

People v Irizarry
2017 NY Slip Op 32555(U)
August 7, 2017
County Court, Westchester County
Docket Number: 16-0161
Judge: Barbara G. Zambelli
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

- against -

AUG 07 2017

AK

DECISION & ORDER

Indictment No.: 16-0161

NATHAN IRIZARRY,

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER
Defendant.

-----X
ZAMBELLI, J.

On June 23, 2017 defendant was found guilty by jury verdict of two counts of Assault on a Police Officer and not guilty of two counts of Aggravated Assault on a Police Officer and Assault in the First Degree.

He moves pursuant to CPL 330.30 (1) to set aside the verdict on the grounds that the court committed reversible error in giving an unprompted instruction to the jury during jury deliberations after fully responding to a jury note and on the further ground that the evidence was legally insufficient to establish defendant intended to prevent Police Officer Oliveri from performing a lawful duty.

The People respond that Defendant has not preserved the issue concerning the supplemental instruction and further that the Court's instruction was entirely appropriate in as much as it provided a meaningful response to the jury note which was immediately requested by the People and after which the defense was given an opportunity to be heard prior to the further jury instruction. They further counter

that the evidence of intent was legally sufficient.

With regard to the note in question, the jury sent in a note requesting the following:

"Can the Judge please define intent and tell us if it must happen before an action or if it can happen after an event has started"

"Can the Judge redefine the difference between Assault in the First Degree and Aggravated Assault on a Police Officer"

A copy of the note was provided to the parties; the note was read into the record. The court indicated it would re-read the expanded intent charge and reinstruct the jury on the elements of each crime which procedure was consented to by the parties. The Court called the jury into the courtroom, re read their note to them and reinstructed them on the expanded intent instruction and both counts. The jury was sent back into the jury room to resume deliberations. The District Attorney almost immediately (within eight minutes) asked the court to give an additional instruction realizing that based on the testimony of Sergeant McGuinn, the court had not meaningfully answered the jury's first question, to wit, "tell us if it (intent) must happen before an action or if it can happen after an event has started". Defense counsel objected. The court agreed with the People, indicated the further instruction and gave the supplemental instruction to the jury.

At the outset, the court finds that both counts were supported by legally sufficient evidence and more particularly that the People met their burden of establishing that defendant acted with intent to prevent Police Officer Oliveri from performing a lawful duty. (See, People v. Campbell, 72 N.Y.2d 602).

With regard to the jury note, the court followed the procedure set forth in People v. O'Rama, 78 N.Y.2d 270, 276 and its progeny. The court provided meaningful notice to the parties: copies of the note were provided to both sides; the Court read the note into the record and explained what the court proposed to tell the jury to which both sides consented. The jury was called into the courtroom, the note was read to the jury, and the court instructed the jury as indicated. O'Rama further requires that the court provide a meaningful response to the jury note. (*Id.*, see also People v. Mack, 27 N.Y.3d 534). In this case, the District Attorney pointed out almost immediately that the expanded definition of intent did not answer the jury's question. The prosecution's request was made in front of all parties. Defense was given an opportunity to respond. The expanded intent charge did not answer the jury's question which, based on the evidence present, was relevant on the issue of intent at the point Sergeant McGuinn was dragged by the vehicle. The court advised the parties that it intended to give the supplemental instruction and told the parties what the supplemental instruction would be. The jury was then brought back

into the jury room and given the supplemental instruction. Thus, the Court complied in all respects with O'Rama.

Accordingly, defendant's motion is denied.

The court considered the following papers on this motion:

	<u>PAPERS NUMBERED</u>
-Notice of Motion and Memorandum of Law;	1-22
-Affirmation in Opposition;	23-41
-Reply Memorandum of Law in Support of Defendant's Motion;	42-54

This decision constitutes the order of the court.

Dated: White Plains, New York
August 7, 2017



BARBARA G. ZAMBELLI
COUNTY COURT JUDGE

Hon. Anthony Scarpino, Jr.
District Attorney, Westchester County
111 Dr. Martin Luther King Jr. Blvd.
White Plains, New York 10601
Attn: Tim Ward, Esq.
Assistant District Attorney

Peter H. Tilem, Esq.
Tilem & Associates
188 E. Post Road
White Plains, New York 10601

Lakisha C. Hickson
Chief Clerk