

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART K-19

THE PEOPLE OF THE STATE OF NEW YORK : BY: STEPHEN A. KNOPF
:
: DATED: 8/17/06
-against- :
: INDICTMENT NO. 1888/2005
MARTIN BATISTA :
Defendant :
-----:

The defendant moves to set aside the verdict of guilty rendered after a jury trial pursuant to CPL §330.30(1). The People oppose this motion.

CASE BACKGROUND

This case arose out of an incident on February 18, 2005 at about 6 AM at 87th Street & 95 Avenue, in Queens County. The defendant drove his vehicle, through the intersection and crashed into Gabriela Tejada's parked vehicle. An eyewitness, Gabriela Tejada was standing in front of her house drinking coffee and having a cigarette, when she observed the defendant come through the intersection in reverse and crash into her parked vehicle. A neighbor came out and called the police. Police Officer Benedict Vitale arrived on the scene and spoke to Ms. Tejada and to the

defendant. He observed the defendant had bloodshot watery eyes, slurred speech, was unsteady on his feet and had a strong odor of alcohol on his breath. The defendant registered a .141 blood alcohol content. He was driving without a valid license and had marijuana on him.

The defendant was arrested and indicted for driving while intoxicated (VTL 1192.2 and VTL 1192.3) as a felony, unlicensed operation of a motor vehicle (VTL 509.1) and unlawful possession of marijuana (PL 221.05). On June 20, 2006 the defendant was convicted of all counts after a jury trial.

MISSING WITNESS CHARGE

The defendant moves to set aside the verdict on the ground that the Court failed to give a missing witness charge. At the conclusion of the testimony the Court held a pre-charge conference to discuss the Court's charge to the jury. The defendant requested a missing witness charge. The court denied the defendant's request.

The defendant now argues that the prosecutor only offered one eye-witness, Gabriela Tejeda. He claims the testimony of Ms. Tejeda indicated that another individual, Andy Aponte, called the police upon arriving at the scene. The defendant further claims Tejeda's testimony indicated several others showed up at the scene and stood in front of the defendant's car preventing him

from driving away. The defendant claims he is entitled to a "missing witness" charge for all the neighbors who came outside after the accident.

"The 'missing witness' instruction allows a jury to draw an unfavorable inference based on a party's failure to call a witness who would normally be expected to support that party's version of events..." (*People v Savinon*, 100 NY2d 192, 196 [2003]). The failure of the People to call a witness does not automatically require a "missing witness" charge. In *People v Roberts*, 187 AD2d 615, at p.616 (1992), the Appellate Division, 2d Dept. clearly stated that:

"In order to establish entitlement to a missing witness charge, a party must make a prima facie showing that the uncalled witness was knowledgeable about a material issue pending in the case, that the witness could be expected to provide testimony favorable to the party who has not called him, and that the witness is available to that party (see, *People v Kitching*, 78 NY2d 532, 536; *People v Gonzalez*, 68 NY2d 424, 427). Once the party seeking the charge has made a prima facie showing, it becomes incumbent upon the opposing party, in order to defeat the request to charge, to account for the witness's absence or otherwise demonstrate that the charge would not be appropriate. This burden can be met by demonstrating that the witness is not knowledgeable about the issue, that the testimony would be cumulative, or that the witness is unavailable (see *People v Gonzalez*, 68 NY2d 424, 428, *supra*)."

The defendant did not make a sufficient prima facie showing in this case and therefore was not entitled to a "missing witness" charge. The defendant is not entitled to a missing

witness charge as to Andy Aponte, or the other neighbors, as they were not present when the defendant drove into the complainant's car. They all arrived on the scene afterwards . Therefore, their testimony is not material to the crimes charged. Additionally, what they did see, the defendant sitting in his car, would have been cumulative to Ms. Tejada's testimony.

Lastly, the defendant did not establish that the witnesses were "available" or under the People's "control". "This has been referred to as the 'control' element, which requires the court to evaluate the relationship between the witness and the party to whom the witness is expected to be faithful." (*People v Savinon, supra*, 197). In this case, Aponte was a stranger to both sides and had no special relationship with either party. He was equally available to both parties. Each party had equal access to Aponte, as his name and address were contained in the police report that both sides had access to.

Clearly, the defendant did not fulfill the three preconditions for the missing witness instruction. Therefore, the decision not to give such a charge was well within the Court's discretion.

THE DEFENDANT'S PRE-TRIAL SILENCE

The defendant contends that the Court should have granted his application for a mistrial based on prosecutorial misconduct.

The misconduct to which he refers consists of testimony elicited from Police Officer Benedict Vitale regarding the defendant's silence when questioned at the scene of the crime.

During the People's direct case, Officer Vitale described responding to the scene. He testified that he spoke to Gabriela Tejada. Then the officer asked the defendant what happened. The officer testified the defendant did not answer and then became belligerent. The defendant objected to the failure of the People to give notice of a statement. The objection was overruled by the Court insofar as there was no statement by the defendant for which notice was required. The next day, the defendant moved for a mistrial based on the prosecutor eliciting testimony concerning the defendant's pre-trial silence. The Court denied the motion for a mistrial, but did give a curative instruction to the jury. The Court instructed the jury to strike the testimony of P.O. Vitale, as it concerned the defendant's refusal to answer questions about what happened. The Court further instructed them not to consider such evidence, as the defendant has the right to remain silent. The defendant renewed his motion for a mistrial at the end of the entire case, which was denied.

Clearly, "...a criminal defendant has the constitutional right to remain silent at the time of his arrest (NY Const, art I, §6 US Const 5th Amend) and his exercise of that right cannot be used by the People as part of their direct case (see, *People v*

Basora, 75 NY2d 992, 993)." (*People v Diggs*, 185 AD2d 990 [1992]). However, in the case at bar the defendant was not under arrest nor in custody when Officer Vitale asked him what happened. The officer's question was merely part of an initial investigation to ascertain what the situation was upon his arrival. The officer testified that the defendant didn't answer in response to his question and then become belligerent. The fact that the defendant didn't give the appropriate response to the officer's question could be construed as evidence of his inebriation. The inability to respond appropriately to a question and his aggressive manner was properly testified to as indicia of the defendant's intoxication.

Some of the cases the defendant cites to support his contentions are not on point. Both *People v Conyers*, (52 NY2d 454 [1981]) and *People v DeGeorge*, (73 NY2d 614 [1989]) deal with using the defendant's silence to impeach his trial testimony. In the case at bar, the defendant did not testify. The testimony in question was from Police Officer Vitale on the People's direct case. That testimony, concerning the defendant's silence when asked what occurred, was elicited simply to illuminate the defendant's demeanor at the time of the incident and demonstrate his level of intoxication. Therefore, the defendant's reliance of those cases is misplaced.

Moreover, even through the testimony in question did not concern defendant's pre-trial silence after arrest, the Court gave the jury a curative instruction immediately after defense counsel raised the issue that the prosecutor had elicited testimony related to defendant's pre-trial silence. The jury was apprised of the defendant's right to remain silent. They were told that testimony concerning his silence was not to be considered by them as evidence. This evidence was not mentioned again in summation or any other part of the trial. At most, if error did occur as to admitting the testimony initially, it was nothing more than harmless error, having little or no effect on the jury's verdict (*see People v Crimmins*, 36 NY2d 230, [1975]). While the defense contends otherwise, overwhelming evidence of defendant's guilt was presented at trial.

Accordingly, the defendant's motion to set aside the verdict is denied.

Order entered accordingly.

Stephen A. Knopf, J.S.C.

