871-65

Submitted by
T. JAMES BRYAN

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

THOMAS 15X JOHNSON, :

Appellant. :

RESPONDENT'S SUPPLEMENTAL MEMORANDUM

In a petition dated July 13, 1970, Thomas 15X Johnson sought a writ of error coram nobis to vacate his conviction of MURDER IN THE FIRST DEGREE (former Penal Law § 1044) for his participation in the assasination of Malcolm X on the grounds that his indictment did not charge him with "a deliberate and premeditated design to effect the death of the person killed," and that he was deprived of the effective assistance of counsel by his lawyer's failure to have the indictment dismissed. The indictment, which was filed on March 10, 1965, reads:

> "THE GRAND JURY OF THE COUNTY OF NEW YORK, by this indictment, accuse the defendants of the crime of MURDER IN THE FIRST DEGREE, committed as follows:

> "The defendants, in the County of New York, on or about February 21, 1965, wilfully feloniously and of malice aforethought shot and killed Malcolm Little, a/k/a Malcolm Shabazz, a/k/a Malcolm X, with a shotgun and pistols." Indictment No. 871-65.

On August 26, 1970, Justice Sandifer of the Supreme Court, New York County, denied the petition on the grounds that the alleged defect appears on the face of the record and therefore cannot be raised by coram nobis, and that the failure of his defense counsel to move to dismiss the indictment for the reason set forth in the petition did not deny him the effective assistance of counsel. The court ruled correctly.

As it stated below, the alleged defect appears on the face of the record, and cannot be used on the ground for coram nobis relief. People v. Howard, 12 N.Y.2d 65 (1962), cert. denied, 374 U.S. 840 (1962).

In any event, the petitioner's claim that the indictment failed to charge murder in the first degree because it accused him and his accomplices of acting with "malice aforethought" and not with a "deliberate premeditated design to affect death" is meritless. As the Court of Appeals said in People v. Conroy, 97 N.Y. 62, 67-70 (1884), in discussing this very contention - that the common law formulation of the intent required for murder in the first degree is insufficient to charge murder in the first degree under Section 1044 of the former Penal Law:

> "It has never been required, under the strictest and most technical rules of pleading, that the particular intent with which a homicide was committed should be set forth in the indictment; but it has uniformly been deemed sufficient to allege it to have been done feloniously, with malice aforethought, and contrary to the form of the sstatute." Id., at 68.

Accord, People v. Joyner, 26 N.Y.2d 106, (1970); People v. Donaldson, 295 N.Y. 158, 165-6 (1946); People v. Lytton, 257 N.Y. 310, 315 (1931).

Further, the appellant's claim that he was denied the effective assistance of counsel by the failure of his lawyer at trial to move to dismiss the indictment is equally meritless. First, as stated above, there was no reason for this relief to have been granted had it been requested. Second, the only relief which the appellant might have obtained would have been to have the court uphold his demurrer to the indictment, which would not have been a bar to reindictment for the same charge. Code of Criminal Procedure § 327. Finally, even if it could be shown that the appellant could have succeeded in a demurrer, an impossibility under the cases cited on this point, it cannot be said that his counsel acted unwisely in foregoing such a meaningless exercise. See People v. DeRenzzio, 19 N.Y.2d 45 (1966); People v. Tomaselli, 7 N.Y.2d 350 (1960).

Wherefore, the order appealed from should be affirmed.

Respectfully submitted,

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