

People v Birch

2012 NY Slip Op 32860(U)

October 17, 2012

Sup Ct, Kings County

Docket Number: 447/99

Judge: Desmond A. Green

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

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THE PEOPLE OF THE STATE OF NEW YORK,	:	Indictment #: 447/99
	:	By: Hon. Desmond A. Green
-against-	:	
	:	DECISION AND ORDER
	:	Date: October 17, 2012
SIDNEY BIRCH,	:	
Defendant	:	
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Defendant has filed a second motion pursuant to CPL §440.10 to vacate his judgment of conviction. The defendant presents two basic arguments in support of his motion: 1) that the indictment was jurisdictionally defective because it did not contain non-hearsay allegations; and 2) that the defendant was subjected to double jeopardy under the federal and state constitutions as well as under CPL §40.20 when the Court submitted three separate counts of Kidnapping in the First Degree to the jury for its consideration, and all of the kidnapping counts related to the same incident. Both of these issues rely on facts and pleadings on the record.

The People answer that the motion must be denied on both procedural and substantive grounds. They argue that defendant waived his right to claim the indictment is defective by failing to raise this issue in a pre-trial motion within forty-five days of arraignment; that the defendant failed to raise these on the record claims in his direct appeal so they are therefore mandatorily barred pursuant to CPL §440.10 (2)(c); and that the claims are without merit.

The evidence at trial showed that on January 15, 1999, the defendant and his girlfriend, Beverly Ruiz, took Ruiz's nine year old brother from his home and brought him to a motel, where they held him for over twelve hours. While holding the boy, the defendant called the boy's mother, and using a disguised voice, demanded a large ransom for the child. Early the next day,

the child was rescued from the motel by the NYPD. For these acts, the defendant was charged with three counts of Kidnapping in the First Degree pursuant to PL §§ 135.25(1), (2)(b), and (2)(c), two counts of Attempted Grand Larceny in the Second Degree, each based on separate and distinct theories of the crime, Attempted Grand Larceny in the Fourth Degree, Conspiracy in the Second Degree, Conspiracy in the Fifth Degree, Kidnapping in the Second Degree, Unlawful Imprisonment in the Second Degree, Attempted Coercion in the Second Degree, Attempted Grand Larceny in the Third Degree, Endangering the Welfare of a Child, Criminal Facilitation in the Second Degree, and Criminal Facilitation in the Fourth Degree.

The defendant was convicted after a jury trial of count three, Kidnapping in the First Degree (PL §135.25[2][c]). He was sentenced on October 18, 1999 to a term of imprisonment of eighteen and one half years to life. Defendant filed an appeal of his conviction in the Appellate Division, Second Department claiming:

- 1) that his statements were not voluntary;
- 2) that he was convicted on legally insufficient evidence;
- 3) that there was prosecutorial misconduct in the opening, summation, and admission of evidence;
- 4) that he was denied the effective assistance of counsel;
- 5) that the trial court was biased;
- 6) that his sentence was excessive.

Each of these claims was denied when the conviction was unanimously affirmed in *People v. Birch*, 284 AD2d 405 (2d Dept. 2001), lv denied 96 NY2d 916 (2001).

While the claims currently raised by the defendant are on the record, defendant failed to raise them in his direct appeal and is therefore precluded from doing so now pursuant to CPL §440.10 (2)(c), which states:

The court must deny a motion to vacate a judgment when although sufficient facts appear on the record of the proceedings underlying the judgment to have

permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him.

Here, the challenged indictment was part of the record on appeal as was the record of charges submitted to the jury and the verdict reached on those charges, however the defendant failed to raise these grounds in his appeal. His motion must therefore be denied (*People v. Cooks*, 67 NY2d 100 [1986]; *People v. Nunez*, 264 AD2d 487 [2d Dept. 1999]; CPL § 440.10[2][c].)

Even if the Court were to reach the merits of the motion on this ground, it would fail. Defendant argues that the indictment did not present non-hearsay allegations which include every element of the offense charged and the defendant's commission thereof, and it is therefore jurisdictionally defective. He argues that this is a defect which may not be waived. He cites CPL §§ 100.40(1)(c) and 100.15(3) in support of this claim, however, CPL §200.50 is the relevant statute which governs the required form and content of an indictment.

Section 7(a) requires, "A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of the offense charged and the defendant's or defendants' commission thereof with sufficient precision to clearly apprise the defendant or defendants of the conduct which is the subject of the accusation."

There simply is no requirement for "non-hearsay" allegations, because the case has been submitted to a Grand Jury which has the responsibility of determining the fundamental, primarily factual question pursuant to CPL §190.65(1)(a) of whether there was evidence establishing each element of the crime (*See People v. Batashure*, 75 NY2d 306 [1990]).

Hearsay pleadings in the factual portion of a criminal court information are not jurisdictional or non-waiveable, as the defendant argues. The issue must be preserved in order to be reviewable. A timely objection must be made by motion to the trial court (*People v. Casey*, 95 NY2d 354 [2000]). A motion is generally filed pursuant to CPL § 210.20 or § 210.25 and the time to make such a motion is governed by CPL §255.20. Failure to make the motion to dismiss the indictment within the prescribed forty-five day period constitutes a waiver of this claim

(*People v. Davidson*, 98 NY2d 738 [2002]; *People v. Lawrence*, 64 NY2d 200, 204-206 [1984]; *People v. Booker*, 63 AD3d 750 [2d Dept. 2009]; *People v. DiNoia*, 105 AD2d 799 [2d Dept. 1984]). Based upon the foregoing, defendant's claim of a jurisdictional defect is denied.

The defendant also argues that his conviction should be vacated on the ground that he was subjected to double jeopardy. He claims this violation occurred when the trial judge submitted three counts of Kidnapping in the First Degree to the jury for its consideration, and when that jury rendered a verdict of guilty on at least two of those counts. He argues that the defendant was indicted, tried, and convicted of multiple kidnapping counts as if he were guilty of committing three kidnapping offenses against three separate victims. The defendant is incorrect on both the law and the facts, and his argument is misplaced and baseless.

In this case, the defendant was convicted only of count three of the indictment:

Kidnapping in the First Degree, in violation of PL § 135.25(2)(c), which states:

A person is guilty of kidnapping in the first degree when he abducts another person and when he restrains the person abducted for a period of more than twelve hours with intent to terrorize him or a third person.

The sentence imposed on the defendant was for that conviction of a single count, not multiple counts, of the indictment.

The other two counts of the Indictment which charged Kidnapping in the First Degree were based on alternate theories of how this crime was committed. Each required proof of different facts and a different intent. Count one charged a violation of PL § 135.25 (1) which states:

A person is guilty of kidnapping in the first degree when he abducts another person and when his intent is to compel a third person to pay or deliver money or property as ransom.

Count two charged a violation of PL §135.25 (2)(b) which states:

A person is guilty of kidnapping in the first degree when he abducts another person and when he restrains the person abducted for a period of more than twelve hours with intent to accomplish or advance the commission of a felony.

In this case, the felony charged was Grand Larceny.

Where factual differences exist in the proof of each count, multiple count pleading is proper (*People v. Ohrenstein*, 153 AD2d 342 [1st Dep't 1989]). "An indictment may state in different counts the accomplishment of the crime charged in various ways as long as the facts relate to the same deed or transaction... this is permitted where there may be doubt or uncertainty as to whether the facts and circumstances will show one or the other to be the exact fact" (*People v. Perrin*, 56 AD2d 957 [3d Dept. 1977]). CPL § 200.30 does not prohibit over indictment or multiple counts arising out of the same act or transactions, but it does bar charging within one count what may qualify as two different charges (New York, CPL § 200.30, Preiser, *Practice Commentary* pp.428-429).

Double jeopardy is defined as subsequent prosecutions involving the same offense (*People v. Goodman*, 69 NY2d 32 [1986]). Under the federal constitution, double jeopardy arises only upon separate prosecutions arising out of the same offense. The subsequent prosecution would violate the prohibition against double jeopardy (*People v. Latham*, 83 NY2d 233 [1994]). This trial was not a subsequent prosecution of a violation of the same subsection of the same statute. The double jeopardy clause of the Fifth Amendment does not, as defendant suggests, prohibit the submission of multiple, different subsections of a particular statute for consideration by a sitting jury at a single trial. Two distinct statutory provisions are not the same offense for double jeopardy purposes, if each provision requires proof of a fact which the other does not. *Id.*


The defendant may be confusing the concepts of double jeopardy and multiplicity. Multiplicity occurs when an indictment contains two separate counts charging what amounts to a single crime. However, a successful argument that an indictment is multiplicitous can only be maintained if both counts are premised on the same subdivision of the same statute and related to the same mental state, same act, same course of conduct and same victim (*People v. Senisi*, 196 AD2d 376 [2d Dept. 1994]). The indictment is not multiplicitous if each count requires proof of an additional fact that the other does not. Where the indictment charges violations of different

subsections of the kidnapping statute, representing different theories of how the crime was committed, the indictment is not multiplicitous (*Id.* at 382; *See also People v. Timmons*, 54 AD3d 883 [2d Dept. 2008]; *People v. Saunders*, 290 AD2d 461 [2d Dept. 2002]).

Although the defendant argues that this prosecution also violated the statutory bar to double jeopardy under CPL § 40.20, that objection must be preserved on the record, and trial counsel failed to preserve it here (*People v. Biggs*, 1 NY3d 225, 231 [2003]). Nevertheless, the statute would not support defendant’s arguments since it also bans a subsequent prosecution of the same offense (*cf. People v. Burgos*, 177 AD2d 783 [1st Dept. 1991]).

Defendant’s motion is therefore denied in its entirety pursuant to CPL §440.10 (2)(c).

This constitutes the decision and order of the Court.



Desmond A. Green
J.S.C.