People v Davis
2012 NY Slip Op 33780(U)
April 4, 2012
Sup Ct, Kings County
Docket Number: 4176/2011
Judge: Dineen A. Riviezzo

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM : PART 14
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THE PEOPLE OF THE STATE OF NEW YORK

-against- Ind. No. 4176/2011

LARRY DAVIS
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Hon. Dineen A. Riviezzo, J.:

Defendant was convicted after jury trial of murder in the second degree under PL 125.25 (1). The evidence consisted in great part of a statement made by defendant in which he stated that he strangled the victim by accident while they were having sex, during which the victim had requested that the defendant apply pressure to the victim's neck to enhance the victim's sexual experience. After discovering that the victim was dead, the defendant admittedly took the victim's cell phone, and placed the victim's body under the bed.

Both the People and the defendant affirmatively stated that they did not wish to submit any lesser included offenses. At one point during deliberations, the jury sent out a note asking how they were to consider the evidence of intoxication. Neither side had requested an intoxication charge. The court instructed the jury not to consider intoxication as a defense.

The jury convicted the defendant of the single charge of murder which was submitted to it.

Defendant now moves to set aside the verdict on the grounds that (1) the evidence was legally insufficient; (2) the medical examiner was improperly allowed to testify that the victim's blood tests were negative for marijuana and cocaine usage; and, (3) the court erred in its instruction as to intoxication.

Each argument is considered below, with additional reference to the facts at trial where

required.

Standard of Review Under CPL 330.30

CPL 330.30 (1)[1] allows the trial court to set aside the verdict only on grounds which would warrant the Appellate Division to do so "as a matter of law." A trial court can only grant a CPL 330.30 motion only if the claim raised for dismissal of the verdict has been reserved for appellate review by interposing a specific and timely objection. Unpreserved claims of error therefore can not form the basis for relief under CPL 330.30. People v. Everson, 100 N.Y.2d 609, 799 N.E.2d 613, 767 N.Y.S.2d 389 (2003); People v Ahmed, 2009 N.Y. Misc. LEXIS 6040 (Sup. Ct., Kings County [Ingram, J.]) [court cannot grant CPL. § 330.30 motion when he has unpreserved claims]). Moreover, a the trial court may not vacate a verdict based on the weight of the evidence and the possibility of innocence, as this is not an error which "if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court" under CPL 330.30 (1). People v. Colon, 65 N.Y.2d 888, 482 N.E.2d 1218, 493 N.Y.S.2d 302 (1985) (trial court erred in granted CPL 330.30 motion and ordered a new trial, relying on "all the factors," including the undisclosed statements, the close factual question, the possibility of defendant's innocence, and his successful completion of a polygraph examination).

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[1]CPL § 330.30, "Motion to set aside verdict; grounds for, " states:

"At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds:

"1. Any ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court."

The power given to the Trial Judge under CPL 330.30 (1) is " 'normally limited to a determination that the trial evidence was not legally sufficient to establish the defendant's guilt of an offense of which he was convicted' " (People v Echevarria, 233 A.D.2d 200, at 202, 650 N.Y.S.2d 98, *lv denied* 89 N.Y.2d 942, quoting People v Carter, 63 N.Y.2d 530, 536, 483 N.Y.S.2d 654, 473 N.E.2d 6). In determining whether the jury verdict is supported by legally sufficient evidence, the court, viewing the evidence in a light most favorable to the People, must determine "whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial." (People v Bleakley, 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672).

Sufficiency of the evidence

Defendant argues that the evidence was insufficient. As noted above, whether the jury verdict is supported by legally sufficient evidence, the court, viewing the evidence in a light most favorable to the People, must determine "whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial." (People v Bleakley, 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672). Clearly, here, the evidence was sufficient. The People's expert witness, the Medical Examiner Dr. DeRoux, testified that the defendant would need to apply pressure to the neck for a period of three minutes to kill the victim, and that the victim would "pass out" after approximately 30 seconds. Based on this testimony, and defendant's admissions, and other corroborative evidence (i.e., the hiding of the victim's body under the bed, and the taking of the victim's cell phone), the evidence was clearly sufficient.

Ruling on Crawford Objection

Defendant argues that Medical Examiner Dr. DeRoux was improperly permitted to testify as to the victim's blood alcohol toxicology. Dr. DeRoux performed the autopsy of the victim, but the blood toxicology analysis was prepared for the Medical Examiner's Office by an independent laboratory. The defendant objects to the evidence, the report and the testimony about the reports, under Crawford v. Washington, 541 US 36 (2004).

In People v Meekins, 10 NY3d 136, 884 NE2d 1019, 855 NYS2d 20 [2008]), a pre-Melendez-Diaz case (Melendez-Diaz v. Massachusetts, 129 S CT 2527 (2009)), the Court of Appeals held that the introduction of a DNA report from a private subcontractor laboratory that tested the victim's rape kit was not a *Crawford* violation, even though the technicians who performed the test did not testify at trial. The Court concluded that the reports were not "testimonial" because the technicians merely recorded neutral testing procedures and the "graphical DNA test results, standing alone, shed no light on the guilt of the accused in the absence of an expert's opinion that the results genetically match a known sample," and such an expert did testify at the trial.

Subsequent to the decision in Melendez-Diaz[2], the Court of Appeals again considered the

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[2]In Melendez-Diaz the Supreme Court held that "certificates" (functionally equivalent to affidavits) reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine were testimonial. The "certificates" were "functionally identical to live, in-court testimony," and were "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,'" Crawford, supra, at 52, 124 S. Ct. 1354, 158 L. Ed. 2d 177. The statements were clearly testimonial in nature.

issue of DNA evidence under Crawford. In People v. Brown, 13 NY3d 332 (2009), the Court permitted the introduction of a DNA report processed by a subcontractor laboratory to the Office of the Chief Medical Examiner (OCME) through the testimony of a forensic biologist from OCME. The report, which consisted of machine-generated raw data, graphs and charts representing the characteristics of the male DNA specimen found in the victim's rape kit, was "nontestimonial," under Crawford. The expert witness forensic biologist conducted the actual analysis linking defendant's DNA to the profile found in the victim's rape kit. She testified that she had personally examined the subcontractor's file; she interpreted the profile of the data represented in the machine-generated graphs; and she made the critical determination linking defendant to the crime. She also stated that she was familiar with the procedures and protocols used by the subcontractor, and the court held that the defendant could have challenged her claims on cross-examination. No conclusions, interpretations or comparisons were apparent in the DNA report, and the technicians who generated the report would not have been able to offer any testimony other than how they performed certain procedures.

Even closer to the issues at hand is People v. Freycinet, 11 N.Y.3d 38, 892 N.E.2d 843, 862 N.Y.S.2d 450 (2008). In that case, a physician employed by the New York City Office of Chief Medical Examiner (NYCOCME) performed an autopsy on the victim. This physician later moved to another state. Another physician employed by the NYCOCME testified to opinions based on the facts contained in the first physician's report, detailing the nature and extent of the victim's wounds, including the"wound track" and "exit wound." The Court of Appeals found the report not to be testimonial, in that the duties of the Office of Chief Medical Examiner, are independent of and not subject to the control of the office of the prosecutor; the report, redacted to eliminate his opinions,

was very largely a contemporaneous, objective account of observable facts; and lastly, the report did not directly link defendant to the crime. "The report is concerned only with what happened to the victim, not with who killed her."

The foregoing Court of Appeals cases were decided before the Supreme Court decided Bullcoming v. New Mexico, 131 S. Ct. 2705 (June 23, 2011). In Bullcoming, the Supreme Court held that a forensic laboratory blood-alcohol report, prepared in connection with a DWI prosecution, was not admissible in evidence when the forensic analyst who prepared the report was not called as a witness. The analyst who was called by the State as a witness did not participate in, interpret or observe the performance of the testing on the defendant's blood sample. The Bullcoming Court observed that a statement in "[a] document created solely for an 'evidentiary purpose,' . . . made in aid of a police investigation, ranks as testimonial" (*Bullcoming v New Mexico*, U.S. , , 131 S. Ct. 2705, 2717, 180 L. Ed. 2d 610 [2011], quoting *Melendez-Diaz v. Massachusetts*, U.S. , , 129 S. Ct. 2527, 2532, 174 L. Ed. 2d 314 [2009]).

By contrast, in the present case, as in People v. Brown and People v. Freycinet, the underlying toxicology report was not testimonial. . The toxicology results included in the autopsy are prepared by an outside laboratory, not a law enforcement agency, which makes only objective findings based on standardized tests. The toxicology results of the victim's blood alcohol in themselves they neither implicate guilt or innocence. Indeed, the blood alcohol toxicology results in fact supported defendant's version of the events, while the absence of illicit drugs was contrary to defendant's account of the events. Thus the present case is governed by People v. Brown and People v. Meekins, and is not affected by the more recent decision in Bullcoming where the report itself was found to be testimonial.

Response to jury note

As noted above, none of the parties requested a charge on intoxication. In response to the jury note, the Court displayed the note to the attorneys, and held extensive colloquy before deciding how to respond. The Court, in addition, explained to the attorneys how it intended to respond before calling in the jury and responding to the note.

Defendant claimed in his statement to the police that he was "drunk and high" when he accidentally strangled the victim. He testified that, "We were both really f----- up. We were drinking and getting high all night." T. P, 211. Yet there was no indication in the self-serving statement as to the any particulars of the alleged intoxication. There was evidence that the victim had an elevated blood alcohol level (either .08 or .09), but the testimony by the Medical Examiner stated that as alcohol affects different persons in different ways, it was impossible to determine the effect on the victim. Moreover, despite the statement that the victim was using drugs, there was no evidence of drug use in his blood tests, even though the Medical Examiner testified that had the victim used drugs, traces would have remained in his blood. Moreover, no alcohol bottles or marijuana was found in the apartment.

As stated in People v. Sirico, 17 N.Y.3d 744, 952 N.E.2d 1006, 929 N.Y.S.2d 14, 2011 NY Slip Op 4718 (2011) :

> "An intoxication charge is warranted if, viewing the evidence in the light most favorable to the defendant, "there is sufficient evidence of intoxication in the record for a reasonable person to entertain a doubt as to the element of intent on that basis" (*People v Perry*, 61 NY2d 849, 850, 462 N.E.2d 143, 473 N.Y.S.2d 966 [1984]; *see also People v Farnsworth*, 65 NY2d 734, 735, 481 N.E.2d 552, 492 N.Y.S.2d 12 [1985]). A defendant may establish entitlement to such a charge "if the record contains evidence of the recent use of intoxicants of such nature or quantity to support the inference that their ingestion was sufficient to affect defendant's ability to form the necessary

> criminal intent" (*People v Rodriguez*, 76 NY2d 918, 920, 564 N.E.2d 658, 563 N.Y.S.2d 48 [1990]). Although a "relatively low threshold" exists to demonstrate entitlement to an intoxication charge, **bare assertions by a defendant concerning his intoxication, standing alone, are insufficient** (*People v Gaines*, 83 NY2d 925, 927, 638 N.E.2d 954, 615 N.Y.S.2d 309 [1994]). Here, there is insufficient evidence to support an inference that defendant was so intoxicated as to be unable to form the requisite criminal intent. Indeed, the uncontradicted record evidence, including defendant's own account, supports the conclusion that his overall behavior on the day of the incident was purposeful. Accordingly, defendant was not entitled to an intoxication charge." (Emphasis added.)

As explained in People v. Gaines, 83 N.Y.2d 925, 638 N.E.2d 954, 615 N.Y.S.2d 309 (1994):

> Defendant's evidence lacked requisite details tending to corroborate his claim of intoxication, such as the number of drinks, the period of time during which they were consumed, the lapse of time between consumption and the event at issue, whether he consumed alcohol on an empty stomach, whether his drinks were high in alcoholic content, and the specific impact of the alcohol upon his behavior or mental state (see, People v Rodriguez, 76 NY2d 918, 921, *supra).* Nor did the prostitute's statement that defendant was "high" or the police officer's comments that defendant had glassy eyes and alcohol on his breath add sufficiently to defendant's statements to warrant the intoxication instruction *(id.).*

Similarly, in People v. Beaty, 89 A.D.3d 1414, 932 N.Y.S.2d 280 (4th Dept. 2011), "the only evidence in the record apart from defendant's statements to the police regarding his alleged intoxication on the night of the rape incident was the victim's testimony that she smelled alcohol on the perpetrator's breath." This corroboration of recent alcohol usage at the time failed to establish an entitlement to the intoxication charge.

Again, in People v. Sturdevant, 74 A.D.3d 1491, 904 N.Y.S.2d 777 (3d Dept. 2010), much greater evidence of intoxication was held not to warrant an instruction on intoxication. In that case, defendant testified that he and two other persons shared a liter and a half of vodka, used marihuana, and "popped some pills" on the morning of the incident. The court observed, as in the

present case, that defendant did not indicate how much alcohol or marihuana he consumed. In addition, he did not state what kind of pills he took and, and other than describing himself as "high" and "a little intoxicated," he offered no details as to the impact of these substances on his behavior and mental state. The additional evidence – an entry on the police report that he was "impaired" when he was arrested – was not sufficient to warrant the charge. Here, the jury's query required that the Court give an instruction that intoxication could not be considered as negating the element of intent.

Here, as in the foregoing case, defendant's statement that he was drunk and high was not supported by any independent evidence. In addition, defendant's unsupported statement lacked the requisite details – such as the number of drinks, the period of time during which they were consumed, the lapse of time between consumption and the event at issue, whether he consumed alcohol on an empty stomach, whether his drinks were high in alcoholic content, and the specific impact of the alcohol upon his behavior or mental state – to warrant an intoxication charge.

As the charge was not supported by sufficient evidence, the court was constrained to advise the jury that they could not consider intoxication as negating defendant's intent.

This constitutes the order of the Court.

4-4-2012
Date

J. S. C.

HON. DINEEN ANN RIVIEZZO