People v Johnson
2011 NY Slip Op 34296(U)
November 15, 2011
County Court, Suffolk County
Docket Number: 01455-2010
Judge: Gary J. Weber
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COUNTY COURT: SUFFOLK COUNTY
STATE OF NEW YORK
---X

DECISION AND ORDER

THE PEOPLE OF THE STATE OF NEW YORK,

BY: GARY J. WEBER, J.C.C.

-vs-

DATED: November 15, 2011

CHAD JOHNSON,

CASE NO. 01455-2010

Defendant.
---X

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The prosecution has made an application *in limine* to prohibit the Defendant from introducing into evidence the minutes from the arraignment of the defendant in First District Court on May 25, 2010 upon the felony complaint. The Defendant has advised the prosecution that it will seek to introduce that portion of the minutes in which the Defendant, by counsel, told the Court he had been beaten by police officers while in custody. The prosecution has objected that the introduction of the minutes would improperly make trial counsel a witness, and defense counsel's own credibility would be on parade in this court. *See People v. Paperno, 54 NY2d 294;* and *Prince, Richardson on Evidence* § *6-114, at 324 (Farrell 11th ed).* Counsel for the Defendant has proposed that his own name be redacted from the arraignment minutes to eliminate this concern. The prosecution still objects.

DECISION

The immediate complaint made by the accused that he had been subjected to police brutality is admissible and, in a case that relies upon a confession, it is reversible error to prohibit introduction of evidence of that complaint. *People v. Alex, 260 NY 425 (1933).* The People propose that because trial counsel was a witness to that complaint this evidence must be denied the defendant. In *People v. Berroa,* the Court held that a defendant had been denied effective assistance of counsel when counsel became a witness <u>*against*</u> the defendant through a stipulation of facts that was, to some degree, inconsistent with the defense. *People v. Berroa, 99 N.Y.2d 134.*

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In *Berroa* the court stated:

> "A lawyer is ethically required to withdraw from acting as an advocate if it is obvious that he or she "may be called as a witness on a significant issue other than on behalf of the client ... [and] it is apparent that the testimony is or may be pre-judicial to the client." *An attorney also should not continue to serve as an advocate when it is obvious that the lawyer will be called as a witness on behalf of the client.* We acknowledge that the Code provisions concerning matters of professional conduct "cannot be applied as if they were controlling statutory [authority] or decisional law," and that not every violation of an ethical rule will constitute ineffective assistance of counsel. However, when a lawyer is called to testify against the client's interest the conflict is obvious."

People v. Berroa, 99 N.Y.2d 134 at 139-140, citations omitted, emphasis supplied.

The present circumstances beg the corollary of whether a defendant is denied effective assistance of counsel if defense counsel should be a witness *for* the defendant and is prohibited. If this were to be true the appropriate course would be to declare a mistrial, assign new counsel for the defendant, and retry this case. Two factors obviate this concern for the court. At the time of arraignment defense counsel was both thorough and circumspect when he advised the court of his client's prompt complaint, and when he requested that the defendant be given an immediate physical examination at the jail.

Independent Proof of the Defendant's Physical Condition is Available

This physical examination was done by the medical unit at the Suffolk County jail. The records of that examination have been subpoenaed to the court and the examining physician is available. The testimony of defense counsel concerning his observations of the defendant, under these circumstances, would be cumulative.

Prompt Outcry is Indisputable

The admission of the redacted arraignment transcript provides indisputable evidence of the fact the defendant made a prompt complaint that he had been mistreated by police.

This Court, having presided over the pretrial *Huntley* hearing, understand's that the central thrust of the Defendant's contention that his confession was involuntary is based upon the argument that the Defendant was caused to believe that his brother, who was then in custody in a nearby room, might be implicated in the demise of Jennifer Papain if the defendant did not confess. It was this form of psychological coercion, not physical violence, which the defendant argued caused him to show police where he had buried Ms. Papain's body and then confess to having strangled her. At the pretrial hearing there

was no evidence introduced concerning the immediate outcry at arraignment, and no evidence was adduced that there had been any physical injury to the defendant. The threat or use of physical violence simply was not central to the Defendant's contentions at the hearing. Under these circumstances no mistrial is necessary.

Accordingly, the relevant portion of the arraignment minutes will be admitted for the purpose of demonstrating that a prompt complaint was made, and the subsequent medical examination will provide such evidence as the defendant might desire concerning his actual physical condition. To the extent that defense counsel could have testified on the defendant's behalf to his own observations of the physical condition of the defendant, that would be cumulative to the medical examination conducted by medical personnel. The proposal by defense counsel that his name be redacted from the transcript together with a limiting instruction that will be given by the court will adequately ameliorate the prosecution's advocate-witness concern.

Accordingly, the defendant will be permitted to introduce on his direct case a redacted portion of the arraignment minutes, and the court will provide a limiting instruction as provided *infra* in the order of the court.

ORDER

ORDERED that the Defendant will be permitted to introduce on his direct case a redacted transcript from the arraignment which, beginning on page 3 line 19 and concluding on page 4, line 21, will read as follows:

Extract from the Official Transcript of the Proceedings on May 25, 2010 before the Hon. Richard Horowitz, First District Court, Suffolk County, New York, Part D11:

> THE COURT: [*DEFENSE COUNSEL FOR CHAD JOHNSON*]
>
> [*DEFENSE COUNSEL FOR CHAD JOHNSON*]: ... "There are a couple of things I would like to say. I have had an opportunity to speak to my client before coming out here this morning. It's apparent to me, what he has told me and my observation, that he was subjected to being beaten by the police officers while in custody. For the record, your Honor, I would like to note that his left arm, which is covered by his shirt as the present time -- he did show me in lock-up there was an injury on his shoulder, on the arm area. Above his left eye there is a mark. Above his eyebrow and the right side of his face, to the right and above his eye, is an injury I am going to ask the Court to direct he be given a medical examination when he goes back to the jail..."

ORDERED that at the time this defense exhibit is admitted into evidence, the court will give the following limiting instruction to the jury:

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"The Defendant has now introduced the relevant portion of the official court transcript from Mr. Johnson's arraignment on this case for your consideration. This evidence may be considered by you as evidence that Mr. Johnson made a complaint that he was "beaten by police officers while in custody" at the first time he could, which was at his arraignment. It is admissible for the limited purpose that a complaint was made and a description of the injuries that were the subject of the complaint. This exhibit is to be considered only for the purpose that a prompt complaint was, in fact, made."

The foregoing shall constitute the decision and order of the Court.

GARY J. WEBER, J.C.C.