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Self-Incrimination, Supreme Court, Appellate Division, Fourth Department: People v. Hall

SUPREME COURT, APPELLATE DIVISION

FOURTH DEPARTMENT

People v. Hall[111]
(decided February 7, 1997)

The Appellate Division unanimously affirmed defendant's conviction of criminal sale and criminal possession of a controlled substance in the third degree.[112] Defendant, Roosevelt Hall, Sr., contended that the county court erred because it allowed an officer to give testimony that defendant was previously involved in two drug transactions that did not result in any charge of taped conversations.[113] Further, defendant contended that the court improperly admitted the transcripts that were recorded by the undercover officer.[114] In addition, defendant contended that the jury instruction was improper with respect to a defense witness

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[111] 236 A.D.2d 789, 654 N.Y.S.2d 491 (4th Dep't 1997).

[112] *Id.* at 790, 654 N.Y.S.2d 493.

[113] *Id.* at 789, 654 N.Y.S.2d at 492. The court, responded to the defendant's contention stating that although the prosecution could not seek to prove crimes (prior drug transactions) not charged in the indictment, "[e]vidence of those prior drug transactions was admissible to show defendant's pattern of executing drug transactions through the same agent" based on its probative value. *Id.* at 790, 654 N.Y.S.2d at 492. In addition, the court gave limiting instructions to the jury indicating that the past drug offenses were not to be used to suggest the defendant's propensity to commit the crimes charged. *Id.* at 790, 654 N.Y.S.2d at 492 (citing People v. Ventimiglia, 52 N.Y.2d 350, 359, 420 N.E.2d 59, 438 N.Y.S.2d 261(1981); People v. Allweiss, 48 N.Y.2d 40, 396 N.E.2d 735, 421 N.Y.S.2d 341(1979); People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901); People v. Battles, 83 A.D.2d 164, 443 N.Y.S.2d 932 (4th Dep't 1981)). *Id.*

[114] *Hall*, 236 A.D.2d at 790, 654 N.Y.S.2d at 492.

who exercised his Fifth Amendment[115] privilege to remain silent.[116]

The Fourth Department affirmed the conviction, holding that it was not error to admit evidence of the defendant's prior drug transactions when "'evidence of prior crime is probative of the crime now charged . . . .'"[117] Further, the court held that the tape-recording transcript was admissible even though they were partly inaudible because of the curative jury instructions, absence of objection and the defendant's failure to submit an alternative transcript.[118] In addition, the court held that because the defendant did not object to the court's jury instruction regarding the witness' invocation of his Fifth Amendment right to remain silent, the objection was not preserved for appeal.[119] However, the court stated that even if the issue had been properly preserved it would have held the jury instructions to be proper.[120]

During trial, the witness for the prosecution, an undercover officer, testified that he spoke to the defendant and James Higdon, a witness for the defense, after arriving at a liquor store on September 24, 1991, for the purpose of purchasing cocaine.[121] Following the discussion, the officer paid the defendant $100.00 for five bags of cocaine.[122] Defendant put the money into the cash register and then told Higdon to retrieve the cocaine.[123] After Higdon left for the cocaine, the defendant and the officer

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[115] U.S. CONST. amend. V. The Fifth Amendment states in pertinent part: "[N]or shall any person be compelled in any criminal case to be a witness against himself . . . ." *Id.* N.Y. CONST. art. I, § 6. Article I section 6 of the New York State Constitution provides in pertinent part: "[N]or shall he be compelled in any criminal case to be a witness against himself . . . ." *Id.*

[116] *Hall*, 236 A.D.2d at 790, 654 N.Y.S.2d at 492-93.

[117] *Id.* at 790, 654 N.Y.S.2d at 492 (quoting People v. Ventimiglia, 52 N.Y.2d at 359, 420 N.E.2d at 62, 438 N.Y.S.2d at 264).

[118] *Id.*

[119] *Id.* at 790, 654 N.Y.S.2d at 493.

[120] *Id.*

[121] *Id.* at 789, 654 N.Y.S.2d at 492.

[122] *Id.*

[123] *Id.*

took a ride to an area near the liquor store.[124] During the ride the officer wore a tape recording device.[125] Defendant and the officer remained there for a short time before driving toward a laundromat, and on the way they saw Higdon.[126] After emerging from the car, the defendant conversed with Higdon who then brought five red baggies of cocaine to the officer at the passenger side of the car.[127]

Addressing Higdon's application of his Fifth Amendment right to remain silent on the witness stand, the *Hall* court stated that the "[d]efendant did not object to the court's instructions to the jury that it could consider the refusal of Higdon to answer only on the issue of his credibility as a witness."[128] Therefore, the defendant did not preserve this issue for appeal.[129] However, the court further stated that if the issue had been preserved it would have, "as a matter of discretion in the interest of justice . . . concluded that the instruction was proper . . . ."[130]

The court relied on *People v. Siegel*[131] in support of its conclusion.[132] In *Siegel*, defendant was present at a large party in

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[124] *Id.* The recording, made possible by the body-wire on the undercover officer during the automobile ride, was transcribed and admitted only as an aid. *Id.* at 790, 654 N.Y.S.2d at 492 (citing People v. Norwood, 142 A.D.2d 885, 531 N.Y.S.2d 385 (3d Dep't 1988)). "Once audibility is established, it is within the trial court's discretion whether to admit transcripts as an aid to the jury . . . ." *Norwood*, 142 A.D.2d at 885, 531 N.Y.S.2d at 386.

[125] *Hall*, at 790, 654 N.Y.S.2d at 492.

[126] *Id.* at 789, 654 N.Y.S.2d at 492.

[127] *Id.*

[128] *Id.* at 790, 654 N.Y.S.2d at 493.

[129] *Id.*

[130] *Id.* In the matter of issue preservation for appellate review, the court cited N.Y. CRIM. PROC. LAW § 470.05(2) (McKinney 1997) which states in pertinent part that:

> For purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same.

Id.

[131] 87 N.Y.2d 536, 663 N.E.2d 872, 640 N.Y.S.2d 831 (1995).

Long Island, and was accompanied by four friends from Queens and a neighborhood friend, Gourdin Heller.[133] After the defendant allegedly made some racial remarks to a former girlfriend, about her current boyfriend, Jermaine Ewell, she relayed those remarks to Ewell.[134] Thereafter, Ewell confronted the defendant and a heated confrontation erupted between the two groups of friends.[135] Defendant and his friends were chased away by Ewell and his friends, but after discussing the ordeal, later returned to the party area armed with bats and sticks obtained at the defendant's house.[136] "According to prosecution witnesses, defendant approached Ewell from behind and hit him on the back of his head with a bat. As Ewell lay on the ground, he was repeatedly beaten with the bats and sticks, suffering multiple skull fractures."[137]

"Defendant was convicted of assault, first and second degrees, conspiracy in the fourth degree, riot in the second degree, and possession of a weapon in the fourth degree, [and] [t]he Appellate Division affirmed . . . ."[138] On appeal the defendant relied on Gourdin Heller as a witness in order to corroborate the defendant's testimony.[139] However, the prosecution attempted to impeach Heller on cross examination and Heller, at risk of perjury and self incrimination, asserted his Fifth Amendment privilege by remaining silent.[140] After the prosecution failed to exercise their option to have Heller's testimony stricken, the court, at the request of the prosecution, instructed the jury that they could consider Heller's silence as a factor against his credibility.[141] Siegel's contended that the court erred by giving

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[132] *Hall*, 236 A.D.2d at 790, 654 N.Y.S.2d at 493.
[133] *Siegel*, 87 N.Y.2d at 539-40, 663 N.E.2d at 873, 640 N.Y.S.2d at 832.
[134] *Id.* at 546, 663 N.E.2d at 877, 640 N.Y.S.2d at 836.
[135] *Id.* at 540, 663 N.E.2d at 873, 640 N.Y.S.2d at 832.
[136] *Id.*
[137] *Id.*
[138] *Id.* at 541, 663 N.E.2d at 873, 640 N.Y.S.2d at 832.
[139] *Id.* at 541, 663 N.E.2d at 874, 640 N.Y.S.2d at 833.
[140] *Id.* at 541-42, 663 N.E.2d at 874, 640 N.Y.S.2d at 833.
[141] *Id.* at 542, 663 N.E.2d at 874, 640 N.Y.S.2d at 833.

this instruction.[142] The Appellate Court held that the jury instruction was not error under the circumstances, because "Heller's direct testimony was favorable to [the] defendant"[143] and because the prosecution was prevented from cross examination of Heller's direct testimony.[144]

Under circumstances where a witness invokes a Fifth Amendment privilege against self incrimination which deprives the prosecution of cross examination, the court found that there existed three levels of remedial action.[145] Depending on the relationship of the testimony such remedial action may include striking the entire testimony, striking part of the testimony or giving a corrective jury instruction involving the witness's credibility.[146] Because the court could have stricken all of the witness's testimony the "defendant [was] hardly in a position to complain of the less drastic remedy the court applied for the deprivation of the People's right of cross-examination . . . ."[147]

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[142] *Id.*

[143] *Id.* at 543, 663 N.E.2d at 875, 640 N.Y.S.2d at 834.

[144] *Id.* at 543-44, 663 N.E.2d at 875, 640 N.Y.S.2d at 834. "Under such circumstances, the prosecution was entitled to have Heller's direct testimony stricken in its entirety and the jury instructed to disregard it . . . ." *Id.* (citing People v. Chin, 67 N.Y.2d 22, 28, 490 N.E.2d 505, 449 N.Y.S.2d 638 (1986).

[145] *Siegel*, 87 N.Y.2d at 544, 663 N.E.2d at 875, 640 N.Y.S.2d at 834.

[146] *Id.* In setting forth the three levels of distinction with regard to the remedies, the court states in pertinent part:

> In the leading case of United States v. Cardillo, the court posed three graduated levels of remedial action. The first is where the witness refused to testify on questions of matters "so closely related to the commission of the crime that the entire testimony of the witness should be stricken." The second is where the refusal to answer was "connected solely with one phase of the case in which event a partial striking might suffice." The third and least drastic relief "would involve collateral matters or cumulative testimony concerning credibility which would not require a direction to strike and which could be handled (in a jury case) *by the judge's charge if questions as to the weight to be ascribed to such testimony arose.*"

Id. (emphasis in original) (citations omitted).

[147] *Id.* at 545, 663 N.E.2d at 876, 640 N.Y.S.2d at 835.

The *Hall* court stated that had the issue been preserved, it would have held that a defense witness's right to assert his Fifth Amendment protection against self incrimination does not interfere with the prosecution's right to cross examination because remedial measures are available as discussed above.[148] The jury instructions given by the *Hall* court providing that the jury was permitted to consider the witness's refusal to testify to affect only his credibility, allowed the jury the benefit of drawing inferences while at the same time protecting the witness against self incrimination. The court's interpretation is that a witness's right to invoke his privilege of silence was not diminished by the court's instruction allowing the jury to consider the silence as affecting the witness's credibility.[149] This instruction was the least harmful remedial measure that the court could impose on defendant.[150]

SUPREME COURT

BRONX COUNTY

Seabrook v. Johnson[151]
(decided May 5, 1997)

During 1996, five corrections officers were indicted for the falsification of business records in the first degree, "offering a false instrument for filing in the first degree," and "assault in the third degree."[152] Petitioner, Norman Seabrook, President of the Correction Officers' Benevolent Association, is the collective bargaining representative for about 10,000 New York City

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[148] People v. Hall, 236 A.D.2d at 789-90, 654 N.Y.S.2d at 491-93 (4th Dep't 1997).

[149] *Siegel*, 87 N.Y. 2d at 545, 663 N.E.2d 876, 640 N.Y.S.2d at 835.

[150] *Id.* at 544, 663 N.E.2d 875, 640 N.Y.S.2d at 834 (citing People v. Chin, 67 N.Y.2d 22, 28, 490 N.E.2d 505 (1986)).

[151] 173 Misc. 2d 15, 660 N.Y.S.2d 311 (Sup. Ct. Bronx County 1997).

[152] *Id* at 16, 660 N.Y.S.2d at 314. Note, Henry Neil was indicted for falsifying business records and "offering a false instrument," but he was not indicted for charges of assault. *Id.*