

**People v Thomas**

2022 NY Slip Op 34267(U)

December 12, 2022

County Court, Wayne County

Docket Number: 70329-21/001

Judge: Daniel G. Barrett

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This opinion is uncorrected and not selected for official publication.

At a Term of the County Court held in and for the County of Wayne at the Hall of Justice in the Town of Lyons, New York on the 10<sup>th</sup> day of November, 2022.

PRESENT: Honorable Daniel G. Barrett  
County Court Judge

STATE OF NEW YORK  
COUNTY COURT COUNTY OF WAYNE

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

DECISION/ORDER ON  
DEFENDANT'S  
CPL 330.30 MOTION  
Ind. No. 70329-21/001

ALBERTINO THOMAS,

Defendant

Appearances - People - District Attorney Michael D. Calarco, Esq.  
Defendant - David R. Morabito, Esq.

The Defendant was indicted on the crime of Assault in the Second Degree in violation of Penal Law 120.05 (2). The Indictment alleges that on or about October 30, 2020 in Wayne County, the Defendant with intent to cause physical injury to another person by means of a dangerous instrument, he caused such injury to Thomas Horton.

The matter could not be resolved by plea. At the appearance of May 12, 2022 the Defendant was in court with his attorney, Joseph Lobosco. Pursuant to the Defendant's request, the matter was scheduled for a jury trial on September 6, 2022. The Defendant was given his Parker Warnings. The matter was scheduled for an appearance on July 21, 2022 for 60 day compliance. The Defendant did not appear that day. Defense counsel had no explanation for his failure to appear, therefore the Court issued a Bench Warrant. The Defendant was picked up on the Bench Warrant and brought to the Court on

September 6, 2022. At that time the Defendant requested to proceed pro se. After searching and full inquiry the Court allowed him to proceed pro se, appointing Joseph Lobosco as Defendant's legal advisor.

The Defendant was found guilty of Assault 2<sup>nd</sup> on September 8, 2022. Thereafter the Defendant retained David Morabito. The matter is now before the Court pursuant to a CPL 330.30 Motion, requesting the Court set aside the verdict.

District Attorney Calarco responded to the Motion by filing an Affirmation in Response to Defendant's Motion.

The first point raised in the Motion is that the Court should not have allowed the Defendant to proceed pro se. Defendant also argues that he was not provided any discovery, which is simply not true. All discovery was provided to defense counsel in a timely manner.

The Defendant at the time complained that defense counsel had not done anything and was not in communication with him. Again that is not factual. The Defendant was well represented by Mr. Lobosco. All necessary motions were filed and decided by the Court. The Court advised the Defendant that if he wanted to proceed with an attorney Mr. Lobosco was going to be his attorney. He asked for an adjournment to obtain an attorney, which was essentially requesting the Court to provide another assigned counsel. The Court advised the Defendant he had no reason to have substitute counsel appointed. The Defendant indicated he wanted to proceed pro se. The Court conducted a searching and full inquiry after hearing from the Defendant and making comments on the record, it determined the Court would allow the Defendant to proceed pro se but required defense counsel to be Defendant's legal advisor. The Defendant was properly questioned and advised about his danger of proceeding forward without an attorney. Despite all of that the Defendant was insistent that he be able to proceed pro se. His waiver was knowingly, voluntarily and intelligently made.

In addition the Defendant had failed to appear in court on July 21, 2022. The only reason he was in court prior to the trial was that he was picked up on the Bench Warrant. During that period of time from when the Defendant was last in court, May 12, 2022, there were no applications nor motions made to the Court and the Defendant made no complaints about Mr. Lobosco nor did he request to be assigned other counsel. In fact in no prior proceeding did Mr. Thomas complain about Mr. Lobosco whatsoever.

In addition at trial the Defendant relied heavily on Mr. Lobosco as his legal advisor. It was very apparent that the Defendant's opening and closing was prepared by Mr. Lobosco in addition to questions asked by the Defendant on cross-examination of the People's witnesses. In addition outside of the jury's presence Mr. Lobosco had actually followed through on objections and/or relevant motions during the trial including a Motion to Dismiss after the People's case and after the close of trial.

The Defendant fails to provide any factual support for the record for his allegations.

The Defendant also argues that he was denied testimony of the witness Cameron Thomas and of his daughter. There is nothing in the record to indicate that claim whatsoever. There was some claim that Cameron Thomas was in court when the District Attorney made the statement that if Cameron Thomas testified he should be aware he could implicate himself in a crime. There was no record indicating that Mr. Thomas was actually in court when that statement was made. The Defendant did not subpoena Mr. Thomas. And again, with regard to the Defendant's daughter he simply made a statement that the daughter's mother was preventing her from coming to court, but again, there is no actual record of that whatsoever. Also the daughter was never subpoenaed.

Defense counsel also seeks to vacate the verdict of Assault in the Second Degree as there was insufficient evidence to support that conviction. The Court has previously reviewed this allegation based upon motions made by Defendant at the end of the People's proof and then at the end of the actual trial, prior to the jury being charged and

instructed. At that time the Court denied both motions. The Court continues to deny that motion. There is more than sufficient evidence in the record to establish the Defendant actually intended to cause physical injury to Thomas Horton on October 30, 2020 and did cause that injury by a dangerous instrument. There was testimony by the victim himself as well as medical testimony that was not in any way refuted, that the victim was stabbed below his chin with a sharp object. The Defendant prior to attacking the victim with this object had gone into his car and obtained something before deliberately stabbing the victim. The medical testimony obviously establishes the victim was caused physical injury.

The Defendant argues he was not provided with the victim's federal conviction. The defense counsel was well aware of the victim admitting to the police that in fact he was on federal probation. His criminal record was provided prior to cross-examination of the victim by the Defendant. The victim admitted his crime and that he was on federal probation at the time.

The Defendant also claims that curative instructions should have been issued because the jury witnessed him being shackled by the Wayne County Sheriff's Department. Firstly, there is no record of this whatsoever and the Court made sure that the Defendant was always in court before the jury was allowed in, the Defendant was always unshackled and not handcuffed and was in civilian clothes. During any recess the jury was always sequestered in the jury room before the Defendant was removed from the courtroom shackled and handcuffed. There is nothing on the record about this whatsoever.

The Defendant also claims he was not allowed to use the podium at the conclusion of the trial while he presented his closing remarks. Again, that is simply not true. It was up to the Defendant whether or not he used the podium.

The Defendant never made any request to the Court to advise the jury concerning the Defendant being currently detained in the Wayne County Jail.

Defense counsel throughout the motion alleges that the Defendant did not make a motion to the Court for a trial order of dismissal. Again that is not true and not supported by the record.

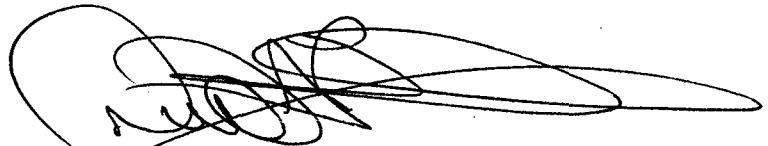
Defense counsel also requests that the verdict be vacated because the Court failed to advise the jury of justification instructions as to Assault in the Second Degree. Firstly no request was made to the Court for justification. Secondly, there is nothing in the record to warrant any instruction on justification.

Any remaining points or claims made by defense counsel not directly addressed by the Court has no merits.

The Court hereby denies Defendant's Motion in its entirety.

This constitutes the Decision and Order of the Court.

Dated: December 12, 2022  
Lyons, New York

A handwritten signature in black ink, appearing to read 'Daniel G. Barrett', written over a horizontal line.

Daniel G. Barrett  
County Court Judge