

COUNTY COURT OF SUFFOLK COUNTY  
TRIAL TERM, PART 6 SUFFOLK COUNTY

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THE PEOPLE OF THE STATE OF NEW YORK,

VS

MARTIN H. TANKLEFF,

Defendant,

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: BRASLOW, J. C. C.  
:  
: DATE: March 17, 2006  
:  
: COURT CASE NO.: 1535-88  
: 1290-88  
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The defendant was indicted for the second degree murder of his mother under a dual theory, intentional murder under Penal Law 125.25(1), and depraved indifference murder under Penal Law 125.25(2). At his trial the jury was charged under both theories and returned a verdict finding him guilty of the depraved indifference murder of his mother under Penal Law 125.25(2) and not guilty of the intentional murder of his mother under Penal Law 125.25(1). The defendant was also charged under the same dual theory of the murder of his father and the jury found him guilty of the intentional murder of his father under Penal Law 125.25(1) and not guilty of the depraved indifference murder of his father under Penal Law 125.25(2). Both murders were committed in the defendant's home at about the same time in the early morning hours of September 7, 1988.

The defendant has served and filed a motion pursuant to CPL 440 seeking to vacate his conviction of having murdered his mother. In the motion which this court is deciding herein, the defendant contends that the evidence adduced at his trial did not support his conviction of having committed the depraved indifference murder of his mother

under Penal Law 125.25(2) .

This subsection of the statute provides that a person is guilty of murder in the second degree when:

Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person.

This issue was raised by this defendant on direct appeal and was decided in People v. Tankleff, 199 A.D.2d 550 wherein the Court held:

The defendant also argues that there was insufficient evidence to support the jury's verdict finding him guilty of "depraved mind" murder with respect to the death of his mother Arlene Tankleff, and that this verdict is inconsistent with the one finding him guilty of intentional murder with respect to the death of his father Seymour Tankleff. These related arguments are meritless.

While it is true that a person cannot commit a single homicidal act while entertaining two inconsistent mental states (see, People v Gallagher, 69 NY2d 525 [defendant cannot simultaneously both have the conscious intent to kill and lack the conscious intent to kill]) the obvious fact in the present case is that the defendant engaged in two separate acts and two separate courses of conduct, that is, the killing of his mother and the killing of his father. Clearly, it was possible for him to have had two different mental states at these two different times.

We agree with the defendant to the extent that he argues that the evidence presented by the prosecution is far more consistent with the conclusion that he intended to kill his mother than with the jury's conclusion that he killed her recklessly. However, we are not free to vacate a conviction based on a finding of recklessness merely because we ourselves consider that a finding of intent would have been more plausible in light of the evidence. The present case is certainly not the first one in which such a circumstance has arisen (see, e.g., People v Applegate, 176 AD2d 888; People v Abney, 173 AD2d 545; People v Santana, 163 AD2d 495, affd 78 NY2d 1027; People v Curry, 158

AD2d 466 [cases where evidence would have supported finding of intent yet jury opted for finding of recklessness]). The jury's conclusion that the defendant lacked a conscious objective to kill while he was beating his mother to death is not irrational, and should be upheld (cf., People v Gonzalez, 160 AD2d 502).

Additionally, the Second Circuit recently referred to the above decision in Policano v. Herbert, 2005 U.S. App. LEXIS 24558 and stated that:

There have been other cases in which the evidence could have supported a finding of either intentional or depraved indifference murder and a conviction on either charge would have therefore been justifiable.

See also People v. Suarez, 2005 N.Y. LEXIS 3431 in which the Court stated:

Of course, a one-on-one dispute will not always reflect a manifest intent to kill or injure. Rather, we make clear only that whether the infliction of serious or fatal injury was intended or not, such a confrontation can almost never support a finding of depraved indifference. It is up to the jury to decide in a particular case whether the defendant acted intentionally, or recklessly, or negligently (or not at all). Indeed, in McPherson -- a one-on-one confrontation -- the evidence was certainly sufficient to support a finding of reckless manslaughter, although not of depraved indifference murder. Nor do we make any absolute pronouncement "that a person who stabs someone with a knife cannot act with 'a depraved indifference to human life'" (dissenting op at 1).

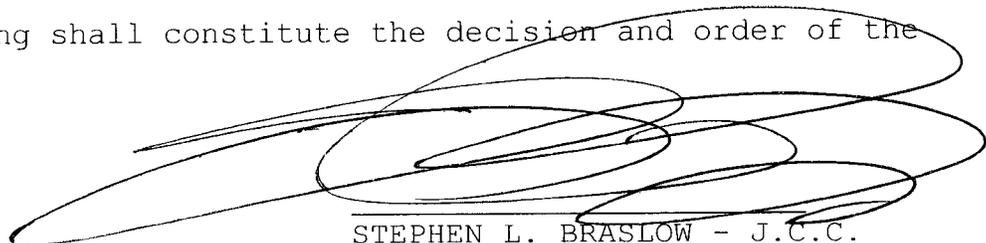
Although the Court in Suarez held that "When depraved indifference murder is properly understood, "twin-count" indictments\*\*\*charging both intentional homicide and depraved indifference murder\*\*\*should be rare", it did not foreclose the possibility that in the appropriate case and under the proper circumstances the jury should never be charged to consider both theories.

Since this issue has already been reviewed on appeal, and since it is recognized that it is at least possible that the evidence could

support a finding of either depraved indifference murder or intentional murder, this court hereby denies the defendant's motion in its entirety.

The foregoing shall constitute the decision and order of the court.

ENTER,

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and curves, positioned above the printed name.

STEPHEN L. BRASLOW - J.C.C.