

People v Lindsey

2018 NY Slip Op 34174(U)

September 11, 2018

Supreme Court, New York County

Docket Number: Ind. No. 04748/2017

Judge: Guy H. Mitchell

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 73

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

DECISION AND ORDER
IND. # 04748/2017

- against -

NEVIN LINDSEY,

Defendant.

-----X
MITCHELL, GUY H., J:

On July 25, 2018, after the conclusion of a jury trial, the defendant was acquitted of one count of Criminal Possession of Stolen Property in the Fourth Degree [Penal Law §165.45(1)] and convicted of one count of Grand Larceny on the Fourth Degree [Penal Law §155.30(1)].

By Notice of Motion dated September 1, 2018, the defendant moved pro-se to set aside the verdict pursuant to Criminal Procedure Law §§ 330.30 (1) and 330.45 and for other relief as this Court may deem necessary. Specifically, the defendant argues that the verdict should be set aside because: 1) he received ineffective assistance of counsel, 2) the verdict is repugnant and 3) the verdict is against the weight of the evidence. While defense counsel has indicated to the court that he is adopting the defendant's motion, defense counsel may *not* adopt defendant's arguments as they relate to ineffective assistance of counsel in support of his motion.

For the reasons stated below, the defendant's motion to set aside the verdict is ***denied***.

A defendant who is represented by counsel does not have a constitutional right to conduct a pro-se defense (*People v Silburn*, 31 NY3d 144 [2018]; *People v Mirenda*, 57 NY2d 261 [1982]). A defendant represented by counsel does not have an indiscriminate right to bring pro-

se motions on his own behalf (*People v Renaud*, 145 AD2d 367 [1st Dept. 1988], app. dismissed, 74 NY2d 734 [1989]; *People v Rodriguez*, 95 NY2d 497 [2000]). “By accepting counseled - representation, a defendant assigns control of much of the case to the lawyer, who, by reason of training and experience, is entrusted with sifting out weak arguments, charting strategy and making day-to-day decisions over the course of the proceedings” (*Id* at 501-502).

Generally, the right to effective assistance of counsel is guaranteed by the Federal and State Constitutions (United States Constitution, 6th Amendment; New York Constitution, Article I, § 6). Counsel must be appointed for any indigent defendant charged with a serious crime (*see Gideon v Wainwright*, 372 US 335 [1963]). A defendant who seeks to challenge his conviction on the ground of ineffective assistance of counsel must establish that: 1) his defense counsel's representation fell below an objective standard of reasonableness and 2) there is a reasonable probability that, but for counsel's errors, the result would have been different (*see Strickland v Washington*, 466 US 668 [1984]). As a matter of New York State constitutional law, a defendant must receive "meaningful representation" (*see People v Henry*, 95 NY2d 563, 565 [2000]; *People v Benevento*, 91 NY2d 708, 712 [1998]; *People v Baldi*, 54 NY2d 137, 147 [1981], denied 61 NY2d 761 [1984]). “The test is reasonable competence, not perfect representation” (*People v Modica*, 64 NY2d 828, 829 [1985]; *People v Nicholson*, 26 NY3d 813, 956 [2018]).

That counsel's strategy was ultimately not successful is not a basis for an ineffective assistance claim (*People v Caban*, *supra*). In the instant matter, counsel's representation of the defendant resulted in the acquittal of one of the two charges submitted to the jury.

Insofar as defendant's first argument, the motion sets forth that defense counsel did not discuss case strategies with him nor did he submit motions that he requested be submitted to the Court. The court finds that this is not a fundamental constitutional right, but rather, it is a strategic decision reserved for counsel (*People v. Hogan*, 26 NY3d 779 [2016]). Moreover, the number of times that defense counsel meets with his or her client and the duration of those meetings is not presumptive of ineffective assistance.

Defendants second argument, that the verdict was repugnant cannot be logically substantiated by his allegation that the jury instructions read to the jury by the Court in response to the jury's request during their deliberations were confusing.

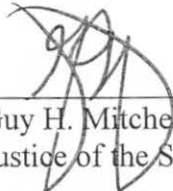
Lastly, CPL 330 does not authorize a motion to set aside a verdict on the ground that the verdict was against the weight of evidence as this relates to an evaluation of facts and does not present a question of law (*People v Roberts*, 165 AD2d 598 [1st Dept. 1991]). Criminal Procedure Law §330.30 (1) limits the power granted to the trial judge to set aside a verdict. Under Criminal Procedure Law §330.30 (1) a verdict may be set aside only if based upon insufficient evidence, or in the alternative, evidence which though legally sufficient, was inadequate to prove guilt beyond a reasonable doubt as a matter of law (*see People v Carter*, 63 NY2d 530, 536–37 [1984]). Legally sufficient evidence is defined as “competent evidence which, if accepted as true, would establish every element of an offense charged and the defendants commission thereof.” (CPL §70.10 [1]). To set aside a verdict, the judge must therefore find that: 1) there was not competent evidence that established each element of the

charged crime or 2) the defendant raised an objectionable issue which requires reversal or modification of the verdict as a matter of law (*see Carter*, 63 NY2d at 536).

The defendant also argues that his viewing of the surveillance video related to this case in the presence of the People, violated his due process rights. It is this Court's recollection that after a period of time, the People were specifically asked to step out of the courtroom and defendant was allowed time to review the surveillance video alone with his attorney.

Accordingly, for the foregoing reasons, the defendant's motion to set aside the verdict is *denied*.

Dated: New York, New York
September 11, 2018



Guy H. Mitchell
Justice of the Supreme Court

HON. GUY H. MITCHELL

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