People v Billy
2011 NY Slip Op 32776(U)
July 28, 2011
Supreme Court, Kings County
Docket Number: 4242/08
Judge: Raymond Guzman
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 9

--- X

THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER
Indictment # 4242/08

-against-

JOEL BILLY,

Defendant,

---X

RAYMOND GUZMAN, J.S.C.

INTRODUCTION

On April 24, 2008, defendant approached Dean Ashton, who was standing in front of 466 East 25th Street in Kings County, and shot him in the lower back. Defendant then fired six additional shots into the ground as he stood over Mr. Ashton. As a result of the shooting, Mr. Ashton was hospitalized for approximately eleven weeks, required the use of a colostomy bag for five months, and still suffers from pain in his legs.

For these crimes, defendant was charged under Kings County Indictment Number 4242/2008 with one count of Attempted Murder in the Second Degree (Penal Law § 110/125.25[1]), one count of Assault in the First Degree (Penal Law § 120.10[1]), two counts of Assault in the Second Degree (Penal Law §§ 120.05[1],[2]), one count of Assault in the Third Degree (Penal Law § 120.00[1]), two counts of Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03[1][b], [3]), and one count of Criminal Possession of a Weapon in the Fourth Degree (Penal Law § 265.01[1])[1].

---

[1]Count one of the indictment, charging Attempted Murder in the Second Degree (penal Law § 110/125.25[1], was dismissed on application of the People, and with no objection from defendant, prior to the commencement of jury selection.

The case was sent to this Court for trial on April 23, 2009. Following jury selection, the People's direct case commenced on April 28, 2009. The People called fifteen witness on their direct case and rested on May 5, 2009. Defendant did not put on a defense case.

After a charge conference, the Court advised the parties it would be submitting three counts to the jury for their consideration: Assault in the First Degree (Penal Law § 120.10[1]); Assault in the Second Degree (Penal Law 120.05[2]); and Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03[3]). The case was submitted to the jury on May 6, 2009. The jury returned a verdict of guilty as to Assault in the First Degree and Criminal Possession of a Weapon in the Second Degree on May 11, 2009.[2]

Defendant now moves this Court, *pro se*, pursuant to Criminal Procedure Law §440.10(1)(f) and CPL § 440.10(1)(h) , to vacate his judgment of conviction on the grounds that the Court improperly read certain portions of the testimony back to the deliberating jury outside the presence of the parties. Additionally, defendant also seeks to have this Court disqualified from considering this motion pursuant to Judiciary Law § 14 on the grounds that this Court acted improperly and cannot be fair in determining this application.

For the following reasons, defendant's motions are denied.

LEGAL ANALYSIS

Initially, the Court will address defendant's motion, pursuant to Judiciary Law § 14, for this Court to be disqualified from deciding the instant application. Defendant's motion alleges that the Court acted improperly by having contact with a deliberating jury by entering the jury room and

---

[2]Assault in the First Degree and Assault in the Second Degree were submitted in the alternative. Having found defendant guilty of Assault in the First Degree, the jury did not consider Assault in the Second Degree.

giving the jury testimonial read back outside the presence of the parties.

New York State Judiciary Law § 14 provides that a Judge must recuse himself from an action, "in which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree."

In the present action, defendant alleges no statutory basis for the Court to recuse itself pursuant to Judiciary Law § 14. Further, there is no proof of bias or prejudice presented by defendant in support of his motion.

"Absent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal." People v Moreno, 70 NY2d 403, 405 (1987); *see also* People v Monk, 50 AD3d 925, 926 (2d Dept 2008); Schwartzberg v Kingsbridge Heights Care Center, 28 AD3d 465, 466 (2d Dept 2006). Accordingly, the Court will not recuse itself from this decision because it does not feel that it would be unable to render a just and fair decision based on the merits of the motion and in compliance with NY Ct Rules § 100.3(E).

Turning now to the merits of the underlying motion, defendant brings application pursuant to CPL §440.10(1)(f) and CPL § 440.10(1)(h) which provide in pertinent part:

> 1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:
>
> (f) Improper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgment which conduct, if it had appeared in the record, would have required a reversal of the judgment upon an appeal therefrom; and
>
> (h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or the United States.

As stated above, defendant contends that this Court had improper contact with the deliberating jury when the Court went to the jury room to personally read testimony to them the presence of the parties. Defendant has supplied two affidavit's in support of his application wherein both he and his sister claim to have actually witnessed this transgression. Before addressing defendant's claim, it is worth examining the communications the Court had with the deliberating jury on the date in question.

The jury began their deliberations on Wednesday, May 6, 2009, and rendered a verdict on Monday, May 11, 2009. During the course of their deliberations, the jury sent a total of fourteen communications to the Court via jury notes signed by the foreperson. On May 7, 2009, the second day of deliberations, the jury sent six communications, the last of which was sent at 4:10 p.m., indicating that they were deadlocked. After consultation with the parties, the Court gave the jury an instruction to continue their deliberations and then gave separation instructions.

The following day, Friday, May 8, 2009, the jury resumed their deliberations at approximately 10:15 a.m., and sent one communication asking for certain testimony to be read back. The note was answered that afternoon in open court. Later that day, at approximately 5:15 p.m., the Court gave the jury separation instructions and dismissed them for the weekend.

At approximately 10:15 a.m., on May 11, 2009, all twelve members of the jury returned and continued their deliberations. On that day, at approximately 11:15a.m., the jury sent out a note asking for certain testimony to be read back. While the parties were discussing how to respond to the latest jury request for testimony, another note was sent out by the jury seeking additional testimony to be read back. These communications were very specific as to what portion of the testimony they wished to hear. The testimony the jury sought in their two notes sent on May 11, 2009, at 11:15 a.m., and

11:20 a.m., were read back to them by the court reporter between approximately 12:45 p.m. and 1:00p.m., in open court. The final communication from the deliberating jury arrived at 1:55 p.m., informing the Court and the parties that the jury had reached a verdict.

As reflected in the minutes attached as People's Exhibit 1 to their opposition papers, at no time did the Court tell the parties that it was going to enter to the jury room to read testimony back to the jury on May 11, 2009. Defendant's allegation that there was pending testimonial read back from the previous Friday is incorrect and not supported by the record. Defendant has supplied sworn affidavits from himself and his sister which both state they witnessed this Court go into the jury room and give read back to the jury. That assertion is also incorrect. As supported by the trial record, each and every jury communication was handled in the same manner, after consultation with the parties, the court reporter would read the testimony back to the jury in the presence of all the parties, defendant included, in open court.

Additionally, defendant and his sister assert that the jury returned their verdict some 20 minutes following the alleged improper read back by the Court. As detailed above, the last request for read back came from the jury at 11:20a.m., and that request was answered at 12:45 p.m. in open court. The next jury communication, which indicated that they had reached a verdict, was sent at 1:55 p.m. later that same day. Insofar as these incorrect assertions of fact are unsupported by the record, defendant's motion is without merit. Accordingly, defendant's motion to vacate his judgment of conviction is denied.

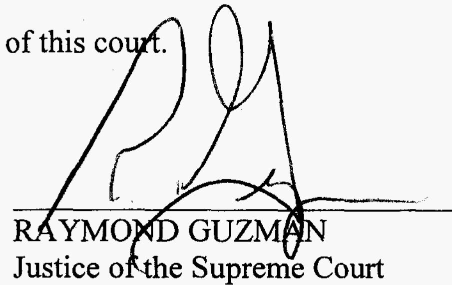
Finally, because all of the facts asserted by defendant which are essential to support his motion are conclusively refuted by the trial record, there is no need to conduct a hearing. CPL § 440.30(4)(c); *see also*, People v Session, 34 NY2d 254 (1974).

[* 6]

CONCLUSION

For the foregoing reasons, defendant's motion to preclude the trial court from deciding this matter pursuant to Judiciary Law § 14, and defendant's motion set aside the verdict pursuant to CPL § 440.10(1)(f) and § 440.10(1)(h) are denied.

This opinion shall constitute the decision and order of this court.



Dated: July 28, 2011
Brooklyn, New York

RAYMOND GUZMAN
Justice of the Supreme Court

ENTERED
AUG - 1 2011
NANCY T. SUNSHINE
COUNTY CLERK