People v Abdullah
2013 NY Slip Op 34232(U)
August 27, 2013
County Court, Broome County
Docket Number: 12-209
Judge: Joseph F. Cawley
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STATE OF NEW YORK
COUNTY COURT : : BROOME COUNTY

FILED
AUG 27 2013
SUPREME/COUNTY COURT
CLERKS OFFICE

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

DECISION AND ORDER
Indictment No. 12-209

RAMAL ABDULLAH,

Defendant.

JOSEPH F. CAWLEY, J.

This *pro se* defendant was originally charged in a ten-count indictment with Criminal Possession of a Controlled Substance in the Third Degree (PL 221.16(1))[date of incident April 2, 2011], Criminal Possession of a Controlled Substance in the Fifth Degree (PL 220.06) [date of incident April 2, 2011], Criminal Possession of a Weapon in the Second Degree (PL 265.03(3))[date of incident October 31, 2011], Criminal Possession of a Weapon in the Third Degree (PL 265.02(1)) [date of incident October 31, 2011] , Resisting Arrest (PL 205.30) [date of incident October 31, 2011], Reckless Driving (VTL 1212) [date of incident October 31, 2011], Aggravated Unlicensed Operation of a Motor Vehicle in the Second Degree (VTL 511(2)(a)(iv)) [date of incident December 30, 2010], Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree (VTL 511(1)(a) [date of incident March 7, 2011], Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree (VTL 511(1)(a) [date of incident April 2, 2011], and Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree (VTL 511(1)(a) [date of incident October 31, 2011]).

Pursuant to Decision and Order dated November 8, 2012, two counts of Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree were dismissed based upon a violation of CPL 30.30, specifically Count 7 (date of incident December 30, 2010) and Count 8 (date of incident March 7, 2011).

Numerous motions have been filed by defendant during the pendency of the action, seeking various relief, and pre-trial suppression hearings were conducted. The indictment was tried before a jury between April 15 and April 29, 2013, upon which verdicts of guilty were returned for Criminal Possession of a Controlled Substance in the Fifth Degree, Reckless Driving, Resisting Arrest, and two counts of Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree.

During the course of the aforesaid trial, defendant engaged in continued and repeated disrespectful, belligerent and threatening conduct, as a result of which he was ultimately removed from the courtroom and standby counsel, Paul Battisti, Esq., assumed the defense.

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No verdict was reached and a mistrial was declared with respect to the charges of Criminal Possession of a Controlled Substance in the Third Degree, Criminal Possession of a Weapon in the Second Degree and Criminal Possession of a Weapon in the Third Degree. Re-trial on those charges is now scheduled to begin on September 4, 2013.

Defendant has filed multiple motions in anticipation of the upcoming re-trial, which relief the prosecution has opposed. The People have also filed motions seeking certain relief, which are opposed by the defendant.

I. JURISDICTION

In an "Affidavit of Fact : In the Nature of Writ of Demand for Dismissal or State the Proper Jurisdiction, Pursuant to U.S. Const. Amend. 11th, and U.C.C. § 3-308" dated June 11, 2013, defendant seeks dismissal of the instant indictment based upon a lack of jurisdiction pursuant to Uniform Commercial Code §3-308.

A Broome County Grand Jury indicted defendant for felony level conduct that allegedly occurred in Broome County, for which this Court has exclusive trial jurisdiction (CPL 10.20(1((a)). Defendant's application, based upon the reasons set forth therein lacks merit, and is denied.

II. DOUBLE JEOPARDY

In an Affidavit dated June 13, 2013, Defendant requests this Court: **a)** "...preclude the re-prosecution" of matters from which the jury was unable to reach a unanimous verdict under a theory of double jeopardy, arguing, *inter alia*, that he did not consent to a partial verdict, and **b)** argues that his conviction of Criminal Possession of a Controlled Substance in the Fifth Degree precludes his prosecution for Criminal Possession of a Controlled Substance in the Third Degree.

The People oppose the requested relief.

a) Trial in this matter began with jury selection on April 15, 2013. Testimony was taken on April 16, 17 and 18. On April 18, this Court addressed defendant regarding inappropriate comments made by him, wherein defendant became belligerent and the Court was compelled to remove him from the courtroom to restore order and security. After being allowed back in the courtroom, defendant announced that he would **not** appear in court on April 19, 2013, claiming that his religious beliefs precluded his attending and participating in such proceedings on Fridays. Notwithstanding the Court's skepticism of defendant's claims [inasmuch as defendant had previously attended and participated in proceedings scheduled on Fridays without comment or objection (i.e. a lengthy court appearance on **Friday** June 22, 2012, as well as suppression hearings on **Friday**, January 8, 2013), an adjournment of the trial was granted at defendant's request. On April 22, defendant was again warned about his outbursts, and upon application of the prosecutor (see letter from Senior Assistant District Attorney Rita Basile dated April 19, 2013), was directed to question all witnesses from the lectern. Subsequently, as a result

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of defendant's continued outbursts and inappropriate conduct, he was ultimately advised that he had forfeited his right to self-representation and was removed from the courtroom. The matter was submitted to the jury on April 23. On April 24, deliberations were suspended as a result of a juror's unavailability; they resumed April 25 and continued through April 26, 2013. As a result of a note from the jury, an *Allen* charge was given on the morning of April 29. After another full day of deliberations, a note was received from the jury indicating that they were unable to unanimously reach a verdict on three counts, and that further deliberations would be futile. Based upon the length of deliberations, after consulting with prosecution and defense counsel, this Court did not feel that there was a reasonable possibility of ultimate agreement upon the unresolved charges. The jury was therefore permitted to terminate deliberations, and a partial verdict was accepted. The foregoing course of action was agreed upon by defense counsel.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee a defendant in a criminal trial not only the right to proceed with counsel, but also the right to proceed without counsel when the defendant clearly asserts his rights in a timely manner and knowingly, intelligently and voluntarily chooses to do so. (People v. Gabriel, 33 Misc.3d 554; *internal citations omitted*). However, the right to represent oneself is not absolute. The preservation of order and dignity during trial is, of course, vital to the proper administration of justice in our courts and this may not be impaired by the contumacious acts of a defendant (People v. Palermo, 32 N.Y.2d 222). The right to self-representation does not include the "right to abuse the dignity of the courtroom," nor the right to "engag[e] in serious and obstructionist misconduct (Faretta v. California, 422 U.S. 806). The right to self-representation is not to be used as a tactic for delay, disruption or distortion of the system, or for the manipulation of the trial process (United States v. Mosley, 607 F.3d 555 (8th Cir. 2010). A defendant may forfeit the right to self-representation by engaging in disruptive or obstreperous conduct. When a defendant's conduct is calculated to undermine, upset or unreasonable delay the progress of the trial, he forfeits his right to self-representation (People v. McIntyre, 36 N.Y.2d 10 (1974)).

Without the benefit of a full transcript, the instances of defendant's inappropriate, contumacious and improper trial conduct are too plentiful to list. His trial conduct, however, was foreshadowed by his pre-trial conduct, which resulted in a Decision and Order dated April 9, 2013, which stated, in relevant part:

> "Finally, the Court wishes to address the defendant's displays of disrespect during the course of this and prior appearances. While this Judge has no interest whatsoever in the defendant's opinion of him personally, such displays of disrespect toward the Court itself and the position which he holds are entirely inappropriate and will no longer be tolerated. The defendant has been given the benefit of the presumption of ignorance of proper courtroom decorum throughout these proceedings, but is hereby placed on notice that any further conduct which reflects disrespect or contempt for either this Court or any person engaged in the conduct of the trial will not be tolerated. Should such occur again, the defendant will be immediately removed and placed in a holding cell until and unless he can conduct himself with civil courtesy and respect for everyone involved in this process."

Notwithstanding the foregoing warning, defendant engaged in numerous instances of inappropriate conduct and even extended personal threats against the Court during the course of the trial. His courtroom conduct prompted a letter during trial from the prosecutor on April 19, 2013 stating, *inter alia*:

> "Specifically, the defendant's frequent outbursts toward not only the People but also the Court made the progression of the trial not only disruptive and time consuming, but also potentially dangerous."

The prosecutor went on to request that the Court limit defendant's movements within the courtroom (like any attorney, defendant ***had*** been given free reign to move about the courtroom), and further asked that he (defendant) be required to question all witnesses from counsel table and not be allowed to approach the People's table or witness stand. She also noted defendant's repeated outbursts in response to the Court's rulings, and his persistent attempts to introduce inadmissible evidence before the jury in direct defiance of Court rulings.

Based upon the defendant's persistent inappropriate courtroom conduct, his removal from the courtroom prior to closings (and the substitution of standby counsel Paul Battisti, Esq.) was reasonable and appropriate.

Moreover, said counsel's subsequent consent to the taking of a partial verdict and declaration of mistrial was, under the circumstances presented, entirely reasonable and appropriate. CPL 310.60 provides, in pertinent part, that a deliberating jury may be discharged by the court without having rendered a verdict when:

(a) the jury has deliberated for an extensive period of time without agreeing upon a verdict with respect to any of the charges submitted and the court is satisfied that any such agreement is unlikely within a reasonable time; or (b) the court, the defendant and the People all consent to such discharge; or (c) a mistrial is declared pursuant to Section 280.10. The determination as to the length of time jurors will be required to deliberate necessarily is factual and rests in the broad discretion of the trial court (see Plummer v Rothwax, 63 N.Y.2d 243 (1984) (mistrial after 4½ hours).

As set forth on the record when the partial verdict was accepted, this jury had deliberated for an extended period of time without agreeing upon a verdict with respect to three counts submitted. This Court was entirely satisfied that an agreement as to the remaining counts was unlikely. Further, the Court, People and defense counsel all concurred with the decision to accept the partial verdict and declare a mistrial as to the remaining charges.

Defendant's application to preclude further prosecution based upon his lack of consent to the taking of a partial verdict and declaration of mistrial is denied.

b) For a crime to constitute a lesser included offense, it must be established that it would be impossible to commit the greater offense without committing the lesser offense and,

second, that a reasonable view of the evidence supports a finding that defendant committed the lesser but not the greater offense (*see generally,* People v. Farley, 63 A.D.3d 1288 (3rd Dept. 2009)).

In People v. Fuller, 96 N.Y.2d 881 (2001)), the Court held that a re-trial is barred on a higher offense after a jury finds defendant guilty of a *lesser included offense* (CPL 300.50(4)) and 330.40(3)(b) *(emphasis added).*

In the present action, the charge of Criminal Possession of a Controlled Substance in the Fifth Degree (PL 220.06 (5) [knowingly and unlawfully possess 500 milligrams or more of cocaine]), for which defendant was convicted, is ***not*** a lesser included charge of Criminal Possession of a Controlled Substance in the Third Degree (PL 220.16(1) [knowingly possess cocaine with the intent to sell]) inasmuch as Criminal Possession of a Controlled Substance in the Fifth Degree (PL 220.06(5)) contains an element based upon the weight of drugs possessed by defendant that is not an element of Criminal Possession of a Controlled Substance in the Third Degree (PL 220.16(1)) (*see,* People v. Alverson, 79 A.D.3d 1787 (4th Dept 2010); *see also,* People v. Lee, 196 A.D.2d 509, *lv. den.* 82 N.Y.2d 851).

Defendant's application to preclude further prosecution based upon his conviction of Criminal Possession of a Controlled Substance in the Fifth Degree is denied.

CPL 330.30 APPLICATION

In a Notice of Motion dated July 2, 2013, along with supporting documents, defendant seeks to set aside the prior verdict pursuant to CPL 330.30(1). The People oppose the relief requested.

CPL 330.30(1) provides:

> "At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds:
>
> 1. Any ground appearing in the record which, if raised upon an appeal from a prospective judgement of conviction, would require a reversal or modification of the judgement as a matter of law by an appellate court."

Defendant's initial submission for dismissal alleges "malicious prosecution evidence", wherein he alleges that the charge of Criminal Possession of a Controlled Substance in the Third Degree (date of incident April 2, 2011) was returned to Binghamton City Court pursuant to CPL 180.40 for disposition, thereby precluding its subsequent presentation to a grand jury.

Although the foregoing matter apparently was returned to Binghamton City Court on or about August 11, 2011 (CPL 180.40) for a possible misdemeanor disposition, no such disposi-

tion in fact occurred. No agreement between the prosecution and defense was reached on that charge, and no plea of guilty was ever entered. Thereafter, as a result of defendant's subsequent arrest (October 31, 2011), all matters were submitted to a Broome County Grand Jury.

Defendant's argument that the testimony of Forensic Scientist Julie Romano was "flaw[ed]", and that prosecution of the charge "show[ed] vindictiveness on part of the prosecution and holds as evidence of malicious prosecution" is simply without merit.

JUDICIAL MISCONDUCT

This Court's conduct throughout the course of defendant's previous trial, as well as all prior court appearances are set forth on the record. No instances of bias, hostility or inappropriate conduct by the Court toward the defendant have occurred. This Court will continue to preside without bias, prejudice or sympathy for or against either party to this action.

Defendant's application to set aside or modify the foregoing verdict pursuant to CPL 330 is denied in its entirety.

SEVERANCE

As previously discussed, Indictment 12-209 originally charged defendant with Criminal Possession of a Controlled Substance in the Third Degree (PL 220.16(1) [date of incident 4/2/11]), Criminal Possession of a Controlled Substance in the Fifth Degree (PL 220.06(5) [date of incident 4/2/11]), Criminal Possession of a Weapon in the Second Degree (PL265.03(3) [date of incident 10/31/11]), Criminal Possession of a Weapon in the Third Degree (PL 265.02(1) [date of incident 10/31/11]), Resisting Arrest (PL 205.30) [date of incident 10/31/11]), Reckless Driving (VTL 1212) [date of incident 10/31/11]), Aggravated Unlicensed Operation of a Motor Vehicle in the Second Degree (VTL 511(2)(a)(iv) [date of incident 12/30/10], and Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree (VTL511(1)(a)) (three counts) [dates if incidents 3/7/11, 4/2/11 and 10/31/11]). Count Seven (7), Aggravated Unlicensed Operation of a Motor Vehicle in the Second Degree [date of incident 12/30/10] and Count Eight (8) Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree [date of incident 3/7/11] were dismissed based upon a speedy trial violation.

At trial, the jury was unable to reach a unanimous verdict, wherein a partial verdict was taken. Defendant was convicted of Criminal Possession of a Controlled Substance in the Fifth Degree (Count 2), Resisting Arrest (Count 5), Reckless Driving (Count 6) and two counts of Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree(Counts 9 and 10). A mistrial was declared with respect to Count 1 (Criminal Possession of a Controlled Substance in the Third Degree), Count 3 (Criminal Possession of a Weapon in the Second Degree) and Count 4 (Criminal Possession of a Weapon in the Third Degree).

In a Notice of Motion dated August 8, 2013, defendant seeks reconsideration of a previous severance application. The People oppose the requested relief.

Offenses are joinable if, among other things, they are based upon different criminal transactions but defined by the same or similar statutory provisions, or if proof of either offense would be material and admissible as evidence-in-chief at the trial of the other offenses (see CPL 200.20[2][b][c]). If the offenses were joinable in an indictment solely because there were based on similar statutes, a court has discretion to order them separately tried "in the interest of justice and for good cause shown" (CPL 200.20[3]). If the offenses were properly joined on any other basis, however, "the court lack[s] statutory authority to sever" (People v. Rogers, 94 A.D.3d 1246 (3rd Dept. 2012); People v. Bongarzone, 69 N.Y.2d 892 (1987); *see also,* CPL 200.20(3)).

The original charges contained within this indictment surrounded defendant's arrest on four different occasions - **December 30, 2010** (Aggravated Unlicensed Operation of a Motor Vehicle [hereinafter "AUO"] in the Second Degree; **March 7, 2011** (AUO in the Third Degree); **April 2, 2011** (AUO in the Third Degree, Criminal Possession of a Controlled Substance in the Fifth Degree and Criminal Possession of a Controlled Substance in the Third Degree); and **October 31, 2011** (Criminal Possession of a Weapon in the Second Degree, Criminal Possession of a Weapon in the Third Degree, AUO in the Third Degree, Resisting Arrest, and Reckless Driving).

During each of the foregoing [arrests], it is alleged that defendant was operating (or pushing, as he claims in his grand jury testimony) the same Buick LeSabre, NY registration # FCJ1709.

Any allegation of Aggravated Unlicensed Operation of a Motor Vehicle (First, Second or Third Degree) requires, *inter alia*, proof that defendant was operating the subject vehicle "...while knowing or having reason to know that such person's license or privilege of operating such motor vehicle...is suspended, revoked or otherwise withdrawn by the commissioner" (VTL 511(1)). Evidence that defendant was charged on a prior date with operating a motor vehicle while knowing or having reason to know that his driver's license was suspended, would be admissible in any subsequent charge of Aggravated Unlicensed Operation, to establish his knowledge of that license suspension. Therefore evidence of each arrest would be admissible to establish an essential element of each subsequently charged AUO , and as such are properly joined in this indictment (CPL 200.20**(2)(b)**).

Further, the AUO Third Degree arrest on April 2, 2011, provided the basis upon which law enforcement performed the search of defendant which ultimately led to the discovery of controlled substances on defendant's person. This information is necessary to complete the narrative so that the jury can understand how law enforcement came upon this evidence.

Finally, a review of grand jury proceedings related to the arrest of October 31, 2011, reflects a prosecution theory that defendant constructively possessed a loaded firearm that was ultimately located in the trunk of said vehicle. During defendant's grand jury testimony, he indicated, *inter alia,* "I don't know nothing about no gun that was in the trunk of the car or whatever" (Grand Jury transcript, April 13, 2012, at p. 227) and again "So, my whole thing was like, I don't know nothing about no gun that was in the trunk of the car" (Grand Jury transcript, April 13, 2012, at p. 227). Defendant's knowledge, or lack thereof, of the contents of said

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vehicle become critical to the prosecution of this offense. Proof of his familiarity with, and prior use of the vehicle, are therefore material and admissible in assessing his knowledge/awareness of its contents.

The foregoing offenses were therefore properly joined pursuant to CPL 200.20 **(2)(b)** (proof of the first offense would be material and admissible as evidence in chief upon a trial of the second, or proof of the second would be material and admissible as evidence in chief upon a trial of the first), as well as 200.20**(2)(c)** (inasmuch as offenses were defined by the same or similar statutory provisions). As the offenses were properly joined pursuant to CPL 200.20(2) (b), this court lacks authority to sever them (*see,* People v. Rogers, *supra*; People v. Bongarzone, 69 N.Y.2d at 895). Defendant's motion to sever Count One from Counts Three and Four is denied.

ROSARIO VIOLATION

By a letter dated July 16, 2013, the People seek re-consideration of the Court's April 9, 2013 ruling precluding testimony concerning monies seized from defendant at or about the time of his arrest on April 2, 2011, which preclusion was granted as a result of a *Rosario* violation. In a reply dated August 6, 2013, defendant opposes the relief sought, and further requests "this court to reconsideration [sic] of it's bias ruling's [sic] on affiant's speedy trial motion's [sic] under C.P.L. 30.30, and suppression of physical evidence motion under C.P.L. 710.20(1)...".

It is this Court's opinion that an appropriate sanction for the People's *Rosario* violation, pursuant to the facts and circumstances of this case, was and still is the preclusion of testimony sought. The People's application to re-open is denied.

Defendant's request for reconsideration simply reiterates prior arguments already addressed by the Court. Defendant's application for reconsideration is denied.

CONDITIONAL EXAMINATIONS

By Notices of Motion dated August 12, 2013, the People seek leave of the Court to take trial testimony of certain witnesses, namely Julie Romano and Daniel Bradshaw, by conditional examination. Defendant opposes the motions.

Upon a review of the People's affidavits in support of the foregoing motions and the applicable statute (CPL 660) and the defendant's submission in opposition thereto, the Court finds that the People have failed to establish that the subject witnesses "will not be amenable or responsive to legal process or available as a witness at a time when his testimony will be sought, either because he [she] is: (a) About to leave the state and not return for a substantial period of time; or (b) Physically ill or incapacitated" (CPL §660.20).

The People's motion for leave to take the testimony of the aforesaid witnesses by conditional examination is therefore denied.

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This constitutes the Decision and Order of the Court.

It is So Ordered.

DATED: August 27, 2013
Binghamton, NY

HON. JOSEPH F. CAWLEY
Broome County Court Judge

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