

**People v Bailey**

2012 NY Slip Op 30463(U)

January 12, 2012

Sup Ct, Kings County

Docket Number: 1277/85

Judge: Ruth E. Smith

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 38

-----X  
THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION AND ORDER  
INDICTMENT NO.: 1277/85

KEVIN BAILEY,

Defendant.

-----X  
RUTH E. SMITH, J.:

By *Pro Se* Motion dated March 1, 2011 and Reply dated June 6, 2011, defendant, an inmate at the Shawangunk Correctional Facility, moves pursuant to CPL §§ 440.20 (1) to set aside his sentence. Defendant also moves, pursuant to a supplemental motion dated April 5, 2011, for stenographic transcripts of portions of his trial. For the reasons that follow, this court denies defendant's motion in its entirety.

**PROCEDURAL HISTORY**

On February 14, 1985, defendant, two co-defendants, Stephen Allen and Anthony Canady, and two other accomplices, each armed with a weapon, entered the apartment of Evelyn Camargo. They shot Devernion Jacobs, Carlos Robles and Vincent Cook, Ms. Camargo and Darryl Mullins, wounding the latter two and killing the others.

On June 11, 1986, after a jury trial, defendant was convicted of Murder in the Second Degree (three counts), Attempted Murder in the Second Degree (two counts), Assault in the First Degree (two counts), Burglary in the First Degree and Criminal Possession of a Weapon in the Second Degree (four counts).

On July 2, 1986, defendant was sentenced, as a second violent felony offender, to

consecutive terms of incarceration of twenty-five years to life on each of the three murder counts and twelve and one-half to twenty-five years on the burglary count and on each of the two counts of attempted murder, respectively. Defendant was also sentenced to concurrent terms of seven and one-half to fifteen years on each assault count and on each count of criminal possession of a weapon, to run concurrently with the other sentences.

Upon defendant's direct appeal, on January 30, 1989, the Appellate Division, Second Department modified the judgment, as a matter of discretion in the interest of justice, by vacating defendant's conviction of Burglary in the First Degree, finding that, "the deficiency in the prosecution's evidence of burglary in the first degree was so fundamental that it should have been noticed by the trial court...[t]here was, in fact, no proof that the defendant entered or remained upon a premises unlawfully..." (*People v. Bailey*, 146 AD2d 788 [2<sup>nd</sup> Dept.], *appeal denied* 74 NY2d 844 [1989]).

Defendant's previous motion to vacate his conviction, pursuant to CPL§440.10, was denied by Decision and Order dated August 4, 1997 (Pincus, J.).

### **DISCUSSION**

Defendant, citing to various portions of the trial transcript, moves pursuant to CPL § 440.20(1), to set aside his sentence or, in the alternative, for a hearing, on the grounds that the consecutive sentences imposed for his convictions on the counts of Murder in the Second Degree and Attempted Murder in the Second Degree "are illegal and must run concurrently because the same act constituted all the offenses and were not separate and distinct acts, or, alternatively, because the acting in concert element of each offense was a material element of the

offense as to the others” (Defendant’s Affidavit ¶ 2). Defendant also claims that the sentences violate the Double Jeopardy Clause of the Constitution, and his right to a jury trial under *Aprendi v. New Jersey*, 530 US 466 (2000) (Defendant’s Affidavit ¶ ¶59-60).

The People contend that defendant’s motion should be denied because each act was separate and distinct as to each victim, and because defendant’s reliance on *Aprendi* is misplaced. They also argue that defendant’s supplemental motion for stenographic transcripts should be denied as he was previously provided with these transcripts pursuant to his direct appeal and that, in any event, he is not entitled to such relief on this collateral attack upon his conviction. This Court agrees.

PL § 70.25(2) provides that:

When more than one sentence of imprisonment is imposed on a person for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other, the sentences, except if one or more of such sentences is for a violation of section 270.20 of this chapter, must run concurrently

(*id.*).

To determine whether concurrent sentences are permitted, the sentencing court must necessarily “examine the statutory definitions of the crimes for which defendant has been convicted” (*People v. Laureano*, 87 NY2d 640, 643 [1996]). It is the defendant’s “actus [reus]” which governs any consideration under PL § 70.25(2) (*People v. Ramirez*, 89 NY2d 444, 451 [1996]). Generally, sentences for two or more offenses may not run consecutively where a single act constitutes two offenses or ... where a single act constitutes one offense and a material

element of the other” (*id.*). “However, even if the statutory elements of multiple offenses overlap, sentences may be imposed to run consecutively when multiple offenses are committed through separate and distinct acts, though they are part of a single transaction” (*id.*; *People v. Frazier*, 16 NY3d 36, 41 [2010]).

In this case, defendant and his cohorts, each armed, lined up the victims, and upon Allen’s command, proceeded to shoot them, killing three and wounding two. Thus, there were separate acts that caused the death of some and the injuries to the others. Accordingly, where, as here, multiple deaths occurred during a single transaction and under a theory of acting in concert, they can still consist of “separate acts” for which consecutive sentences may be imposed (*People v. Brathwaite*, 63 NY2d 839, 843 [1984]; *see also People v. McKnight*, 16 NY3d 43 [2010], *People v. Riley*, 309 AD2d 979 [2<sup>nd</sup> Dept 2003], *lv denied* 1 NY3d 632 [2004]; *People v. Flores*, 46 AD3d 570 [2<sup>nd</sup> Dept 2007], *lv denied* 10 NY3d 765 [2008]).

Defendant’s reliance on *Aprendi v. New Jersey* (530 US 466 [2000]) is misplaced, since he was neither sentenced to an enhanced term as a persistent felony offender, nor was he sentenced to a term beyond the “statutorily prescribed sentencing range” (*People v. Quinones*, 12 NY3d 116, 130 [2009]).

### **CONCLUSION**

Based upon the foregoing reasons, the Court denies defendant’s motion. Defendant’s request for stenographic transcripts is also denied.

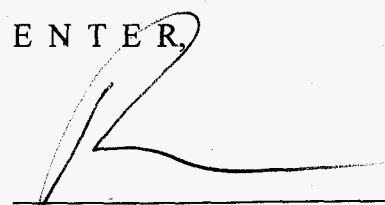
This Decision shall constitute the order of the court.

The defendant is hereby advised pursuant to 22 NYCRR § 671.5 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 from this determination. This application must be made within 30 days of service of this decision. Upon proof of his 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 certification granting leave to appeal is granted.<sup>1</sup>

Dated: Brooklyn, New York  
January 12, 2012

E N T E R,



Ruth E. Smith, A.J.S.C.

**ENTERED**  
JAN 12 2012  
NANCY T. SUNSHINE  
COUNTY CLERK

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<sup>1</sup>22 NYCRR § 671.5 .