrell*, 39 A.D.3d 871. The Appellate Division added that the "denial of this application is without prejudice to the defendant seeking relief in the Supreme Court, Queens County if he is so advised, pursuant to CPL 440.20." *Id.*, at 872.

The defendant responded with a letter to the Appellate Division stating that it was

“absurd” to move before the sentencing judge. Treating this letter as a motion to reargue, it was denied by the Appellate Division on June 20, 2007.

The defendant made yet another motion to reargue before the Appellate Division, and the Appellate Division granted the branch of the motion which is for leave to reargue, recalled and vacated the order denying defendant’s motion for *coram nobis*, and granted the application. *People v. Borrell*, 49 A.D. 3d 890. It recalled and vacated the original 2004 decision on direct appeal, and substituted a new one. The only substantial difference between the two orders was the following language. It held that defendant’s sentence for the robbery conviction under count three was improperly imposed to run consecutively to the robbery conviction under count six “since the convictions under these counts both arose from a single transaction.” *Id.* At 892-893. It went on to add, “[n]onetheless, we deem it appropriate to direct that the concurrent sentences imposed on counts three and six run consecutively to the sentences imposed on the remaining counts of that indictment.” *Id.*, at 893.

This decision was appealed to the Court of Appeals on the ground that the corrective action directed by the Appellate Division was “illegal”, in that it altered the trial court’s order that the sentence on count three be consecutive by directing that the sentences on counts three and six run concurrently and consecutively with the remaining counts.

On May 5, 2009, the Court of Appeals reversed the Appellate Division and held that whatever the merits of the defendant’s argument with regard to his sentence, his appellate counsel “was, on the whole, constitutionally adequate.” *People v. Borrell*, 12 N.Y.3d 365, 370. The Court of Appeals directed that the defendant’s motion for *coram nobis* be denied.

The Court of Appeals went on to further state “While it may ultimately be determined

that defendant should have been sentenced concurrently, as he now contends, and that the representation at issue would have been more efficacious had the issue been raised on appeal, the relevant and, indeed, dispositive threshold issue on this coram nobis application is not whether defendant's representation could have been better but whether it was, on the whole constitutionally adequate. This less exacting standard was met by counsel on the appeal." *Id.*, at 370.

The dissent begins, "Although the Appellate Division may not have expressly stated its reason from granting defendant's application for a writ of coram nobis, the court's order reveals that, at the very least, it viewed appellate counsel as ineffective for failing to challenge the propriety of defendant's sentences." It went on to say, "Although I believe the Appellate Division was correct in granting defendant's application, in my view, the court erred in the relief it then granted. The court modified defendant's sentence by correcting the alleged sentencing error but went further and modified the sentence by directing that the concurrent sentences imposed on the two counts run consecutively to the sentences imposed on the remaining counts of that indictment. What is most troubling is that the Appellate Division was without authority to alter the validly imposed portion of defendant's sentence. . . ." *Id.*, at 371.

THE DEFENDANT'S PRESENT APPLICATION

Under P.L. 70.25(2) "When more than one sentence of imprisonment is imposed on a person for two or more offenses committed through a single act or omission. . . the sentences. . . must run concurrently."

Under this reasoning, there is no question that the act encompassed by counts three and six was a separate act from the act encompassed by counts one, two, four, and five. Counts one, two, four, and five allege a robbery from the owner of the bar, Louis Givney, and counts three and six allege a robbery from Jerry Kelly. Therefore, it would have been entirely appropriate for the sentencing court to run the sentences of counts three and six to run consecutively to the other counts, which allege a robbery from another person.

However, this is not what the sentencing court did. It ran the sentence under count three consecutively to the remaining counts and count six concurrently to the remaining counts.

Counts three and six charge the defendant with the robbery of Jerry Kelly under different subsections of Robbery in the First Degree. They arise from a single act: the robbery of Jerry Kelly.

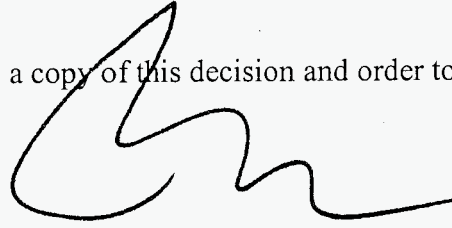
In *People v. Ramirez*, 89 N.Y.2d 444, 677 N.E.2d 722, 654 N.Y.S.2d 998, the defendant was convicted of Robbery in the First Degree with respect to a single individual under three different subsections; robbery while causing serious physical injury, robbery while armed with a deadly weapon, and robbery while displaying a weapon. The Court of Appeals stated that all three sentences must run concurrently, because all of these crimes “constitute a single act against” the same person.

Therefore, the defendant's application to delete the sentencing courts direction that the sentence on count three run consecutively to the sentences on the remaining counts is granted.

The application is denied in all other respects.

Order entered accordingly.

The clerk of the court is directed to mail a copy of this decision and order to the attorney for the defendant.



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Robert C. McGann, J.S.C.