

People v Aveni

2010 NY Slip Op 34017(U)

August 9, 2010

Supreme Court, Westchester County

Docket Number: 2009-0978

Judge: Susan Cacace

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COUNTY COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY

THE PEOPLE OF THE STATE OF NEW YORK, X

FILED
AND ENTERED
ON 8/9, 2010
WESTCHESTER
COUNTY CLERK

-against-

PAUL AVENI,

Defendant. X

CACACE, J.

DECISION AND ORDER
Indictment No. 2009-0978
FILED
AUG 09 2010
TIMOTHY CYBON
COUNTY CLERK
COUNTY OF WESTCHESTER

Defendant was convicted after a jury trial under Westchester County Indictment No. 2009-0978 of Burglary in the Second Degree, Criminally Negligent Homicide, Criminal Injection of a Narcotic Drug, Criminal Contempt in the First Degree and Criminal Possession of a Controlled Substance in the Seventh Degree.

The defendant has brought a motion pursuant to CPL § 330.30 (1) to set aside the verdict arguing that an appeal of this judgement would require a reversal of the conviction of Burglary in the Second Degree.

The defendant was charged with entering the home of his mother with the intent to commit the crime of Criminal Possession of a Controlled Substance therein. A Temporary Order of Protection had been served upon the defendant ordering him to stay away from the home of his mother. The defendant was found to have possessed heroin at the time he entered his mother's home.

The defendant argues that the conviction for Burglary in the Second Degree cannot stand for the failure of the People to legally establish two of the required elements, that he entered a dwelling unlawfully and that he did so with the intent to

commit a crime therein.

During the course of the trial, the defendant's mother testified that the defendant entered her residence with her permission. The defendant concedes that a Temporary Order of Protection was in effect and that the terms of that order mandated that the defendant stay away from the residence of his mother. The defendant argues that his mother, as owner of the residence, has the legal authority to override the provision of the order of protection and to make the defendant's entry into her residence legal. The defendant relies on *People v. Lewis*, 13 AD 3d 208 (1st Dept, 2004) affirmed 5 NY 3d 546. The Appellate Division decision in *Lewis* does not support the defendant's position. In fact, the court stated

Defendant also argues that the trial court erred in instructing the jury that, for the purpose of the "enters... unlawfully" element of the burglary count, the complainant could not grant defendant a license or privilege to enter premises from which he had been excluded by a court order. Defendant's argument is without merit, as the challenged instruction was entirely correct,

People v Lewis, 13 AD 3d at 210-211 citing *People v. Scott*, 195 Misc 2d 647,651, *People v. Pau Luong*, 180 Misc 2d 953,954.

The court went on to add

Stated otherwise, the occupant of the premises has no power to grant a license or privilege to enter the premises, within the meaning of Penal Law § 140.00(5), to a person who is required by court order to refrain from entering those premises.

People v. Lewis, supra at 211.

The Court of Appeals did not disturb this holding but went on to rule that the crime of criminal contempt committed by violating an order of protection could not serve

as the crime the defendant intended to commit within a premises to elevate a criminal trespass to a burglary. *People v. Lewis*, 5 NY 3d 546.

The defendant also argues that the crime of Criminal Possession of a Controlled Substance cannot serve as the crime the defendant intended to commit within the premises to satisfy that element of the burglary charge. The parties agree that the crime of possession of a controlled substance is a continuing crime. As such, he could only be prosecuted once for such possession. *Johnson v. Morgenthau*, 69 NY 2d 148, *People v. Miernik*, 284 AD 2d 919. However, contrary to the defendant's assertion, a continuing crime is not completed once the actor has performed acts constituting all of the elements necessary to commit the crime. The actor continues to commit the crime until such time as there is a break in possession.

In the instant case, the testimony established that the defendant possessed the controlled substance at the time he entered his mother's residence. It cannot be said that this possession ended prior to his entry into the residence.


Accordingly, the defendant has failed to demonstrate that the People have failed to establish any element of the crime of Burglary in the Second Degree and that this charge must be reversed on appeal. The defendant's motion is denied.

The Court considered the following papers on this application: (1) notice of motion to vacate verdict dated July 12, 2010, together with attached affirmation and memorandum of law; and (2) People's affirmation in opposition, dated July 29, 2010 together with

Memorandum of Law.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
August 9, 2010



HON. SUSAN CACACE
County Court Judge

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