

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST DEPARTMENT

People v. Lee

2021 NY Slip Op 06774 (N.Y. Ct. App. 2021) · No. Appeal No. 14751; Case No. 2019-1938; Ind. No. 1900/16 ·
Decided December 2, 2021

SUMMARY

The Appellate Division, First Department unanimously affirmed Donald Lee's convictions for first-degree burglary, second-degree robbery, second-degree assault, and fourth-degree grand larceny, along with his aggregate 14-year sentence. The court upheld the denial of a midtrial competency examination, found that Lee waived or forfeited his right to be present during part of the trial, and approved lay opinion identification testimony concerning surveillance video. The court also rejected challenges to the prosecutor's summation and found no basis to reduce the sentence.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Gische, J.P.; Kapnick, J.; Kern, J.; Gesmer, J.; Kennedy, J.
JURISDICTION	New York
DECIDED	December 2, 2021
DOCKET	Appeal No. 14751; Case No. 2019-1938; Ind. No. 1900/16
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendant appealed from a judgment of the Supreme Court, New York County, entered after a jury trial, convicting him of burglary in the first degree, robbery in the second degree, assault in the second degree, and grand larceny in the fourth degree, and sentencing him to an aggregate term of 14 years.
STANDARD OF REVIEW	Abuse of discretion for the competency-examination request, admission of lay opinion identification testimony, and mistrial motion; preservation rules for unobjected-to or inadequately objected-to summation claims; independent review in the interest of justice where applicable.
PRECEDENTIAL VALUE	Published intermediate appellate decision; precedential under New York law.

PARTIES

Donald Lee, Defendant-Appellant v. The People of the State of New York, Respondent

TOPICS

criminal procedure

evidence

appellate procedure

preservation of error

standard of review

PRACTICE AREAS

criminal law

criminal procedure

evidence

appellate practice

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion by denying defendant's midtrial request for a new competency examination.
2. Whether defendant waived or forfeited his right to be present during part of the trial by refusing to return to the courtroom after being advised that the trial would continue in his absence.
3. Whether the trial court properly permitted two police officers to provide lay opinion testimony identifying defendant in a surveillance video.
4. Whether prosecutorial summation required a mistrial or reversal.
5. Whether defendant's unpreserved summation claims warranted review in the interest of justice or required sentence reduction.

HOLDINGS

1. The trial court providently exercised its discretion in denying defendant's request for a new competency examination because defendant's competency had been established before trial and no evidence showed a change in his condition requiring another examination.
2. Defendant waived or forfeited his right to be present during the portion of trial testimony conducted after he refused to return to the courtroom, where he had been advised that the trial would continue in his absence and counsel confirmed that he did not want to return that day.
3. The trial court properly exercised its discretion in permitting two officers to give lay opinion testimony identifying defendant as the person depicted in the surveillance video.
4. The trial court properly denied defendant's mistrial motion because the curative instructions given or offered in response to the challenged summation remarks were sufficient to avoid prejudice.

KEY QUOTATIONS

*"This testimony "served to aid the jury in making an independent assessment regarding whether the man in the [video] was indeed the defendant"" (*1)*

*"The curative instructions that the court provided or offered to provide, in each instance, were sufficient to avoid any prejudice." (*2)*

FACTUAL BACKGROUND

Defendant was convicted after a jury trial of burglary, robbery, assault, and grand larceny and received an aggregate 14-year sentence. He had a psychiatric illness and experienced a courtroom outburst, but the record showed that he understood the proceedings and could assist in his defense; his competency had previously been established in CPL article 730 proceedings. After being removed from the courtroom, defendant told counsel that he did not want to return that day, while the trial continued and defendant returned the following day. Officers identified defendant as the person depicted in a poor-quality surveillance video, and the prosecution made two challenged portions of summation.

PROCEDURAL HISTORY

The Supreme Court, New York County, rendered judgment on March 1, 2019, following a jury trial. During trial, the court denied a midtrial request for a new competency examination, removed defendant from the courtroom after an outburst, permitted officers to give lay opinion identification testimony concerning a surveillance video, and denied a mistrial motion based on prosecutorial summation. The Appellate Division unanimously affirmed.

DISPOSITION

affirmed

CASES CITED

- Pate v. Robinson, 383 U.S. 375 (1966)
- People v. Tortorici, 92 N.Y.2d 757, 766 (1999), cert. denied, 528 U.S. 834 (1999)
- People v. Morgan, 87 N.Y.2d 878, 879-880 (1995)
- People v. Espinal, 123 A.D.3d 475, 476 (1st Dep't 2014), lv. denied, 25 N.Y.3d 1163 (2015)
- People v. McCray, 165 A.D.3d 595, 596 (2018), lv. denied, 32 N.Y.3d 1175 (2019)
- People v. Sanchez, 65 N.Y.2d 436 (1985)
- People v. Collins, 29 A.D.3d 434 (2006)
- People v. Russell, 79 N.Y.2d 1024, 1025 (1992)
- People v. Boyd, 151 A.D.3d 641 (2017), lv. denied, 29 N.Y.3d 1124 (2017)
- People v. Sanchez, 21 N.Y.3d 216, 225 (2013)
- People v. Overlee, 236 A.D.2d 133 (1st Dep't 1997), lv. denied, 91 N.Y.2d 976 (1998)
- People v. D'Alessandro, 184 A.D.2d 114, 118-119 (1st Dep't 1992), lv. denied, 81 N.Y.2d 884 (1993)

OPINION

People v. Lee 2021 NY Slip Op 06774

PER CURIAM.

People v Lee (2021 NY Slip Op 06774) People v Lee 2021 NY Slip Op 06774 Decided on December 02, 2021 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to

revision before publication in the Official Reports. Decided and Entered: December 02, 2021 Before: Gische, J.P., Kapnick, Kern, Gesmer, Kennedy, JJ. Ind No. 1900/16 Appeal No. 14751 Case No. 2019-1938 [*1]The People of the State of New York, Respondent, vDonald Lee, Defendant-Appellant. Robert S. Dean, Center for Appellate Litigation, New York (Elizabeth G. Caldwell of counsel), for appellant. Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent. Judgment, Supreme Court, New York County (Mark Dwyer, J.), rendered March 1, 2019, convicting defendant, after a jury trial, of burglary in the first degree, robbery in the second degree, assault in the second degree and grand larceny in the fourth degree, and sentencing him to an aggregate term of 14 years, unanimously affirmed. The court providently exercised its discretion in denying defense counsel's midtrial request for a new competency examination (see generally *Pate v Robinson*, 383 US 375 [1966]; *People v Tortorici*, 92 NY2d 757, 766 [1999], cert denied 528 US 834 [1999]; *People v Morgan*, 87 NY2d 878, 879-880 [1995]). Defendant's competency had been established in CPL article 730 proceedings before trial, and there had been no evidence of a change in his condition that would have required the court to order another examination (see *People v Espinal*, 123 AD3d 475, 476 [1st Dept 2014], lv denied 25 NY3d 1163 [2015]). Notwithstanding defendant's psychiatric illness, for which he had been treated, and his outburst in court, the record revealed his ability to understand the proceedings and assist in his defense (see e.g. *People v McCray*, 165 AD3d 595, 596 [2018], lv denied 32 NY3d 1175 [2019]). Defendant's claim that his psychiatric medication had been interrupted has not been substantiated. Defendant forfeited and/or waived his right to be present during a portion of the trial testimony. The court had previously informed defendant of his right to be present throughout trial and advised him that the trial would continue in his absence if he chose not to be present. After defendant's profane outburst, he was removed from the courtroom. Defense counsel consulted with defendant, and thereafter advised the court that defendant did not want to return to the courtroom that day; defendant returned to court the next day and the trial proceeded without incident. By refusing to attend, defendant waived or forfeited his right to be present (see *People v Sanchez*, 65 NY2d 436 [1985]; *People v Collins*, 29 AD3d 434 [2006]). The court providently exercised its discretion in permitting two officers to give lay opinion testimony that defendant was the man depicted in a surveillance videotape of the crime. This testimony "served to aid the jury in making an independent assessment regarding whether the man in the [video] was indeed the defendant" (*People v Russell*, 79 NY2d 1024, 1025 [1992]). The quality of the videotape was poor, defendant's appearance had changed, and the officers had spent sufficient time with defendant to be in a better position than the jurors to identify him on the video (see *People v Boyd*, 151 AD3d 641 [2017], lv denied 29 NY3d 1124 [2017]). Any potential prejudice was minimized by the court's limiting instructions that the officers' testimony was merely to aid the jury in its independent assessment of whether the man in the video was defendant (see *People v Sanchez*, 21 NY3d 216, 225 [2013]). The court also providently exercised its discretion [*2]in denying defendant's mistrial motion based on two portions of the prosecutor's summation. The curative

instructions that the court provided or offered to provide, in each instance, were sufficient to avoid any prejudice. By failing to object, by making generalized objections, and by failing to request further relief after objections were sustained, defendant failed to preserve any of his remaining challenges to the summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (see *People v Overlee*, 236 AD2d 133 [1st Dept 1997], lv denied 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], lv denied 81 NY2d 884 [1993]). We perceive no basis for reducing the sentence. THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. ENTERED: December 2, 2021