

State of New York

Court of Appeals

BEFORE: HON. ROWAN D. WILSON, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,
-against-
TARENCE KIRKLAND,
Appellant.

**ORDER
DENYING
LEAVE**

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is
ORDERED that the application is denied.

Dated: **JUL 29 2022**



Associate Judge

*Description of Order: Order of the Supreme Court, Appellate Division, Second Department, dated March 16, 2022, affirming a judgment of the County Court, Westchester County, rendered September 1, 2017.

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D68772
C/afa

AD3d

Argued - December 3, 2021

BETSY BARROS, J.P.
VALERIE BRATHWAITE NELSON
ROBERT J. MILLER
PAUL WOOTEN, JJ.

2017-10699

DECISION & ORDER

The People, etc., respondent,
v Tarence Kirkland, appellant.

(Ind. No. 15-00868)

Adam Seiden, Mount Vernon, NY, for appellant.

Miriam E. Rocah, District Attorney, White Plains, NY (William C. Milaccio and Christine DiSalvo of counsel), for respondent.

Appeal by the defendant from a judgment of the County Court, Westchester County (Anne E. Minihan, J.), rendered September 1, 2017, convicting him of criminal sale of a controlled substance in the third degree (two counts), upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant was charged with, *inter alia*, two counts of criminal sale of a controlled substance in the third degree for allegedly selling cocaine to an undercover police detective on February 10, 2015, and February 18, 2015. At the jury trial, the undercover police detective identified the defendant as the person who sold cocaine to him on both occasions. The defendant argued that, given the circumstances of the underlying transactions, the undercover officer did not have sufficient opportunity to reliably identify the defendant. The defendant was convicted on both counts.

The defendant's challenge to the legal sufficiency of the evidence is partially unpreserved for appellate review (*see* CPL 470.05[2]; *People v Hawkins*, 11 NY3d 484, 492). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620), we find that it was legally sufficient to establish the defendant's guilt beyond a

reasonable doubt (*see People v Specks*, 140 AD2d 472). Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see CPL 470.15[5]; People v Danielson*, 9 NY3d 342), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383, 410; *People v Bleakley*, 69 NY2d 490, 495). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633; *People v Miles*, 8 AD3d 758, 760; *People v Mundle*, 236 AD2d 425).

The testimony from the undercover police detective regarding his interactions with the defendant prior to the cocaine sales at issue was properly permitted at trial, as that evidence was relevant to the contested issue of identification, particularly the undercover officer's prior familiarity with the defendant (*see People v Vaughan*, 156 AD3d 826, 827; *People v Bones*, 52 AD3d 522; *People v Torres*, 19 AD3d 732, 734; *People v Smith*, 5 AD3d 291, 292; *People v Julius*, 300 AD2d 167, 168; *People v Cain*, 193 AD2d 810, 810; *People v Henry*, 166 AD2d 720). Under the circumstances, the probative value of the evidence of the undercover detective's prior interactions with the defendant on the issue of identification outweighed its prejudicial effect (*see People v Louis*, 192 AD2d 558, 559). Moreover, the County Court limited the admission of that evidence so as to minimize its prejudicial effect (*People v Vaughan*, 156 AD3d at 827; *People v Bones*, 52 AD3d 522). The defendant's related contention that the court should have issued a limiting instruction with regard to the purpose for which this evidence was introduced is unpreserved for appellate review (*see People v Farmer*, 54 AD3d 871, 872), and, in any event, without merit.

The defendant's contention that the County Court's *Sandoval* ruling (*see People v Sandoval*, 34 NY2d 371) denied him due process and a fair trial is also without merit. “[A] criminal defendant who chooses to testify, like any other civil or criminal witness, may be cross-examined regarding prior crimes and bad acts that bear on credibility, veracity or honesty” (*People v Hayes*, 97 NY2d 203, 207; *see People v Sandoval*, 34 NY2d at 376). In determining a *Sandoval* motion to exclude prior crimes and bad acts for impeachment purposes, the court must determine whether the defendant has met his or her burden of establishing that the “prejudicial effect of the admission of evidence thereof for impeachment purposes would so far outweigh the probative worth of such evidence on the issue of credibility as to warrant its exclusion” (*People v Sandoval*, 34 NY2d at 378). A *Sandoval* determination rests largely within the sound discretion of the hearing court (*see People v Hayes*, 97 NY2d at 207).

Here, the County Court engaged in the requisite balancing of probative value against prejudicial effect with respect to each of the defendant's prior convictions, and reached an appropriate compromise ruling that excluded some convictions, admitted others, and precluded inquiry into the underlying facts of the defendant's prior felony conviction (*see People v Walker*, 141 AD3d 678). The court providently exercised its discretion in determining that the defendant failed to meet his burden of demonstrating that the prejudicial effect of the limited evidence of his prior convictions so outweighed the probative worth of that evidence on the issue of credibility that exclusion was warranted (*see People v Townsend*, 70 AD3d 982; *see also People v Bennette*, 56 NY2d 142, 147).

There is no merit to the defendant's contention that Penal Law § 70.06 is an ex post

facto law as applied to him because his prior crime of rape in the second degree, which served as the predicate crime for his predicate felony sentence, was committed before the enactment of said statute (*see People v Pendergrass*, 115 AD2d 497). Nor is there merit to his argument that because his rape in the second degree conviction was rendered prior to that crime's designation as a violent felony, his enhanced sentence was therefore invalid (*see People v Morse*, 62 NY2d 205, 217). Contrary to the defendant's contention, "the increased punishment was inflicted for the present crime only and not as an additional penalty for the prior offense" (*People v Pendergrass*, 115 AD2d at 497; *see People v Walker*, 81 NY2d 661, 667).

Finally, the contentions raised by the defendant regarding his enhanced sentence (*see Penal Law § 70.06[1][b][iv]*), based upon the tolling provisions of Penal Law § 70.06(1)(b)(v), are unpreserved for appellate review (*see CPL 470.05[2]*; *People v Jurgins*, 26 NY3d 607, 612; *see also People v Wright*, 198 AD2d 249, 250). In any event, the defendant's contentions are without merit (*see CPL 400.21[7]*).

BARROS, J.P., BRATHWAITE NELSON, MILLER and WOOTEN, JJ., concur.

ENTER:



Maria T. Fasulo
Clerk of the Court

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543-0001

DOCKET# CLA-2022-00415
2017- 10699
15-0868

REASON FOR GRANTING THE PETITION

SEPT, 26, 2022

1 THE ELEVENTH CIRCUIT IN UNITED STATES VS. OWENS 672 F.3d 966 (11TH CIR. 2012) DETERMINED THAT STATUTORY RAPE (OUR RAPE 2) IS NOT A VIOLENT CRIME FOR THE PURPOSES OF THE ARMED CAREER CRIMINAL ACT. THE COURT STATED THAT THE DEFINITION OF A VIOLENT CRIME MANDATES VIOLENT PHYSICAL FORCE BEING USED THE ACTS REQUIRED FOR STATUTORY RAPE (OR RAPE 2) DO NOT REQUIRE SUCH FORCE OR VIOLENT. DECISION & ORDER ON MARCH 16, 2022 PAGE 2 LINE 41 THERE IS NO MERIT TO THE DEFENDANT'S CONTENTION THAT PENAL LAW & 70.06 IS AN EX POST FACTO LAW AS APPLIED TO HIM BECAUSE HIS PRIOR CRIME OF RAPE IN THE SECOND DEGREE, WHICH SERVED AS THE PREDICATED CRIME FOR HIS PREDICATE FELONY SENTENCE, WAS COMMITTED BEFORE THE ENACTMENT OF SAID STATUTE MOVER OVER SENTENCE 2003 TO TEN YEARS PROBATION NONE VIOLENT RAPE 2 TILL SEPT 1, 2016 AND WAS TURN TO VIOLENT CRIME FOUR YEARS AFTER CASE OF OWENS WAS DECIDED ON 2012 SO THIS CASE DO APPLY TO ME TARENCE KIRKLAND 100 PERCENT.

2 APPELLATE TARENCE KIRKLAND DID NOT RECEIVE A FAIR TRIAL IN VIOLATION OF THE UNITED STATES CONSTITUTION BECAUSE THE COURT ALLOWED UNCHARGED CRIMES TO BE PRESENTED TO THE JURY, THE RESULTS WAS SEVERE AND PREJUDICE TO THE APPELLANT TARENCE KIRKLAND THE SAID EVIDENCE WAS OF LIMITED PROBATIVE VALUE.

3 APPELLANT TARENCE KIRKLAND WAS WRONGFULLY SENTENCE AS A SECOND FELONY OFFENDER AND NEVER HAD FINAL PAROLE HEARING ON 10-04-2006 AND WAS GIVING SENTENCE TESTIFIED UNDER OATH ON SEPT, 1 2017 14 MONTHS AFTER FOUND GUILTY NEVER HAD FINAL PAROLE HEARING WAS GIVEN AN ILLEGAL SENTENCE OF SIX YEARS AND DID 51 MONTHS OUT OF ILLEGAL SENTENCE AND HAVE NEW EVIDENCE ON BOTH CASES IS BACK IN COURT THAT NEVER HAD FINAL PAROLE HEARING AND TIME WAS ENHANCE MADE ME A VIOLENT PREDICATE THE FIVE AND HALF MONTHS ILLEGALLY INCARCERATED MADE ME PREDICATE. MOVE OVER JUDGE ADAM SEIDEN LAWYER THAT DID THE APPEAL WROTE TO WESTCHESTER COUNTY JAIL NEW YORK STATE PAROLE AND SUPERVISION AND AFFIDAVITS BY LAWYER STEPHEN FILLER, ESQ. ALL SAID NO FIANAL PAROLED HEARING ON 10-04-2066. THIS IS THREE MAJOR REASON WHY MY PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED. AND THE TWO 440.00 MOTION IS IN NEW YORK COURT OF APPEALS 45 MONROE STREET BROOKLYN, N.Y. 11238 DOCKET # 2022-05730. PEOPLE V. SMALLS, 26 NY 3RD 253 (2015)

AS A RESULT OF THE FOREGOING, THE JUDGEMENT OF CONVICTION SHOULD BE REMOVED AND/ OR THE SENTENCE VACATED.

THANK YOU TRULY YOURS
TARENCE KIRKLAND APPELLANT

Tarence Kirkland

Gail Kagan

MIRIAM E. ROCAH
DISTRICT ATTORNEY OF WESTCHESTER
COUNTY COURTHOUSE
111 DR. MARTIN LUTHER KING,JR. BLVD
WHITE PLAINS, NEW, YORK, 10601

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543-0001

DOCKET # CLA-2022-00415
2017-10699
15-0868 SEPT, 26, 2022

REASON FOR GRANTING THE PETITION

4 N.Y.S. PENAL LAW 380.30

TIME FOR PRONOUNCING SENTENCE.

1. IN GENERAL. SENTENCE MUST BE PRONOUNCED WITHOUT UNREASONABLE DELAY.
2. I TARENCE KIRKLAND WAS FOUND GUILTY ON JULY 13. 2016 AND WAS NOT SENTENCE TILL 14 MONTH LATER ON SEPT, 1, 2017 DEPRIVE ME OF HAVING MY THIRTH APPEAL AFTER CONVICTION MY APPEAL WAS GRANTED IN APRIL OF 2018
3. WHEN IT SHOULD HAVE GRANTED IN 2016 DEPRIVE ME FROM HAVING MY APPEAL
4. 20 MONTHS EARLIER MY DUE PROCESS VIOLATION TWICE NO THIRTH APPEAL AFTER
5. CONVICTION AND NO PAROLE FINAL HEARING. ON 10-04-2006.

5 THE NEW YORK PROSECUTOR HAS SIX MONTHS TO INDICT A DEFENDANT FOR A FELONY CHARGE. MY ALLEGED CRIME WAS FEB, 10, AND FEB, 18, 2015 INDICT, OCT, 8 MONTH TWO MONTHS OVER THE LAW ALLOWED AND BILL OF PARTICULAR DATE HAD MARCH 18, INSTEAD OF FEB, 18, 2015,

THANK YOU TRULY YOURS

TARENCE KIRKLAND APPELLANT

Tarence Kirkland

MIRIAM ROCAH
DISTRICT ATTORNEY OF WESTCHESTER
COUNTY COURTHOUSE
111 DR. MARTIN LUTHER KING, JR. BLVD
WHITE PLAINS, NEW YORK, 10601

RECEIVED DISTRICT ATTORNEY

No. _____ 2022 OCT 27 P 3:38

COUNTY OF WESTCHESTER

IN THE
SUPREME COURT OF THE UNITED STATES

Tarence Kirkland — PETITIONER
(Your Name)

VS.

People Of The State of New York RESPONDENT(S)

RECEIVED

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

PROOF OF SERVICE

I, Tarence Kirkland, do swear or declare that on this date, October 27 2022, 2022, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Miriam Roach District Attorney of Westchester
Westchester County Courthouse

111 Dr. Martin Luther King Jr. Blvd White Plains, New York 10601

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 27, 2022

Tarence Kirkland
(Signature)