State of New York v Shabazz
2016 NY Slip Op 33067(U)
October 24, 2016
County Court, Broome County
Docket Number: 16-97
Judge: Kevin P. Dooley
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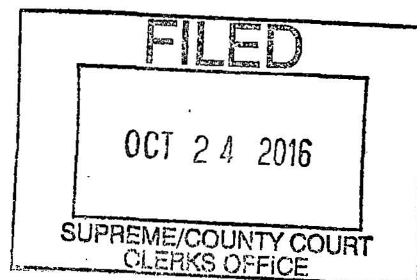

STATE OF NEW YORK
COUNTY COURT :: COUNTY OF BROOME

THE STATE OF NEW YORK

-v-

SALIH R. SHABAZZ,
Defendant.

DECISION AND ORDER
Indictment No. 16-97

KEVIN P. DOOLEY, J.

On September 28, 2016, the defendant filed with the Court a motion for an Order, pursuant to CPL 330.30, setting aside the verdict rendered on July 18, 2016, finding him guilty of two counts of Criminal Possession of a Controlled Substance in the Third Degree and two counts of Criminally Using Drug Paraphernalia in the Second Degree.[1] The defendant alleges new evidence has been discovered since trial, which would have resulted in a more favorable verdict for him had such evidence been available to him at trial, and that the guilty verdicts rendered were repugnant to his acquittal on one count of the indictment. By letter dated October 6, 2016, the prosecutor filed a response opposing the defendant's motion. The following constitutes the Decision of the Court.

Procedural History

On March 4, 2016, a Broome County Grand Jury handed up Indictment No. 16-97, charging the defendant and his co-defendant Nancy J. Lockwood with three counts of Criminal Possession of a Controlled Substance in the Third Degree, class B felonies, and two counts of Criminally Using Drug Paraphernalia in the Second Degree, class A misdemeanors. The five count indictment alleged that on February 26, 2016, at an apartment at 211 Harrison Street in Johnson City, the defendants possessed heroin and cocaine with the intent to sell it, and also possessed a digital scale and packaging materials.

The defendant was arraigned in Broome County Court on March 9, 2016. On April 28, 2016, the defendant filed with the Court an Omnibus Motion seeking certain Orders and relief.

[1] The motion was filed under the cover letter of defense counsel, and consists of a notarized statement of the defendant, setting forth the grounds of the motion, and notarized statements of three of his family members. The Court deems the motion to be made by defense counsel, and not a *pro se* motion by the defendant.

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The People responded to the Omnibus Motion on May 27, 2016. By Decision and Order dated June 10, 2016, the Court granted the defendant's request for pre-trial hearings to determine whether the prosecution intended to offer any statements and admissions of the defendant for which timely notice was not provided, and whether any statements and admissions to law enforcement for which timely notice was provided were obtained in violation of the defendant's constitutional rights.

On June 24, 2016, the defendant appeared in Court and executed a written waiver of his right to a jury trial. That same day, a pre-trial hearing was conducted, and by Decision and Order dated June 27, 2016, the defendant's motion to preclude or suppress the statements and admissions he made to law enforcement was denied. By Decision and Order dated July 7, 2016, the Court ruled on the defendant's *Sandoval* application and the prosecution's *Molineux* application.

The bench trial began on July 11, 2016. The People called Johnson City Police Sgt. Chris Ketchum, Broome County Sheriff Detective Daniel Browne and Binghamton Police Investigators Robert Burnett and Daniel Burns, who all testified concerning the execution of a search warrant at the defendant's residence on February 26, 2016, and the seizure of heroin, cocaine, and drug paraphernalia at that location. Johnson City Police Officer James Conrad testified about transporting the defendant to the police station, advising the defendant of his constitutional rights, and about incriminating statements made by the defendant. Broome County Sheriff Evidence Custodian Michelle Stebbins and Broome County District Attorney Investigator Patrick Gallagher testified concerning the chain of custody of the evidence seized and its delivery to the New York State Police Crime Laboratory in Port Crane, New York. The parties stipulated to the results of the examinations, which established the weight of the substances seized and that they were determined to be heroin and cocaine. The defense presented no evidence.

On July 18, 2016, the defendant was convicted of Criminal Possession of a Controlled Substance in the Third Degree under counts one and two of the indictment, alleging possession of heroin with intent to sell, and two counts of Criminally Using Drug Paraphernalia in the Second Degree. The defendant was found not guilty of Criminal Possession of a Controlled Substance in the Third Degree under count three of the indictment, which alleged possession of cocaine, with intent to sell.

Defendant's Current Motion

The defendant now moves for an Order setting aside the verdicts on the grounds that he has new evidence, which could not have been produced at trial, to contradict the trial testimony of Sgt. Chris Ketchum. Sgt. Ketchum testified that he had observed the defendant in the vicinity of 211 Harrison Avenue over the course of several days prior to and on the day the search warrant was executed. The defendant, however, alleges that he has proof that he was not in New York State from February 1, 2016, through February 25, 2016. The defendant also alleges that the guilty verdicts for Criminal Possession of a Controlled Substance in the Third Degree under counts one and two were repugnant with his acquittal for Criminal Possession of a Controlled Substance in the Third Degree under count three of the indictment.

Newly Discovered Evidence Claim

CPL 330.30 (3) provides that a court may set aside a verdict on the ground that new evidence has been discovered since the trial, which could not have been produced by the defendant at trial even with due diligence on his part, and which is of such character as to create a probability that the verdict would have been different if the evidence had been received at trial. "Newly-discovered evidence, in order to be sufficient, must fulfill all the following requirements: (1) It must be such as will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it must be such as could have not been discovered before the trial by the exercise of due diligence; (4) it must be material to the issue; (5) it must not be cumulative to the former issue; and, (6) it must not be merely impeaching or contradicting the former evidence." *People v. Salemi*, 309 NY 208, 215-216 (1955), quoting *People v. Priori*, 2 Bedell 459 (1900). The defendant has the burden of proving every one of these requirements by a preponderance of the evidence.

In this case, the defendant was clearly aware, from the search warrant application (attached as Exhibit B to the defendant's motion) and from Sgt. Ketchum's trial testimony, that there was evidence that the defendant had been seen in Johnson City on several occasions in the weeks leading up to the execution of the search warrant. The defendant's whereabouts in February 2016, were, of course, known to him and does not constitute "newly discovered evidence." Therefore, to the extent evidence that the defendant was seen in Johnson City prior to the execution of the search warrant was material to establish the defendant's knowing possession

of heroin and drug paraphernalia on February 26, 2016, the defendant had the opportunity at trial to cross-examine Sgt. Ketchum and/or offer evidence from himself and/or his family members to discredit the prosecution's proof. The defendant's current claim that he was out of state from February 1, 2016, through February 25, 2016, is not "newly discovered evidence," and this information would only serve the purpose of contradicting or impeaching the testimony of prosecution witnesses at trial. *People v. Brewer*, 50 AD3d 1577 (4th Dept., 2008); *People v. Corea*, 25 AD3d 563 (2d Dept., 2006). Accordingly, this aspect of the defendant's motion is denied.

Repugnant Verdict Claim

CPL 330.30 (1) provides that a court may set aside or modify a verdict on any ground appearing on the record which, if raised on appeal, would require reversal or modification of the verdict as a matter of law by the appellate court. However, a defendant must have made "a timely protest" at trial of the alleged error of law, in order to preserve the issue for appeal or to raise it in a post-verdict motion. *People v. Padro*, 75 NY2d 820 (1990); *People v. Hughes*, 114 AD3d 1021 (3d Dept., 2014).

In order to preserve for appellate review an issue of an alleged repugnant verdict, there must be an objection to the verdict prior to the discharge of the jury. *People v. Scanlon*, 52 AD3d 1035 (3d Dept., 2008); *St. Paul*, 3 AD3d 604 (3d Dept., 2005). However, in non-jury cases, such as here, the issue may be raised by moving to set aside the verdict, since the Court, as trier of the facts as well as the law, is still available to correct repugnancies in the verdict if there be any. The ground raised, however, must still constitute an error of law. *People v. Alfaro*, 66 NY2d 985 (1985).

Here, the guilty verdicts for Criminal Possession of a Controlled Substance in the Third Degree under counts one and two were not repugnant, as a matter of law, with the defendant's acquittal for that same crime under count three of the indictment. A verdict as to a particular count of an indictment will be set aside as legally repugnant "only when it is inherently inconsistent when viewed in light of the elements of each crime charged to the jury." *People v. Muhammad,* 17 NY3d 532 (2011); *People v. Tucker*, 55 NY2d 1 (1981). In other words, if a defendant is convicted of one crime, but acquitted of second crime that shares one or more essential elements with the first, the guilty verdict must be set aside because, by acquitting a

defendant of the second crime, the finder of fact determined that one of the essential elements has not been proven beyond a reasonable doubt. *People v. Booker,* 141 AD3d 834 (3d Dept., 2016); *People v. Kramer*, 118 AD3d 1040 (3d Dept., 2014).

That is not the case here, where the defendant was charged with three separate counts of the *same crime*, Criminal Possession of a Controlled Substance in the Third Degree, in violation of Penal Law §220.16(1). Therefore, the verdicts were not repugnant as a matter of law. While those counts necessarily contained the same elements, the Court's verdict was fact-driven. As a factual matter, the not guilty verdict on count three was supported by a finding that the People failed to prove that the cocaine found in a lockbox in the defendant's apartment was possessed with the intent to sell it. The cocaine forming the basis of the third count consisted of approximately one gram and was contained in a single baggie. The evidence presented on that count was consistent with personal use, and neither side requested the Court to consider the lesser included offense of Criminal Possession of a Controlled Substance in the Seventh Degree, a class A misdemeanor.

The evidence presented with respect to counts one and two concerning the narcotic drug heroin, however, was consistent with the defendant possessing that drug with intent to sell it, and was inconsistent with possession for personal use. A quantity of heroin charged in one of the two counts of conviction was found on the living room floor along with a digital scale and packaging material, and the defendant's co-defendant appeared to be in the process of packaging it for sale when the police entered unannounced with a search warrant. The second count of conviction related to nearly 200 packets of heroin, bundled for sale, found in a lockbox in the kitchen. The cocaine that formed the basis of count three was found in a separate lockbox. For all these reasons, the verdicts were not repugnant.

Conclusions of Law

The defendant has failed to allege any ground constituting a legal basis for his motion. The statements of the defendant and his family members alleging that the defendant was out of the area from February 1, 2016, through February 25, 2016, did not constitute newly discovered evidence, and would serve only to contradict or impeach the testimony of prosecution witnesses at trial. The guilty verdicts were not legally repugnant, and if raised on appeal from his

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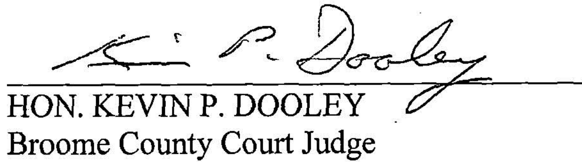
conviction, his repugnancy claim would not require reversal or modification of the verdict as a matter of law.

The defendant's motion to set aside the verdict rendered by the Court on July 18, 2016, is denied.

It is so Ordered.

Dated: October 24, 2016
Binghamton, New York



HON. KEVIN P. DOOLEY
Broome County Court Judge