People v June
2012 NY Slip Op 33769(U)
June 29, 2012
Supreme Court, Albany County
Docket Number: DA 569-11
Judge: Dan Lamont

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

ORIGINAL

THE PEOPLE OF THE STATE OF NEW YORK

-against-

DIAMON JUNE

Defendant.

DECISION/ORDER

Indictment # 15-3789
Index # DA 569-11

APPEARANCES:

For the People:

HONORABLE P. DAVID SOARES
Albany County District Attorney
Albany County Judicial Center
Albany, New York 12207

DAVID A. GONZALEZ, ESQ.
Assistant District Attorney, of Counsel

For the Defendant:

DANIELLE NERONI, ESQ.
668 Madison Avenue
Albany, New York 12208

DAN LAMONT, J.

By letter/motion dated May 29, 2012, defendant moves this Court for an Order setting aside the verdicts of the jury finding the defendant guilty of two counts of Robbery in the Second Degree and an Order granting the defendant a new trial. By letter dated June 5, 2012, the People oppose the defendant's motion.

BACKGROUND

The two-count Indictment accuses the defendant of committing the crimes of Robbery in the Second Degree in violation of Penal Law § 160.10(1), a class C armed violent felony: and Robbery in the Second Degree in violation of Penal Law § 160.10(2)(b), a class C violent felony. The charges are that on June 17, 2011, at approximately 12:11 a.m., in front of 29 Wilkins Avenue, in the City of Albany, County of Albany, the defendant

Diamon June did forcibly steal money, food and a cell phone from a pizza delivery man while aided by another person actually present and while displaying what appeared to be a rifle or shotgun.

On October 31, 2011, defendant posted a $30,000 insurance company surety bail bond and personally signed a written Parker admonishment before being released. On Friday, March 2, 2012 sometime after 3:00 p.m., the defendant and his counsel personally appeared for a pre-trial Sandoval hearing. The Court immediately gave the defendant an on the record additional date and time specific Parker admonishment informing defendant that the trial was scheduled to begin on Monday, March 5, 2012 at 9:30 a.m.

On Monday morning March 5, 2012, the defendant failed to appear for trial. The Court waited until approximately 10:41 a.m. to provide defense counsel with an opportunity to reach the defendant and to make a record regarding the defendant's absence. The following colloquy occurred thereafter between the Court and defense counsel, Matthew Alpern:

> The Court: "Mr. Alpern, do you have any information or any applications relative to Mr. June not being here?
>
> "MR. ALPERN: I don't have any representations as to why he's not here at this point, and I would just request if the Court is going to issue a bench warrant, my request really centers around not wanting to do the trial or objecting to doing the trial without him being present, which is a separate issue as to–
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> "THE COURT: You don't have any information? I'm not saying you necessarily should, but you have no information as to the defendant's whereabouts? You have no information at all about that, correct?"
>
> "MR. ALPERN: That's correct." (March 5, 2012 transcript pgs.2-3)

After providing the People with an opportunity to be heard, the Court provided defense counsel with an additional opportunity to be heard, a portion of which follows:

> Mr. Alpern: "And also, I don't know – and I would have to think about this because I've never done a trial where a client didn't appear, but I wonder if now I am in a position where my conversations with him may put me as a witness as to why he's not here. I don't know. I would have to think about that. So I'm in kind of an awkward – that may be something that a jury should hear as to what occurred. So I'm kind of in an odd spot.
> ***
>
> "and then there's no way for me to respond to why he's not here except by speculating based on conversations I may or may not have had, and then I can't call myself as a witness." (emphasis supplied) (March 5, 2012 transcript pgs 4-5)

Beyond the conversation with counsel on the record, the Court was also aware of the fact that defendant's counsel had unsuccessfully attempted to reach the defendant by telephone that morning. At approximately 10:47 a.m., the Court issued a bench warrant for the defendant's arrest and directed that the scheduled trial proceed in defendant's absence. On March 7, 2012, defendant was convicted as charged. On March 14, 2012, the defendant was arrested on the bench warrant and remanded, and he subsequently retained new legal counsel.

DISCUSSION

The following quote from the Court of Appeal's decision in People v. Sanchez, 65 NY2d 436 [1985] sets forth the framework for this Court to determine defendant's letter/motion for an Order setting aside the guilty verdicts of the jury and granting the defendant a new trial:

> "The *Taylor* court noted that " 'there can be no doubt whatever that the governmental prerogative to proceed with a trial may not be defeated by conduct of the accused that prevents the trial from going forward.' *Illinois v. Allen*, 397 U.S. 337, 349 [90 S.Ct. 1057, 1063, 25 L.Ed.2d 353]" (414 U.S.

> 17, 20, 94 S.Ct. 194, 196, 38 L.Ed.2d 174). As explained in *Falk v. United States*, 15 App.D.C. 446, 460, *cert. denied* 181 U.S. 618, 21 S.Ct. 923, 45 L.Ed. 1030, quoted in *Diaz v. United States*, 223 U.S. 442, 457-458, 32 S.Ct. 250, 254-255, 56 L.Ed. 500: "The question is one of broad public policy, whether an accused person, placed upon trial for crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of courts and juries and turn them into a solemn farce *** Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong." Thus, under the *Taylor* rule, if a defendant deliberately leaves the courtroom after his trial has begun, he forfeits his right to be present at trial regardless of whether he knows that the trial will continue in his absence." (at page 443)

The Court of Appeals in People v. Sanchez, *supra* held that a defendant also forfeits his right to be present at trial when he deliberately absents himself from the courtroom after he has been told that his trial is about to begin. On the day that defendant was released on $30,000.00 bail (October 31, 2011), this Court provided the defendant with a written Parker admonishment and informed the defendant that his trial could proceed in his absence. On Friday, March 2, 2012, before his trial was to commence on Monday, March 5, 2012, this Court provided the defendant with clear and precise date and time specific Parker warnings–including telling the defendant that "witnesses have been subpoenaed and scheduled and jurors are going to be brought in and we don't have any other trial for next week" (March 2, 2012 transcript: pg. 2). Although this Court assiduously gave the defendant Parker admonishments informing the defendant that his trial could proceed in his absence, defense counsel's arguments regarding People v. Parker, 57 NY2d 136 [1982] have no direct, determinative application to the circumstances of this case (see, People v. Sanchez, *supra*).

Under the rationale of People v. Sanchez, *supra*, before proceeding with a trial in the defendant's absence, the trial court should make an inquiry and recite on the

record the facts and reasons relied upon in determining that defendant's absence was deliberate (see, People v. Brooks, 75 NY2d 898 [1990]). On March 5, 2012, this Court did make an inquiry into the surrounding facts and circumstances of the defendant's absence. Defendant's counsel had tried to reach the defendant by telephone during the morning of March 5, 2012. However, defendant's counsel stated on the record that he did not have any information as to defendant's whereabouts. More importantly, defendant's counsel stated that he did not have any representations as to why the defendant was not there, while at the same time stating: "but I wonder if now I am in a position where my conversations with him may put me as a witness as to why he's not here" and "then there's no way for me to respond to why he's not here except by speculating based on conversations I may or may not have had" (emphasis added) (March 5, 2012 transcript: pages 4-5). In an attempt to provide his client with zealous representation and to avoid providing the Court with any specific information that could be detrimental to his client, defendant's trial counsel was obviously not providing the Court with all of the information available to him as to why his client was not present for trial. Defendant's counsel would not even admit on the record that he had conversations with the defendant regarding why defendant was absent from his trial.

On March 5, 2012, the Court made the following factual determinations: (1) defendant was present in Court the previous Friday and was informed on the record that the trial would proceed in his absence unless there was some legitimate reason that he couldn't come to court; (2) the defendant failed to appear the following Monday morning by 9:30 a.m. for trial; (3) defendant's counsel made phone calls to defendant that did not produce defendant's presence nor any reason for defendant's absence; and (4)

counsel clearly had some information as to why the defendant was not present that he did not wish to share with the Court ("there's no way for me to respond to why he's not here except by speculating based on conversations I may or may not have had") (March 5, 2012 transcript: page 405). Although this Court did not state on the record that defendant's absence was "deliberate", this Court most certainly found the defendant's absence to be deliberate based upon all of the surrounding circumstances and directed that the trial would proceed in defendant's absence (see, People v. Redzeposki, 7 NY3d 725 [2006]; see also, People v. Roden, 3 AD3d 432 [1st Dept. 2004]; People v. Fudge, 186 AD2d 839 [3rd Dept. 1992]; People v. McKinnies, 144 AD2d 178 [3rd Dept. 1988]). Defendant's absence from his own trial and defendant's counsel's evasive responses to the Court's inquiries regarding why the defendant was absent from trial unambiguously indicated a defiance of the process of law in an attempt to paralyze the proceedings of the court and the summoned prospective jurors and turn the whole process into a "solemn farce" (see, People v. Sanchez, *supra*). Accordingly, this Court holds and determines that defendant's letter/motion for an Order setting aside the verdicts of the jury and granting defendant a new trial should be and the same is hereby denied.

On March 14, 2012–just one week after defendant was convicted as charged, defendant was arrested on the bench warrant and remanded, and he subsequently retained new legal counsel. Parenthetically, this Court did receive a letter dated April 21, 2012, from the defendant's mother stating that the defendant did not show up for his trial because he was scared of going to prison for 10 years and he wanted to see his unborn child before the child was 10 years old.

The foregoing constitutes the Opinion, Decision and Order of the Court.

ENTER

Dated: Albany, New York
June 29, 2012

DAN LAMONT, Acting J.S.C.

cc: David A. Gonzalez, Esq., Asst. Dist. Atty.
Danielle Neroni, Esq.

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