

MEMORANDUM

SUPREME COURT, QUEENS COUNTY  
CRIMINAL TERM, PART K-17

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

ANTHONY SAMEDI,

Defendant.

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BY EVELYN L. BRAUN, J.S.C.

DATED: December 14, 2006

IND. NO.: 3108/04

On March 13, 2006, after a nonjury trial held before this Court, defendant herein was found guilty of the crimes of Assault in the Second Degree and Criminal Possession of a Weapon in the Second Degree.

The matter was set down for sentence on April 6, 2006. On that date, defense counsel advised that he intended to submit a pre-sentencing memorandum as an aid to sentence on behalf of defendant and asked the Court to adjourn the case so that the report could be completed. The Court agreed to the adjournment and thereafter, the case was adjourned several more times for that purpose.

On May 22, 2006, prior to the submission of the pre-sentence memorandum, defendant, *pro se*, filed the instant motion to set aside the verdict pursuant to CPL 330.30. Defendant contends herein that, due to the ineffective assistance of counsel, (1) his waiver of his right to a jury trial was not knowing, intelligent and voluntary; and (2) he was deprived of his right to testify at trial.

As it applies to the instant case, CPL 330.30 provides “[a]t any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict . . . upon . . . : (1) Any ground appearing in

the record which, if raised on an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court.”

In view of defendant’s allegations, the Court relieved trial counsel and assigned new counsel to represent him. On September 8, 2006, present counsel adopted defendant’s *pro se* motion, which motion is presently before this Court.

Defendant now claims that although he wished to exercise his right to a jury trial, he was coerced into waiving such right by trial counsel. He alleges that trial counsel erroneously advised him that the decision whether or not to waive a jury rested with counsel and not the defendant. Specifically, defendant claims that prior to trial, he and counsel discussed the best way to proceed in the case and that he expressed his concerns about waiving a jury. Trial counsel advised him that it would be better to proceed nonjury. He asserts that he ultimately acceded to counsel’s wishes and waived his right to a jury trial because he did not want to anger him. Although he acknowledges that he executed a written waiver of a jury trial in open court, he maintains that he did not understand its significance.

It is well established that a defendant, "having accepted the assistance of counsel, retains authority only over certain fundamental decisions regarding the case" such as "whether to plead guilty, waive a jury trial, testify in his or her own behalf or take an appeal" (*People v. Colon*, 90 NY2d 834, quoting *People v White*, 73 NY2d 468, 478).

In order to determine this motion, the Court relies on a thorough review of the record of March 1, 2006 and its own independent recollection of the manner in which both counsel and defendant conducted themselves at that time. During the preliminary proceedings and throughout the trial it was very apparent to the Court that defendant

was not reticent about expressing his views to counsel. The Court specifically recollects that defendant responded to the Court's inquiries without any hesitation in an assertive and confident manner.

The record reveals that at the start of the proceedings, counsel indicated that the defense was inclined to proceed with a nonjury trial. The Court inquired whether counsel had discussed the issue of proceeding with a nonjury trial with his client. Trial counsel advised the Court that he had explained the differences between a jury trial and a nonjury trial to defendant and after discussing the perceived deficiencies in the People's case, he had explained to defendant the various reasons he would expect a nonjury trial to inure to his benefit.

The Court then had defendant sworn, and, after discussing at length the differences between a jury trial and a nonjury trial and explaining his constitutional right to a jury trial and the meaning thereof, inquiring throughout as to whether or not the defendant understood each point, the Court ultimately inquired whether or not the defendant wished to waive a jury trial. As part of the allocution by the Court prior to accepting defendant's waiver of a jury trial, the Court stated the following:

"THE COURT . . . So that's wholly your decision, obviously with respect to making such a decision. You have counsel to advise you based upon your assessment of the situation of your case and whatever it is that you take into consideration, but finally it's up to you to decide whether you want to go jury or nonjury; do you understand that?"

"THE DEFENDANT: Yes.

"THE COURT: And have you made that decision?"

"THE DEFENDANT: Yes.

"THE COURT: All right. And what is your decision?"

"THE DEFENDANT: A nonjury."

Thereafter, in response to the Court's further questions, defendant indicated that he had enough time to consult with counsel and no one threatened, coerced or forced him to waive a jury trial. He stated he was waiving a jury trial voluntarily of his own free will. Defendant's current claim that he didn't realize that the Court's questions with respect to force or coercion applied to any inappropriate words or actions of counsel, as well as any other individual, appears to be recently fabricated in an effort to establish grounds for the relief requested. At no time did defendant express any dissatisfaction or disagreement with counsel. Nor did defendant exhibit any confusion when responding to the Court's questions in connection with his decision to waive a jury.

Contrary to defendant's present assertion that he did not understand that it was his right to choose the manner in which the trial would proceed, the Court's complete and thorough explanations in this regard, and defendant's responses thereto, establish that he understood that it was his right whether or not to waive a jury and the ramifications of a waiver (see *People v. Smith*, 6 NY3d 827).

Upon presentation of the written jury trial waiver form to the defendant, the Court stated:

"THE COURT: . . . [I]f in fact the defendant still wishes to have his case tried by a judge . . . there is a place for him to sign that form indicating, and there is a place for defense counsel to so witness that signature."

Defendant signed the written waiver in open court and acknowledged such execution on the record.

Turning to defendant's second claim that he was denied his right to testify at trial, such claim is also unsupported by the record.

Although a trial court does not have a general obligation to *sua sponte* ascertain if

the defendant's failure to testify was a voluntary and intelligent waiver of his right (see *People v. Dolan*, 2 AD3d 745), nevertheless, prior to defendant resting in this case, the Court inquired of trial counsel, in the presence of defendant, whether he had explained to defendant that he had no obligation to testify and that if he chose not to testify, "no negative or bad inference or conclusion can or will be drawn from that." Additionally, the Court asked trial counsel whether he had advised defendant that he had an absolute right to testify if he chose to. Counsel represented that he had certainly discussed those matters with defendant.

The Court then asked permission to address defendant directly concerning his decision about whether or not to testify. The Court explained to defendant that the burden of proof remains solely on the People and that he is presumed innocent. The Court repeated that no negative inference could be drawn from his decision not to testify. Conversely, the Court told defendant that if he wanted to testify, he had an absolute right to do so. Most significantly, the Court stated:

"THE COURT: . . . [A]nd after conferring with your attorney and deciding what's in your best interest, it's your decision to make; do you understand that?"

The defendant answered that he understood. The Court continued:

"THE COURT: All right. So you had this discussion with your attorney; is that correct?"

The defendant responded, "Yes."

"THE COURT: And did you indicate to your attorney that you do not wish to testify; is that correct?"

The defendant answered: "Yes. Yes."

The Court clearly communicated to defendant that the decision to testify was his to make and the record supports a finding that it was defendant himself who made the

decision that he did not wish to testify.

Defendant's present assertion that his attorney told him that he did not want him to testify at trial, even if credited, does not establish that trial counsel was ineffective and that such ineffectiveness deprived him of his right to testify. Any such statement by counsel can certainly be considered in the nature of advice.

Overall, defendant's criminal history bespeaks a familiarity with the criminal justice system which renders it unlikely that the defendant was confused by the court's questions or unaware of the nature of his relationship with counsel. None of his allegations establish a colorable issue of ineffective assistance of trial counsel, (see *People v. Henry*, 95 NY2d 563; *People v. Rumola*, 31 AD3d 1059; *People v. Barnes*, 143 AD2d 499), or coercion. Where allegations of this nature are clearly belied by the record, there is no necessity for a hearing (see *People v. Robertson*, 2 AD3d 756; *People v. Barnett*, 258 AD2d 526; *People v. Breeden*, 221 AD2d 352).

The record is clear that defendant knowingly, intelligently and voluntarily waived both his right to a jury trial and his right to testify at trial (see *People v. Wheeler*, 258 AD2d 542, citing *People v. Davis*, 49 NY2d 114, 119; *People v. Hunter*, 237 AD2d 304; *People v. Soyuzov*, 235 AD2d 439).

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

This constitutes the decision and order of the Court.

The Clerk is directed to forward a copy of this memorandum and order to the attorney for the defendant and the District Attorney.

Dated: December 14, 2006

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J.S.C.