

<b>Allen v Riley</b>
2021 NY Slip Op 33212(U)
June 20, 2021
Supreme Court, Onondaga County
Docket Number: Index No. 000698/2019
Judge: Gerard J. Neri
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At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga, at 401 Montgomery Street, Syracuse, New York, on July 20, 2021.

Present: Hon. Gerard J. Neri, J.S.C.

STATE OF NEW YORK  
SUPREME COURT ONONDAGA COUNTY

**DECISION and ORDER**

**GARY J. ALLEN,**

Index No: 000698/2019

Plaintiff,

-against-

**J. TIMOTHY RILEY, M.D., MUHAMMAD A. KHAN, M.D., VASCULAR SURGEONS OF CNY, PLLC, f/k/a VASCULAR, CARDIAC AND THORACIC SURGEONS OF CENTRAL NEW YORK, PLLC,**

Defendants.

Plaintiff Gary J. Allen seeks an order precluding Defendants J. Timothy Riley, M.D. (“Riley”), Muhammad A. Khan, M.D. (“Kahn”), and Vascular Surgeons of CNY, PLLC (“VSCNY”, and collectively the “Defendants”) from entering evidence of Plaintiff’s, Plaintiff’s Wife’s, and Plaintiff’s Brother’s prior criminal history (*see* Attorney Affirmation, NYSCEF Doc. No. 86, ¶13). Defendant opposes the motion.

Plaintiff seeks an order of the Court precluding Defendants from offering evidence, including the cross examination of Plaintiff, concerning prior convictions for menacing (*see* Certificate of Disposition, NYSCEF Doc. No. 87) and counterfeit U.S. currency (*see* Certificate of Conviction, NYSCEF Doc. No. 88; *see also* Attorney Affirmation, NYSCEF Doc. No. 86, ¶5). Plaintiff pled guilty the sale and distribution of counterfeit U.S. Currency, was sentenced to ten months incarceration in a Federal prison, and three years of post-release supervision (*ibid*,

¶6). Plaintiff's wife and brother were also charged in the course of the investigation of the counterfeit charge (*ibid*). Plaintiff states that upon completion of his sentence, he has become a responsible member of society, including maintaining employment and supporting his family up until his disability (*ibid*). Plaintiff asserts that the introduction of evidence of his convictions would be heavily prejudicial and would outweigh any probative value (*ibid*, ¶7).

Plaintiff notes that the admission of evidence of past convictions for impeachment purposes is within the discretion of the Court (*see People v. Hulls*, 76 N.Y.2d 190, 199 [1990]; *see also Acunto v. Conklin*, 260 A.D.2d 787 [Third Dept. 1999]; *see also Davis v. McCullough*, 37 A.D.3d 1121, 1122 [Fourth Dept. 2007]). Plaintiff notes the remoteness in time of the conviction is a factor the court should consider (*see People v. Sandoval*, 34 N.Y.2d 371, 376-77 [1974]). While New York does not have a bright line rule for the age a which a conviction may not be used, Plaintiff refers to the Federal rules which sets 10 years (*see Federal Rules of Evidence 609(b)*). Plaintiff's counsel reiterates that Plaintiff has served his sentence, and has been a productive member of society ever since he completed his sentence, up until the time of his disability (*see Attorney Affirmation*, NYSCEF Doc. No. 86, ¶12). Plaintiff urges the Court to grant the relief requested.

Defendants oppose the relief sought and not the 2004 conviction for counterfeiting is "by definition a crime of deceit" (*see Attorney Affirmation*, NYSCEF Doc. No. 91, ¶3). The Federal crime of dealing in counterfeit obligations or securities is defined as:

"Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be

fined under this title or imprisoned not more than 20 years, or both” (18

U.S.C. §473).

Defendant alleges that Plaintiff “was untruthful about the nature of the crime even in his deposition, as he asserted he was convicted merely of ‘possession of counterfeit money.’ (Ex. C [NYSCEF Doc. No 94], p. 19)” (Attorney Affirmation, NYSCEF Doc. No. 91, ¶9). Defendants assert Plaintiff credibility is central to this matter (*ibid*, ¶¶12, 17). Defendants assert that Plaintiff’s convictions for menacing, 3<sup>rd</sup> should also be allowed into evidence (*ibid*, ¶18). Defendants also urge that the counterfeiting charge that Plaintiff’s wife was convicted of should be utilized for impeachment purposes (*ibid*, ¶22).

Defendants argue that Sandoval specifically excludes remoteness as a consideration for crimes of deceit. “Commission of perjury or other crimes or acts of individual dishonesty, or untrustworthiness (e.g., offenses involving theft or fraud, bribery, or acts of deceit, cheating, breach of trust) will usually have a very material relevance, whenever committed” People v. Sandoval, 34 N.Y.2d 371, 377 (1974). Defendants assert that “evidence of criminal convictions is more broadly admitted in civil cases under CPLR §4513 than in criminal cases” (*see* Memorandum of Law, NYSCEF Doc. No. 98, p. 4). “Pursuant to CPLR §4513, any conviction of a crime may be introduced to impeach the credibility of a witness at a civil trial” (Able Cycle Engines, Inc. v Allstate Ins. Co., 84 A.D.2d 140, 142-143 [Second Dept. 1981]). Defendants then distinguish the cases cited by Plaintiff from the instant matter. Defendant opposes Plaintiff’s motion to preclude impeachment of Plaintiff or Plaintiff’s Wife by use of the counterfeit convictions.

Defendants assert that Plaintiff’s conviction for menacing 3<sup>rd</sup> should be allowed both under CPLR §4513 and as a prior inconsistent statement. Defendants assert Plaintiff “did not

discuss the conviction in his deposition” (*see* Memorandum of Law, NYSCEF Doc. No. 98, pp. 7-8). Defendants attached the Plaintiff’s deposition transcript, which states in pertinent part: “Q. And prior to that felony plea, had you ever had a criminal conviction? A. No. Not that I remember, no. Q. And how about after that, that period of incarceration, any criminal misdemeanor or felony convictions after that? A. No” (Allen Transcript, NYSCEF Doc. No. 94, p. 19). Defendant asserts the menacing 3<sup>rd</sup> conviction should be allowed for impeachment purposes.

Discussion:

“The rules governing the admissibility of evidence of other crimes represent a balance between the probative value of such proof and the danger of prejudice which it presents to an accused” (People v. Sandoval, 34 N.Y.2d 371, 375 (1974), *citing* People v. Schwartzman, 24 N.Y.2d 241 [1969]). “The principals articulated in Sandoval are applicable to civil, as well as criminal, actions” (*see* Tripp v. Williams, 39 Misc.3d 318, 322 [Sup. Ct. Kings County 2013]). “While the nature and extent of such cross-examination is discretionary with the trial court, the inquiry must have some tendency to show moral turpitude to be relevant on the credibility issue (Badr v. Hogan, 75 N.Y.2d 629, 634 [1990]). It is beyond dispute that Plaintiff’s conviction for dealing in counterfeit obligations or securities in violation of 18 U.S.C. §473 is one which directly bears on Plaintiff’s credibility. However, a closer look at the evidence before the Court reveals this particular instance is not so cut and dry.

Defendant submitted Plaintiff’s Certificate of Conviction, and included with the exhibit is Allen’s Sentencing Memorandum and Motion for Downward Departure (NYSCEF Doc. No. 92, pp. 12-16). Allen’s attorney argued for a downward departure as Allen only committed the offense under duress (*ibid*). Allen stated in the application:

“I believed [Joseph Allen, Plaintiff’s brother], and trusted him on his word. A few months had gone by, and he had asked my wife and I to go to his new place for dinner. He gave me a quick tour of his place when I noticed phony passports with his pictures on them. After I had confronted him about it, he pushed me on the ground and stuck a large handgun into my mouth and threatened me. He said that if I didn’t do what he said, or if I ever turned him in, that he would kill everybody, me, Mom, my wife and her family. I was really scared and feared for my life and the lives of my family. I knew that my brother had been involved with organized crime and that he would harm others if necessary. I tried to keep distant from him after that incident, but he would still come around wanting things and trying to get me involved in his scams. After repeatedly refusing him, he again would become angry and threaten me. At this time, I just wanted him out of my life. Whatever it took to get him and his evil ways out of my life. I didn’t want to jeopardize my life or my family, so I got him off my back by doing what he wanted. In a way I’m glad for what happened. Now I feel protected knowing that he is behind bars and not out there somewhere where he can hurt my family or others” (*ibid*, pp. 14-15).

On August 28, 2003, Allen was sentenced to 10 months on the counterfeit charge, three years of supervised release, and a special assessment of \$100.00 (*ibid*, p. 2). On August 26, 2004, Allen paid his final installment of his special assessment in full satisfaction of the judgment of conviction (*ibid*).

Contrary to Defendants’ arguments, Sandoval would tend to support the preclusion of Plaintiff’s and Plaintiff’s Wife’s federal convictions.

“To the extent, however, that the prior commission of a particular crime of calculated violence or of specified vicious or immoral acts significantly revealed a willingness or disposition on the part of the particular defendant *voluntarily* to place the advancement of his individual self-interest ahead of principle or of the interests of society, proof thereof may be relevant to suggest his readiness to do so again on the witness stand. A demonstrated determination deliberately to further self-interest at the expense of society or in derogation of the interests of others goes to the heart of honesty and integrity” (People v. Sandoval, 34 N.Y.2d 371, 377 [1974], *emphasis added*).

The statement made by Allen indicates the reason he and his wife entered into the counterfeiting conspiracy orchestrated by Plaintiff’s brother Joseph Allen was that Joseph Allen threatened to kill Plaintiff and his family, including Plaintiff’s and Joseph’s own mother, should Plaintiff fail

to do what Joseph demanded or if Plaintiff turned Joseph in. The evidence proffered by Defendants tend to show that Plaintiff's and Plaintiff's Wife's commission of the counterfeiting crimes were not voluntary. The Court further finds that the prejudice against the Plaintiff outweighs any probative value as the medical malpractice claims bear no relationship to Plaintiff's commission of counterfeiting crimes. The Court grants Plaintiff's motion relative to excluding evidence of the counterfeiting crimes and precludes any evidence or testimony to be used for impeachment purposes.

Plaintiff also seeks to preclude evidence of a misdemeanor conviction for menacing 3<sup>rd</sup>.

Menacing 3<sup>rd</sup> is defined by the Penal Law as follows:

“A person is guilty of menacing in the third degree when, by physical menace, he or she intentionally places or attempts to place another person in fear of death, imminent serious physical injury or physical injury. Menacing in the third degree is a class B misdemeanor” (Penal Law §120.15).


Plaintiff's primary argument rests on the remoteness of the conviction, that the 19-year-old is in essence stale for purposes of impeachment. Defendants counter that menacing 3<sup>rd</sup> is exactly the type of crime Sandoval intended to allow a party to use for impeachment as the core of the crime is the coercion of another through threats of death or physical injury. There is insufficient evidence in the record to preclude the use of Plaintiff's menacing 3<sup>rd</sup> conviction for impeachment purposes. It is a crime which goes towards Plaintiff's traits for honesty and integrity, and therefore New York has no demarcation for how old a crime must be before it is impermissible for impeachment purposes. Plaintiff's reliance solely on the conviction's age is misplaced. Plaintiff's motion to preclude use of Plaintiff's menacing 3<sup>rd</sup> conviction for impeachment purposes is denied.

**NOW, THEREFORE**, upon reading and filing the papers with respect to the Motion, and due deliberation having been had thereon, it is hereby

**ORDERED**, that Plaintiff's motion in limine to preclude use of Plaintiff's menacing 3<sup>rd</sup> conviction is DENIED; and it is further

**ORDERED**, that Plaintiff's motion in limine is granted in all other respects.

Dated: June 20, 2021

  
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HON. GERARD J. NERI, J.S.C.

ENTER.