

People v Grey

2011 NY Slip Op 32045(U)

July 13, 2011

Supreme Court, Kings County

Docket Number: 1245/89

Judge: Mark R. Dwyer

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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,

Indictment No. 1245/89

RODOLFO GREY,

Defendant.

-----X

Mark Dwyer, J.

**DECISION
AND
ORDER**

Defendant, pro se, moves pursuant to CPL 440.20(1) to set aside his sentence on the ground that concurrent sentences were required under PL § 70.25 (2).

On August 11, 1988, at approximately 8:00 p.m., Nigel Garrett and Terence O'Neil were working at a game booth at a Coney Island amusement park. Two individuals, identified by Nigel Garrett as defendant Rodolfo Grey and an accomplice, Lonnie Jones, approached Garrett. Garrett testified that defendant Grey stuck a hard object in his back and Lonnie Jones demanded money and jewelry from him. Garrett did not comply. Terence O'Neil moved to the back of the booth, whereupon Lonnie Jones punched Garrett in the face. Next, Garrett turned toward Lonnie Jones and defendant shot Garrett in the back. Both perpetrators then fled without making any additional efforts to steal property.

Defendant was convicted, after a jury trial, of attempted murder in the second degree (PL §§ 110.00/125.25 [1]), attempted robbery in the first degree (PL §§ 110/160.15 [2]) and criminal possession of a weapon in the second degree (PL § 265.03). On October 30, 1989, defendant was sentenced as a second violent felony offender to ten to twenty years imprisonment for the attempted

murder and five to ten years for the attempted robbery, to run consecutively to each other. He was sentenced to five to ten years on the weapons possession count to run concurrently with the other sentences.

On appeal to the Appellate Division, Second Department, defendant raised four claims: 1) there was insufficient evidence adduced at trial to establish that it was defendant who shot the complaining witness; 2) the trial court failed to instruct the jury on how to consider a witness's prior inconsistent statement; 3) the trial court failed to act impartially; and 4) the sentence was excessive. In a supplemental pro se brief defendant claimed that the People withheld a lineup photograph from the defense. Defendant's conviction was affirmed. People v. Grey, 190 AD2d 863 (2d Dep't, 1993). Defendant's application for leave to appeal to the Court of Appeals was denied. People v. Grey, 82 NY2d 719 (1993).

On May 14, 1993, defendant moved in the Appellate Division, Second Department, for a writ of error coram nobis. Defendant claimed that his appellate counsel had overlooked a meritorious claim, namely, trial counsel's ineffective assistance. Defendant's motion was denied by the Appellate Division on July 27, 1993. People v. Grey, 90-01371 (2d Dep't, 1993).

On January 28, 2000, defendant moved pursuant to CPL 440.20 to set aside his sentence on the ground that the court improperly sentenced him to consecutive sentences for the attempted murder and attempted robbery convictions. Defendant subsequently withdrew that motion.

On March 12, 2001, defendant moved pursuant to CPL 440.10 to vacate his conviction, claiming that the court's conduct at trial deprived him of a fair trial. On that motion defendant again raised the claim that it was improper for the court to impose consecutive sentences. Defendant's motion was denied on procedural

grounds on May 8, 2001 (Dowling, J.).

On June 14, 2010, defendant moved again pursuant to CPL 440.20 to set aside his sentence, claiming ineffective assistance of counsel because counsel was unprepared to represent him at sentencing. Defendant contended that counsel: 1) failed to prepare a defense pre-sentence report; 2) failed to prepare a written memorandum of law regarding defendant's eligibility for consecutive sentencing; and 3) failed to object when the court referred to prior crimes for which defendant had been arrested but not convicted. Defendant's motion was denied on November 10, 2010 (Cyrulnik, J.).

On the instant motion, filed 20 years after conviction, defendant presses the claim, withdrawn in 2000 and denied on procedural grounds in 2001, that concurrent sentences were required under PL § 70.25 (2) because elements of the crimes for which he was convicted overlapped. Defendant argues that the same act, namely the shooting, constituted the element of causing serious physical injury for both attempted robbery and was the corpus of the attempted murder. However, the robbery conviction was not predicated on causing serious physical injury to the victim. Defendant was convicted of PL § 110.00/160.15 (2) (armed with a deadly weapon), and not, as he argues, PL § 110.00/160.15 (1) (caused serious physical injury to a non-participant). Neither of the offenses for which defendant was convicted constituted a legal component of the other offense. Accordingly, concurrent sentences were not required on the ground that a single act violated one statute and was a material element of the other offense. See, e.g., People v. Rodriguez, 79 AD3d 644 at 647 (McGuire, J., concurring) (1st Dep't, 2010).

Defendant further claims that the imposition of consecutive sentences was

illegal because the prosecution did not meet its burden of demonstrating that the attempted robbery and the attempted murder constituted two separate and distinct acts. Defendant contends that the trial court's remark at sentencing that "serious physical injuries were inflicted in course of this attempted robbery" signifies an acknowledgment by the court that a single act constituted both offenses.

The People respond that defendant's motion is procedurally barred because the issue has previously been determined on the merits both by the sentencing court and on defendant's 2001 motion to set aside the sentence. CPL 440.20 provides, in pertinent part, that at any time after the entry of a judgment, the court in which the judgment was entered may set aside the sentence on account of legal error. The court must deny such a motion when the ground or issue raised thereupon was previously determined on the merits upon an appeal from the judgment or sentence. The court may deny such a motion when the ground or issue raised thereupon was previously determined upon a prior motion or proceeding in a court of this state. Despite such determination, the court in the interest of justice and for good cause shown may in its discretion grant the motion if it is otherwise meritorious.

Defendant's claim has not previously been determined on the merits on appeal, and the court is not mandated under CPL 440.20 (2) to deny the motion on that ground. On appeal defendant claimed that the trial evidence was insufficient, that the trial court gave an erroneous instruction to the jury and failed to act impartially, and that the sentence was excessive. He did not argue that it was improper for the court to impose consecutive sentences. Nor is review barred because the sentencing court itself ruled that consecutive sentences were permissible. That is the sentencing ruling here challenged, and a ruling does not

bar review of its own propriety. While defendant did raise this claim on his 2001 CPL 440.20 motion, the court did not consider the merits, instead ruling that the claim had previously been determined on the merits on appeal. Therefore the second procedural bar, that is, that the issue was previously determined on a CPL 440 motion, does not apply.

As to the merits, in determining whether Penal Law § 70.25 (2) mandates concurrent sentences, “the sentencing court must first examine the statutory definitions of the crimes for which defendant has been convicted.” People v. Laureano, 87 NY2d 640, 643 (1996); see People v. McKnight, 16 NY3d 43, 48 (2010). Based on the definitions, the court must identify for each crime the actus reus, that is, the act or omission that constitutes the crime. The actus reus is defined as the “wrongful deed that comprises the physical components of a crime and that generally must be coupled with mens rea to establish criminal liability.” People v. McKnight, 16 NY 3d 43; People v. Rosas, 8 NY3d 493, 496 n. 2 (2007) (quoting Black’s Law Dictionary). The Penal Law defines an “act” as a “bodily movement” (Penal Law § 15.00 [1]).

Under Penal Law § 70.25 (2), if the pertinent act or omission is the same for both offenses then consecutive sentences may not be imposed. However, if the acts or omissions committed by defendant were separate and distinct acts, even though committed as part of a single transaction, the court possesses discretionary consecutive sentencing authority. People v. McKnight, 16 NY3d 43; People v. Ramirez, 89 NY2d 444 (1996); People v. Day, 73 NY2d 208 (1989).

Here, the task for the court is to determine whether the trial court erred as a matter of law in concluding that the actus reus for attempted murder was a different act from the actus reus for the attempted robbery. That is, in order to

impose consecutive sentences the court had to find that the shot was not an act committed as part of the attempted robbery. The trial court concluded that the shot was a separate act, and that legal conclusion was not wrong.

It is well established that if separate and distinct acts were committed, and they violated more than one section of the Penal Law, punishment for each of them would be proper although they arose out of a single transaction. People ex rel. Maurer v. Jackson, 2 NY2d 259, 264 (1957). In People v. DiLapo, 14 NY2d 170 (1964), defendant claimed that an attempted robbery and an assault consisted of one act - the firing of a shot at the victim by the defendant. The Court held that it was possible to say that there were separate acts. The attempted robbery was committed when defendant, assisted by accomplices actually present, attempted to take property from the person of another. The assault consisted of defendant's act of immediately thereafter firing a shot at the victim with intent to kill.

Consecutive sentences have been repeatedly upheld in circumstances similar to those herein, where an assault upon the victim occurred either during an attempted robbery or as an "unnecessary afterthought" following a completed robbery. Consecutive sentencing was proper in these cases even though the convictions arose from a single criminal transaction, because the crimes were separate and distinct acts and did not constitute "two or more offenses committed through a single act." PL § 70.25 (2). See People v. Tanner, 30 NY2d 102, 108 (1972) (after robbery of taxi-driver completed, defendant opened door of cab and killed driver); People v. Hayes, ___ AD3d ___; 2011 NY Slip Op 03722 (1st Dep't, 2011) (victim complied with defendant's knife-point demand to hand over property; defendant walked away, but moments later turned back and slashed victim); People v. Samms, 83 AD3d 1099 (2d Dep't, 2011) (acts constituting

assault and robbery were separate and distinct); People v. Blue, 55 AD3d 391 (1st Dep't, 2008) (defendant left scene of attempted robbery and returned moments later and shot victim); People v. Marte, 52 AD3d 737 (2d Dep't, 2008) (defendant shot victim after robbery had been completed); People v. Hayes, 22 AD3d 253 (1st Dep't, 2005) (after robbing victim at gunpoint, defendant forced victim to another location and attempted to kill him); People v. Murray, 299 AD2d 225 (1st Dep't, 2002) (after completion of robbery, defendant formed new intent and committed a distinct criminal act by shooting the victim in the neck, rendering her quadriplegic); People v. Rubero, 294 AD2d 310 (1st Dep't, 2002) (after defendant took victims's chain, defendant formed new intent - to kill victim - and shot victim three separate times); People v. Franco, 270 AD2d 160 (1st Dep't, 2000) (after robbery was clearly complete, defendant and codefendants dragged unconscious victim to different location where they attempted to kick and stomp him to death); People v. Lewis, 268 AD2d 249 (1st Dep't, 2000)(defendant brandished shotgun and demanded money; in completely separate act, defendant killed victim with shotgun, thus making the attempted robbery a wholly separate crime from the manslaughter); People v. Mahone, 206 AD2d 263 (1st Dep't, 1994) (robbery was completed before defendant stabbed the victim); People v. Evans, 162 AD2d 702 (2d Dep't, 1990) (subsequent intentional killing was separate and distinct from prior act of robbery); People v. Connally, 160 AD2d 272 (1st Dep't, 1990) (consecutive sentences for robbery and unlawful imprisonment proper when, after completing robbery, defendant and his cohorts left victim locked in trunk of car, where he remained for several hours barely able to breathe); People v. Smiley, 121 AD2d 274 (1st Dep't, 1986) (defendant's final attack upon victim, in an attempt to guarantee his demise, occurred after the robbery had been completed); People v.

Sims, 105 AD2d 1087 (4th Dep't, 1984) (defendant shot victim in face after robbery completed and victim was attempting to escape from vehicle).

In this case, there was no completed robbery since no property was taken. However, the attempt to rob the victim failed and was over before the shot was fired. Defendant and his accomplice demanded property from the victim, but the victim did not surrender to the demands. When the victim's co-worker moved toward the rear of the game booth (surreptitiously disposing of cash), defendant's accomplice punched the victim, exclaiming that the co-worker was about to call the police. Defendant then shot the victim. After the shot, no effort was made to take property; the perpetrators simply fled. It was reasonable to conclude on these facts that the attempt to rob the victim had ended and that defendant and his accomplice abandoned their original intention to take the victim's jewelry and formed a new intent, that is, to punish the victim and perhaps prevent the police from being called. The events occurred over a very short time frame, but the trial court reasonably determined that the forcible larceny attempt was over and that the shooting constituted a separate act of gratuitous violence. Under these circumstances, the court had the discretion to impose consecutive sentences.

In accordance with the foregoing, defendant's motion to set aside his sentence is denied.

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, New York 11201 for a certificate granting leave to appeal the denial of defendant's CPL 440.20 motion. This application must be made within 30 days of service of this Decision and Order. Upon proof of financial inability to retain counsel and to pay the costs and

expenses of the appeal, the 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 (22 NYCRR 671.5).

ENTER:



MARK DWYER
J.S.C.

Dated: June 13, 2011

ENTERED
JUN 14 2011
NANCY T. SUNSHINE
COUNTY CLERK