People v Colon
2018 NY Slip Op 33536(U)
March 26, 2018
County Court, Westchester County
Docket Number: 16-1459
Judge: George E. Fufidio

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COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
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THE PEOPLE OF THE STATE OF NEW YORK

- against -

DECISION AND ORDER
Ind. No.16-1459

JERRY COLON,

Defendant.
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FILED
APR 13 2018
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

FUFIDIO, J.

The Defendant, Jerry Colon, moves for an order pursuant to CPL 330.30 (1) to set aside his jury trial verdict convicting him of one count of robbery in the first degree (Penal Law § 160.15[3]), one count of criminal possession of a weapon in the third degree (Penal Law § 265.02[1]), one count of criminal possession of stolen property in the fifth degree (Penal Law § 165.40) and one count of criminal mischief in the fourth degree (Penal Law § 145.00). The jury acquitted the Defendant of one count of menacing in the first degree (Penal Law § 120.13) and one count of attempted assault in the second degree (Penal Law § 110.00/120.05[2])

By motion dated, March 5, 2018, the Defendant argues that the verdict that convicted him of robbery in the first degree and criminal possession of a weapon in the third degree and acquitting him of menacing in the first degree is repugnant and that the convictions for robbery in the first degree and criminal possession of a weapon in the third degree should be set aside pursuant to CPL 330.30. Specifically, the Defendant contends that the only conclusion that can be drawn from the verdict is that "It is logically inconsistent, and factually impossible for the defendant to: (1) have threatened the use of the box cutter (Robbery in the First Degree); (2) to have had the intent to use the box cutter unlawfully against another (Criminal Possession of a Weapon in the First (sic) Degree); and (3) to have **not** displayed the box cutter to place another in reasonable fear of physical injury..."

The Defendant also argues that the verdict that convicted him of robbery in the first degree and criminal possession of a weapon in the third degree was rendered against the weight of the evidence.

By Affirmation in Opposition, the People oppose the Defendant's claims and argue that the motion pursuant to CPL 330.30 (1) should be denied in its entirety since his arguments are without merit.

After a verdict is rendered and before sentence is imposed, a defendant may move to set aside the verdict on "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," (CPL 330.30[1]). Since the authority to set aside a verdict is limited to grounds which would require reversal or modification on appeal, only an error of law which has been properly preserved for appellate review may serve as a basis for setting aside the verdict (*see People v Hines,* 97 NY2d 56 [2001]; *People v Josey*, 204 AD2d 571 [2d Dept 1994]; *People v Amato*, 238 AD2d 432, 433 [2d Dept 1997]; *People v Thomas*, 8 AD3d 303 [2d Dept 2004]). This Court finds that the issue was adequately preserved, however, denies the Defendant's motion for the following reasons:

A. REPUGNANT VERDICT

A verdict is considered repugnant, or internally inconsistent, when it convicts a defendant of one offense while simultaneously and irreconcilably acquitting him of another, whose elements are necessarily included in the offense for which he has been convicted (CPL 300.30[5]; *People v Loughlin*, 76 NY2d 804 [1990]). The repugnancy rule exists to ensure that no defendant is convicted of a crime for,"which the jury has actually found that the defendant did not commit an essential element, whether it be one element or all" (*People v Muhammad*, 17 NY3d 532 [2011], *citing People v Tucker*, 55 NY2d 1, 6 [1981]). The test for a repugnant verdict was articulated in *Tucker* where the Court expressed a preference for an analysis of the particular instructions that were given to the jury rather than a review of the record *in toto,* which the Court feared would, "intrude too far into the jury's deliberative process." (*Tucker*, 55 NY2d at 6-7). Accordingly, the Court of Appeals said that, "[t]he instructions to the jury will be examined only to determine whether the jury, as instructed, must have reached an inherently self-contradictory verdict (*Tucker*, 55 NY2d at 8) or in other words if it would be a legal impossibility for a jury to have convicted the defendant on one count and acquitted him on the another, however, [i]f there is a theory under which a split verdict could be legally permissible, it cannot be repugnant, regardless of whether that theory has evidentiary support in a particular case (*Muhammad*, 17 NY3d at 539-540).

Turning to the case at bar, the Court instructed the jury using the New York State model jury instructions. The first instruction given to the jury concerning robbery was the general instruction, that robbery is in its essence a forcible stealing and that a person forcibly steals when:

"in the course of committing a larceny, such person uses or threatens the immediate use of physical force upon another for the purpose of, meaning with the intent[1] of:
[one:] compelling the owner of such property [or another person] to deliver up the property; [or]
[two:] preventing or overcoming resistance to the taking of the property; [or]
[three:] preventing or overcoming resistance to the retention of property, immediately after the taking..." (http://www.nycourts.gov/judges/cji/2-PenalLaw/160/160.pdf).

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[1]The jury was also given the Model Jury Instructions on the various mental states and other instructions, such as larceny, physical injury and dangerous instrument, that were necessary for the jury to deliberate on all of the these charged crimes.

Thereafter, the jury was instructed on the elements of robbery in the first degree:

"1. That on or about (date), in the county of (county), the defendant, (defendant's name), forcibly stole property from (specify); and
2. That in the course of the commission of the crime [or immediate flight therefrom], the defendant possessed a dangerous instrument and used or threatened the immediate use of that dangerous instrument."
(http://www.nycourts.gov/judges/cji/2-PenalLaw/160/160-15%283%29.pdf).

Next, the jury was instructed on menacing in the first degree[2]:

"1. That on or about (date), in the county of (county), the defendant, (defendant's name), placed or attempted to place (specify) in reasonable fear of physical injury...by displaying a dangerous instrument...; and
2. That the defendant did so intentionally."
(http://www.nycourts.gov/judges/cji/2-PenalLaw/120/120-14%281%29.pdf).

Finally[3], the jury was instructed on criminal possession of a weapon in third degree:

"1. That on or about (date), in the county of (county), the defendant, (defendant's name) possessed a (specify);
2. That the defendant did so knowingly; and
3. That the defendant did so with the intent to use (specify) unlawfully against another."
(http://www.nycourts.gov/judges/cji/2-PenalLaw/265/265-01%282%29.pdf).

Upon analysis, there is nothing in the elements of the jury instructions that would lead this Court to believe, as the Defendant posits, that convictions for robbery in the first degree and criminal possession of a weapon in the third degree are mutually inclusive of menacing in the first degree.

Central to the Defendant's argument is the theory that the jury's verdict is irreconcilable. In his view, it could not have found that the Defendant used, or threatened the immediate use of a dangerous instrument for robbery in the first degree and that he intended to unlawfully use a box cutter against the victim for criminal possession of a weapon in the third degree, without also necessarily finding that he intended to place the victim in reasonable fear of physical injury by displaying a dangerous instrument. However, each of these crimes and their elements are mutually exclusive.

The theory of intent is critical to this reconciliation, specifically, the notions of intending

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[2]The defendant stipulated to the prior conviction required to elevate menacing in the second degree to menacing in the first degree and criminal possession of a weapon in the fourth degree to criminal possession of a weapon in the third degree.

[3]For the purposes of this motion, the Court is only addressing the claims made by the Defendant in his motion. The jury was fully instructed on all of the counts in the indictment.

to use something versus using something intentionally. In the former, one's conscious objective can be to use a dangerous instrument without regard to the outcome of such use and/or for a purpose other than the intentional infliction or fear of infliction of physical injury. Indeed, as the jury was instructed on robbery in general; the intent element of any degree of robbery is the use of force against another for the purpose of, *inter alia*, the unlawful retention of stolen property (*see, People v Gordon*, 23 NY3d 643[2014],). Under Penal Law § 160.15 [3], that use of force is intensified by the use or threatened use of a dangerous instrument, but the intent element remains the same. Regarding criminal possession of a weapon in the third degree, it must be proven that the defendant actually possessed a dangerous instrument (*see, People v Skyles*, 266 AD2d 321 [2nd Dept 1999]) and that he simply intended to use it in any unlawful manner against another.

In the latter however, for a jury to convict on menacing in the first degree, it must be convinced beyond a reasonable doubt that the conscious objective of a defendant, by displaying a dangerous instrument, was to create a reasonable fear of physical injury in the victim. It is not sufficient for the People to prove that a defendant was reckless or criminally negligent in his actions or that he displayed a dangerous instrument for another purpose, rather the intentional creation of a reasonable fear of physical injury is what is required and because that is specifically not an element of either robbery in the first degree or criminal possession of weapon in the third degree, the verdict cannot be said to be repugnant.[4]

B. WEIGHT OF THE EVIDENCE

The second half of the Defendant's motion asks this Court to set aside the verdict because it was rendered against the weight of the evidence. As a matter of law, this Court is not authorized to set aside a verdict based upon these grounds as a matter of law (*People v Carter*, 63 NY2d 530, 536 [1984]).

Based on the foregoing, it is hereby ORDERED that the motion is denied in its entirety.

The foregoing constitutes the opinion, decision and order of this court.

Dated: White Plains, New York
March 26 , 2018

Honorable George E. Pufidio
Westchester County Court Judge

[4]It is also worth noting that the jury acquitted the Defendant of attempted assault in the second degree under Penal Law § 110.00/120.05 [2]. The elements of this crime are that 1. The Defendant attempted to cause physical injury by means of a dangerous instrument and 2. That he intended to cause physical injury.

TO:

HON. ANTHONY A. SCARPINO, JR.
District Attorney, Westchester County
111 Dr. Martin Luther King, Jr. Boulevard
White Plains, New York 10601
By: Virginia A. Marciano, Esq.
Assistant District Attorney

SAMUEL S. COE, ESQ.
Attorney for the Defendant, Jerry Colon
50 Main Street, Suite 1000
White Plains, New York 10606