

People v Johnson

2014 NY Slip Op 32606(U)

September 17, 2014

Sup Ct, Kings County

Docket Number: 7147/2013

Judge: James P. Sullivan

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This opinion is uncorrected and not selected for official publication.

If trial facts must be supplemented by an affidavit, then a CPL § 330.30 (1) motion is inappropriate (*People v. Jackson*, 152 A.D.2d 977, 978, [1989] lv denied, 74 NY2d 897 [1989]). In addition, a trial court cannot set aside a verdict if a decision to reverse or modify a judgment would entail the exercise of appellate discretion (*see, People v. Carter*, 63 NY2d 530, 536 [1984]).

The court has carefully examined the defendant's moving papers. Defendant claims that trial counsel 1) had a conflict of interest, 2) failed to call witnesses, 3) failed to investigate, 4) failed to object to prejudicial testimony, and 6) failed to request the People to turn over the 911 recordings, radio runs, and sprint reports. Defendant further alleges that trial counsel made an insufficient motion for a trial order of dismissal, specifically claiming that the testimony of Ms. Saunders, one of the complaining witnesses, was erroneously submitted to the jury absent specific testimony about the conduct alleged on specific dates, and that there was insufficient evidence that one of the locations involved in the alleged crimes, namely, 1526 Eastern Parkway in Brooklyn, New York was a residence.

Initially, defendant cites alleged deficiencies in trial counsel's performance that do not appear on the record. Defendant first claims that trial counsel had a conflict of interest. However, as this claim is based on matters outside the record, this court cannot consider it. Likewise, defendant's claims that trial counsel failed to investigate, failed to call certain witnesses, and failed to request *Rosario* material, are based on matters outside the record, and are not properly made pursuant to CPL § 330.30 (1). (*See, People v. Leka*, 209 A.D.2d 723 [2d Dept. 1994]). It is well settled that a trial court "lack[s] the authority to consider fact not appearing on the record in determining [a] defendant's motion pursuant to CPL § 330.30 [1] to set aside the verdict on the ground, *inter alia*, of ineffective assistance of counsel" (*People v. Green*, 92 A.D.3d 894, 896 [2nd Dept. 2012]; *People v. Shelton*, 111 A.D.3d 1334 [4th Dept. 2013]; *People v. Nichols*, 35 A.D. 3d 508 [2d Dept. 2006]; *People v. Grossfield*, 216 A.D.2d 319 [2nd Dept. 1995]).

Defendant further alleges that trial counsel was ineffective for failure to object to Police Officer Ramirez's testimony as to other victims. Additionally, defendant alleges that trial counsel's order of dismissal motion was insufficient. Defendant claims that defendant was prejudiced because Ms. Saunders did not testify to the specific dates of the incident, and that there was insufficient evidence that the location was a dwelling. Initially, pursuant to CPL § 330.30 (1), only a claim of error that is properly preserved for appellate review will provide a basis to set aside the verdict. Here, as this issue was not properly preserved, it cannot serve as a basis for reversal on appeal. Accordingly, the defendant has not preserved his claims concerning these alleged deficiencies, and this court is not bound to consider these contentions under a CPL § 330 motion.

In any event, defendant has not established that he was denied effective assistance of counsel on these additional grounds. A review of the record indicates that although trial counsel initially objected to Officer Ramirez's answer as hearsay, she continued to question him regarding the

identities of the other victims. Here, defendant has failed to “demonstrate the absence of strategic or other legitimate explanations” for counsel’s alleged failure (*People v. Rivera*, 71 N.Y.2d 705, 709 [1988]; see, *People v. Taylor*, 1 N.Y.3d 174, 177 [2003]; *People v. Benevento*, 91 N.Y.2d 708 [1998]). Further, a review of the record reveals that trial counsel did in fact argue that the People had not sufficiently proven the charge of burglary in the second degree. Trial counsel claimed that the People did not prove that defendant wrongfully entered 1526 Eastern Parkway, nor that defendant had the intent to commit a crime within. In her argument, trial counsel noted that she had introduced a copy of defendant’s purported lease in an attempt to demonstrate that defendant believed that he had a legitimate right to be at the location.

In determining a motion for a trial order of dismissal, the court is required to decide whether the evidence, viewed in a light most favorable to the prosecution, is legally sufficient to ‘establish every element of an offense charged and the defendant’s commission thereof’ (CPL § 70.10 [1]; see *People v. Contes*, 60 N.Y.2d 620 [1983]; *People v. Hutchinson*, 57 A.D.3d 565 [2008], *lv denied* 12 N.Y.3d 784; *People v. Hannah*, 267 A.D.2d 402 [2009]). “Ultimately, so long as the evidence at trial establishes ‘any valid line of reasoning and permissible inferences [that] could lead a rational person’ to convict, then the conviction survives sufficiency” (*People v. Santi*, 3 N.Y.3d 234, 246 [2004]; see also *People v. Williams*, 84 N.Y.2d 925 [1994]).

Viewing the evidence adduced at trial, this court finds that it was legally sufficient to support the charges for which defendant was convicted. Ms. Monica Saunders testified in detail regarding the transactions between her and the defendant with respect to obtaining an apartment at 1526 Eastern Parkway in Kings County. Although Ms. Saunders could not give specific dates regarding these transactions, she testified regarding the various transactions she had with the defendant between the period between June and August 2013. She further testified that defendant represented himself as the landlord and owner of the building, and she was able to identify the defendant in court as the individual to whom she provided payment to in exchange for keys to the apartment at 1526 Eastern Parkway. Further, Mr. Philibert testified that he was the owner of the location, and that he had never given the defendant any permission or authority to change locks or modify the apartment. Mr. Philibert (the owner of the building) provided documentation demonstrating that he was the owner of the residence including, a copy of the deed, a copy of tax, water, and electric bills. Additionally, Mr. Philibert testified that any real estate brokers or agents who wished to show an apartment at the location for a possible rental had to go with him. Thus, this court finds that the evidence was legally sufficient to support the charges.

In determining whether counsel provided meaningful representation, “courts use a flexible approach in reviewing the totality of the circumstances, evidence and law as of the time of representation (see, *People v. Henry*, 95 N.Y.2d 563, 565-566 [2000]; see, also *People v. Hobot*, 84 N.Y.2d 1021, 1022 [1995]). “[T]rial tactics which terminate unsuccessfully do not automatically indicate ineffectiveness. So long as the evidence, the law, and the circumstances

of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met. (*People v. Baldi*, 54 N.Y.2d 137, 146-147). Therefore, the question to be resolved is not only whether the defendant demonstrated that his counsel provided “*less than meaningful representation*,” but “whether the attorney’s conduct constituted ‘*egregious and prejudicial*’ error such that the defendant did not receive a ‘fair trial.’” (*Benevento*, 91 N.Y.2d at 713, quoting *People v. Flores*, 84 N.Y.2d 184, 188 [emphasis added]).

To prevail on a claim of ineffective assistance of counsel, the defendant must “demonstrate the absence of strategic or other legitimate explanations for counsel’s failure.” (*People v. Rivera*, 71 N.Y.2d 705, 709[1988]; see, *People v. Taylor*, 1 N.Y.3d 174, 177 [2003]; *Benevento*, 91 N.Y.2d at 714). Additionally, the defendant must overcome the legal presumption that counsel’s performance falls within the wide range of reasonable professional competence. (*Strickland v. Washington*, 466 U.S. 668 [1984]). Without such demonstration, “it will be presumed that counsel acted in a competent manner and exercised professional judgment” (*Rivera*, 71 N.Y.2d at 709). Here, the defendant has not established that he was denied effective assistance of trial counsel.


Finally defendant requests disclosure of legal instructions to the Grand Jury pursuant to CPL § 210.30. CPL § 210.20 (2) states that a motion to dismiss or reduce the indictment must be made within the time frame set forth for pre-trial motions pursuant to CPL § 255.20. Pursuant to CPL § 255.20, all pre-trial motions must be made within forty-five days after arraignment and before commencement of trial. On January 9, 2014, Justice Danny K. Chun granted defendant’s motion to inspect the grand jury minutes to the extent that of the court examining them in camera. Justice Chun rendered a decision specifying he had reviewed the Grand Jury minutes and determined that the evidence presented was legally sufficient to establish the offenses charged, and concluded that the Grand Jury was properly instructed on any applicable law. Justice Chun denied defendant’s motion to dismiss the indictment, and further held that no reduction of any count was warranted.

To the extent that this motion may be considered a motion to reargue, Civil Practice Law and Rules § 2211 (d) (3), made applicable to criminal actions by CPL § 60.10, specifies that a motion to reargue shall be made “within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.” Thus, defendant’s motion is untimely.

In any event, in assessing the evidence before the Grand Jury, in the light most favorable to the People, the court finds that there is no evidence supporting defendant’s claim that count six is duplicitous. The testimony presented to the Grand Jury refers to separate incidents occurring on

separate dates. Further, the Grand Jury was properly instructed on the law with respect to these separate incidents.

Accordingly, defendant's motion to set aside the verdict pursuant to CPL § 330.30 is denied in all respects. This constitutes the decision and order of the Court.



James P. Sullivan, J.S.C.

ENTERED
SEP 24 2014
NANCY T. SUNSHINE
COUNTY CLERK