

**This opinion is uncorrected and subject to revision in the Official Reports. This opinion is not available for publication in any official or unofficial reports, except the New York Law Journal, without approval of the State Reporter or the Committee on Opinions (22 NYCRR 7300.1)**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS: CRIMINAL TERM: PART K-TRP

PRESENT:

HON. SEYMOUR ROTKER  
Justice.

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

-against-

Indictment No.: 2327-2000

OMAR CARLAJAL,

Motion: TO SET ASIDE THE  
VERDICT PURSUANT TO CPL  
330.30.

Defendant.

-----X

OMAR CARLAJAL, PRO SE.  
FRANCIS R. RUDDY, ESQ.  
For the Motion

RICHARD A BROWN, DA

BY: PETER R MASON, ADA  
Opposed

Upon the foregoing papers, and due deliberation had, the motion is denied . See the accompanying memorandum this date.

Kew Gardens, New York  
Dated: October , 2001

\_\_\_\_\_  
SEYMOUR ROTKER, Acting J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS: CRIMINAL TERM: PART K-TRP

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

-against-

Indictment No. 2327-2000

OMAR CARLAJAL ,

MEMORANDUM DECISION

Defendant.

-----X

The defendant was charged by indictment filed on September 27, 2000 with burglary in the second degree and related crimes. The charges resulted from his arrest on July 17, 2000. Immediately following the arrest, the defendant was arraigned in the Criminal Court on a felony complaint and counsel was assigned. An indictment was voted and filed, the defendant was arraigned in Supreme Court, pretrial motions were filed and resolved. On April 18, 2001, the matter appeared on the trial ready calendar. On that day, the defendant and his counsel appeared before this Court and executed a written waiver of his right to trial by jury. On April 25 and 26, 2000, the case was tried by the Court without a jury. At the conclusion of the trial, the Court announced a verdict convicting the defendant of burglary in the second degree, criminal mischief in the fourth degree and possession of burglar's tools.

On or about May 16, 2001, prior to sentencing, the defendant filed a pro se motion to set aside the verdict. Subsequent to the filing of this motion, the Court relieved the attorney who had continuously represented the defendant from the time of his initial arraignment and assigned new counsel. A motion schedule was established to give defendant and his new counsel an opportunity to consider and to file any additional motions that they might deem appropriate.

On August 9, 2001 the defendant's new counsel filed a motion adopting and amplifying the defendant's pro-se application. The People responded with an affirmation in opposition dated October 3, 2001.

The defendant's motion seeks to set aside the guilty verdict on the ground that he was "deprived a fair trial, by the constructive exclusion of a Spanish interpreter at a material stage of the proceeding when defendant executed a waiver of jury trial" and on the ground that "the verdict was against the weight of the evidence".

It is not disputed that the defendant's native language is Spanish and that no interpreter was present when the waiver of the right to trial by jury was executed. The defendant argues this constituted a "constructive" denial of his right to be present during the trial of the indictment (CPL 260.20). He bases this argument upon his reading of the Court of Appeals decision in the case of People v. Robles, 86 NY2d 763 (1995). The defendant's reading of the holding in Robles is incorrect.

The language from Robles which the defendant cites in his motion is from the dissenting opinion. Contrary to the defendant's argument, the Robles court rejected the "constructive exclusion" argument advanced by the appellant in that case and by the defendant here.

Robles was convicted at trial of criminal sale of a controlled substance in the third degree. On appeal he argued that because his primary language was Spanish and because no interpreter had been present when the trial court conducted a *Sandoval* Hearing, he had been "constructively" denied his right to be present at the trial.

Although the case turned on narrow technical issue<sup>1</sup>, the Court of Appeals, in reversing the appellate division, considered and discredited the "constructive exclusion" argument. The Court noted that the defendant and his counsel "were personally present at the hearing and no request for

---

<sup>1</sup> The question presented was whether the any error with respect to the interpreter had been preserved for appellate review by a timely objection. The Court of Appeals acknowledged that an error involving the actual exclusion of the defendant would not have required an objection below to preserve it for review. Robles and his counsel, however, were present during the proceeding at issue and, therefore, an objection was necessary and had not been made.

an interpreter was uttered to the trial court”. The court viewed the error complained of not as a violation of the defendant’s right to be present , see , People v .Dokes, 79 NY 2d 656 (1995) but as an alleged violation of his right to the assistance of an interpreter. That issue is controlled by the Court’s prior holding in People v. Ramos, 26 NY 2d 272 (1970).

In Ramos, a defendant whose primary language was Spanish, was convicted after trial of criminal possession of narcotics. No interpreter had been present during the trial except that one was provided when the defendant testified in his own defense. Following the verdict, the defendant brought a writ of error, *coram nobis* seeking to set aside the conviction on the ground that “he had been deprived of his constitutional right to a fair trial because of his inability to understand the proceedings against him”.

The issue, wrote the Court of Appeals, was “the obligation of the court to provide a defendant an interpreter for the purpose of translating trial testimony to him”. The Court held that although the defendant had an unquestionable right to the assistance of an interpreter, the right could be waived by the failure of the defendant or his counsel to “call to the attention of the trial court, in some appropriate manner, the fact that he does not possess sufficient understanding of the English language”. There is, the Court wrote “no obligation upon the court to provide...an interpreter” absent some “obvious manifestation...of the defendant’s lack of understanding of English”. The Court concluded that “only where it becomes acutely obvious that the defendant is exhibiting an inability to understand the trial proceeding or to communicate with his counsel...should the court take affirmative steps to determine the need of an interpreter”<sup>2</sup>.

The minutes for the proceeding in which the defendant waived the right to trial by jury have

---

<sup>2</sup> Part of the Court’s rationale for this ruling was its fear that a sophisticated defendant “could remain silent throughout the trial, and take a chance on a favorable verdict—failing in which, he could secure a new trial upon the ground that he did not understand the language in which the testimony was given”. The Court noted that “the absurdity of such a proposition is self evident”.

been provided to the Court. Based upon a review of these minutes two things are clear. First, neither the defendant nor his counsel (who had represented the defendant since his arraignment in Criminal Court) made any request for the assistance of an interpreter. Nor did they in any way call the Court's attention to the defendant's alleged lack of fluency in the English Language. Second, a reading of the minutes give no indication of any inability on the part of the defendant to understand the nature of the proceedings. The Court, as required by CPL 320.10, conducted a probing inquiry before approving the waiver. The defendant was asked a number of questions which called for far more than simple "yes" or "no" answers and, the record indicates, he had no difficulty giving full and complete answers in the English Language. A few examples are as follows:

THE COURT: How far did you go in school?

THE DEFENDANT: I got my high school diploma.

THE COURT: And during the course of your going to school did you study English?

THE DEFENDANT: yes

THE COURT: How long have you lived in the United States?

THE DEFENDANT: Approximately 18 years

THE COURT: Okay. Are you presently on any medication or drugs that in any way impair your ability to understand what's going on here?

THE DEFENDANT: Right now, yes, I am on medication, psychological medication.

THE COURT: What does it do for you.

THE DEFENDANT: It really just relax me.

Based upon these answers there was no reason for the Court to suspect that the defendant was insufficiently fluent in English or that an interpreter was required.

The defendant's contentions contained in paragraph 12 of his affirmation to the effect that "the word 'interpreter' is written on defense counsel's notice of appearance; the words 'interpreter required' are stamped on the backing of the felony complaint and that the word 'Spanish' appears at the top of the Supreme Court file" are factually incorrect. These allegations are a recitation of the facts cited in the dissenting opinion in Robles, supra.. In the dissenting Justice's view, these facts were sufficient to alert the Court to the need for an interpreter. The majority in Robles decided the case on technical grounds and neither accepted nor rejected this view. More importantly though the facts from the Robles case as cited by the defendant are not the same as the facts here. Although the phrase "Span. Intr. 8/9/01" appears on the outside of the Supreme Court file jacket, there is no

indication on the felony complaint yellowback or on the notice of appearance that an interpreter was required.

Assigned defense counsel has attached to his motion the minutes for nine calendar calls involving the defendant for dates prior to April 18, 2001. These minutes establish that an interpreter was present when the defendant was arraigned in Criminal Court, when he was arraigned on the indictment and when pretrial hearings were conducted. None of these proceedings were conducted before this Court and there is no reason to believe, nor is it alleged, that this Court would have any reason to know or even to inquire as to what transpired on other dates before other judges. The fact that the defendant evidently had the assistance of an interpreter on prior or even on subsequent occasions does not make it “acutely obvious” that the defendant cannot adequately understand proceedings conducted in English. Absent such a showing, the burden is on the defendant or his counsel to request assignment of an interpreter. Nothing in these or any other minutes indicate that such a request was made.

The Court finds it significant that the defendant does not directly allege that he did not understand the nature and consequences of the waiver which he signed in open court. As noted previously, the defendant was clearly able to respond in English to the questions asked of him by the Court in that language at the time the waiver was executed. He told the court that he was a high school graduate and an eighteen year resident of this country. He stated that he has studied English in school. Beyond those facts, however, the Court notes that the defendant has an extensive criminal record dating back over ten years. He is neither unfamiliar with the Criminal Justice system nor is he likely to be either mystified or intimidated by court proceedings. His pro se motion is written in English, cites relevant case authority and is signed by the defendant himself without an affidavit of translation. An affirmation submitted by the defendant’s counsel makes reference to a hearsay statement by the defendant alleging that some unnamed and unidentified “other third party” prepared the motion for him. Although it is impossible based upon this record to know to what degree the defendant is fluent in the English language, the Court has absolutely no doubt that the defendant was aware of the significance of the waiver proceeding and was also aware of his absolute right to have

an interpreter produced at his request. The fact that neither the defendant nor his counsel exercised this right leads the Court to conclude that it was knowingly waived, see Robles, supra..

Turning to the defendant's claim with respect to the sufficiency of the evidence, he alleges that in their pleadings and opening statement the People limited themselves to proving the crime of burglary based upon a theory of unlawful entry with intent to commit a larceny and that the proof offered at trial was insufficient to establish his intent to commit that specific offense.

The first count of the indictment reads, in relevant part, that the defendant "knowingly or remained unlawfully in the dwelling of (the complainant) with intent to commit a crime therein". Contrary to the defendant's contention the pleadings do not limit the People to any particular theory of the case. The defendant does not allege that the theory of the case was limited in any pretrial proceedings and does not quote any specific language in the People's opening that would lead to that conclusion<sup>3</sup>. In attempting to prove that the defendant is guilty of the crime of burglary there is no need for the State to "prove an intent to commit a particular crime as distinct from the general intent to commit some crime", People v. Mackey, 49 NY2d 274, 279 (1980). The element of the defendant's entry with the intent to commit a crime while within the premises can be inferred from the circumstances of the entry, People v. Gilligan, 42 NY2d 969 (1977), People v. Henderson, 41 NY2d 233 (1976). Upon reviewing the evidence<sup>4</sup> in the light most favorable to the People, People v. Contes, 60 NY2d 620 (1983), the Court finds that the evidence presented was sufficient to support its verdict.

For all of the foregoing reasons the defendant's motion is, in all respects, denied.

---

<sup>3</sup> The cases cited by the defendant in support of his position are distinguishable because in those cases the People clearly limited themselves to a theory of the case whereby they assumed the burden to prove that the defendant entered or remained with intent to commit a specific crime and then failed to establish what they set out to prove. It is not necessary for the People to assume that burden and defendant fails to establish that they did so in this case.

<sup>4</sup> The defendant concedes that when searched by the police after his removal from the premises a knife was recovered from his sock. There was testimony offered at trial this knife belonged to the complainant.

Kew Gardens, New York  
Dated: October , 2001

---

SEYMOUR ROTKER, Acting J.S.C.