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CRIMINAL CONDUCT COMMITTED UNDER DURESS

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INTRODUCTION

People who commit crimes sometimes do so because they've determined that the potential rewards outweigh the punitive risks or perhaps, their conduct reflects nothing more than a spur-of-the moment crime of opportunity carried out with little thought about causes or consequences.

Occasionally, a defendant may claim that he/she was entrapped by overzealous police into committing a crime that he/she would not otherwise have engaged in (Penal Law § 40.05) or that he/she did so on account of COERCION by the USE or THREATENED USE of UNLAWFUL PHYSICAL FORCE upon him/her or a third person which force (or threatened use thereof) a PERSON OF REASONABLE FIRMNESS would be UNABLE TO RESIST (Penal Law § 40.00[1]).

In either case, if the People have proven all the elements of a charged crime beyond a reasonable doubt, the defendant then undertakes the burden of proving the AFFIRMATIVE DEFENSE by a preponderance or greater weight of the evidence (Penal Law § 25.00 [2]).

FIREWALL

A good example of DURESS can be found in the 2006 movie, "Firewall" in which a bank software security specialist (played with the de rigeur dose of righteous, percolating rage by Harrison Ford) is coerced by a deranged and violent criminal (Paul Bettany) and his criminal cohorts into hacking into his own bank's computer system and transferring $100,000.00 into the villain's Cayman Island's bank account while Ford's wife and two children are held at gunpoint.

Unlike most real-life situations, Ford's embezzler-under-protest-turned-hero manages to use his computer skills to siphon away Bettany's money from his own accounts and then dispatches him in a most low-tech manner by smashing open his skull with a pickaxe.

In such a case, it would probably not be too hard to establish the elements of duress (use and threated use of unlawful physical force upon family members) that a person of reasonable firmness (let alone someone of Ford's heroic mettle), would have been unable to resist.

In real-life, however, the task is not so easy.

ELEMENTS OF DURESS

The CJI (see nycourts.gov/criminal jury instructions) which tracks Penal Law § 40.00, states that if the jury is satisfied that the People have proven the elements of the crime charged beyond a reasonable doubt, they should then (assuming a reasonable view of the evidence derived from the People's proof and/or defense evidence, supports it) consider whether the defendant was coerced to engage in the proscribed conduct by the use or threatened imminent use of unlawful physical force upon him/her or a third person, which force a person of reasonable firmness in the defendant's situation would have been unable to resist (citing, *inter alia, People v Brown*, 68 AD3d 503 [2nd Dept 1979], *People v Land*, 112 AD2d 247 [2nd Dept 1985]).

The instructions caution, however, that a defendant cannot avail him/herself of duress if he/she intentionally or recklessly placed him/herself in a situation where it was probable that he/she would be subjected to such pressure (citing, inter alia, *People v Campos*, 108 AD2d 751 [2nd Dept 1985], *People v Amato*, 99 AD2d 495 [2nd Dept 1984]).

As stated in Penal Law § 40.00 (2), the (affirmative) defense of duress is NOT available when a person INTENTIONALLY or RECKLESSLY places himself in a situation in which it is PROBABLE that he will be subjected to duress.

So, if for example, the defendant wanted to join a biker gang, knowing that he would be required to engage in violent criminal conduct as a rite of initiation or as part of continued membership in good standing (and risk his own life if he didn't), he would probably be hard-pressed to prevail on a claim that such conduct was coerced.

THE THREAT OF HARM MUST BE REAL AND READILY REALIZED

In *People v Folk*, (179 AD3d 946 [2d Dept 2020]), the Second Department held that the trial court properly denied the defendant's request for a duress instruction because, viewing the evidence in the light most favorable to the defendant, there was no reasonable view of the evidence to support it. In particular, the defendant's claimed fears of future violence failed to demonstrate that the alleged threats made to him were CAPABLE OF IMMEDIATE REALIZATION (citing *People v Amato*, 49 AD2d 495 [2nd Dept 1984]).

And, in *People v Staffieri*, (251 AD2d 988 [4th Dept 1984]), the Fourth Department held that the trial court did not abuse its discretion in denying the defendant's request for a jury instruction on duress because the defendant' claims of threats by her abusive husband were neither specific nor alleged to be contemporaneous with the charged crimes (burglary, grand larceny). Also, the defendant admitted that there were opportunities to get away from her husband that she did not take (citing, inter alia, *People v Vespa*, 165 AD2d 670 [1st Dept 1990]).

Similarly, in *People v Amato*, supra, though the AD reduced the defendant's Robbery 1st degree conviction to Robbery 3rd degree and dismissed the weapons counts (for lack of evidence as to the possession/use of a loaded firearm), it found that the trial court in this bench trial properly rejected the defendant's duress claim because the alleged threat of harm lacked immediacy, and the defendant had several opportunities to bail out of the robbery but failed to do so.

In this case, two would-be robbers entered the defendant's apartment, laid a gun down on the table and said, "we have a job that calls for a third person and you're coming with us." The defendant expressed disinterest but one of the others said, "you'll come with us if you know what's good for you and your family." Concerned for his girlfriend and son, the defendant agreed.

One of the codefendants switched plates on his car and they drove to a jewelry store where the defendant was instructed to wait across the street and then enter shortly after the others. During the five minutes he was hanging around and watching the crime unfold, the defendant made no effort to leave or to call the police.

One codefendant engaged the proprietors (mother and daughter), acting as a customer, while the other entered and said, "this is a robbery." He took them into the back room while his cohort started grabbing jewelry. The defendant entered and joined the thief when a cop looked inside and kicked in the front glass.

The defendants escorted the victims out the back way while other officers took cover behind patrol cars. One of the robbers was apprehended while the defendant and the other pulled one of the victims down the street. The codefendant put his hand in his pocket and crouched down, whereupon the police opened fire and hit him three times. The defendants were eventually arrested and while three revolvers were found in the store, none were connected to any of the defendants.

In affirming the trial court's rejection of the defendant's duress claim, the Second Department noted that the defendant not only put himself in this predicament, but he also passed on at least a couple of opportunities to abandon this criminal misadventure. Also, the threats were not shown to be capable of immediate realization. (Citing *People v Brown*, supra).

HARMLESS ERROR

The AD did point out that the trial court erred in not allowing the defendant to offer evidence of his fear of the codefendant based upon knowledge of his reputation for violence but deemed it harmless considering the overwhelming evidence of guilt.

BEWARE OF SIMILAR BAD ACTS AND CONVICTIONS

As with entrapment, once the defendant advances the argument that he committed the crime because he/she was coerced (to a degree that a person of reasonably firm resolve could not resist), the door will be open to the admission of rebuttal evidence consisting of prior convictions and bad acts reflecting a predisposition to commit crimes of a similar nature (See *People v Calvano*, 30 NY2d 199 [1972], *People v Rosado*, 244 AD2d 772 [3d Dept 1977]: In robbery prosecution, it was permissible to confront the defendant with the facts underlying a Y.O. adjudication of a robbery charge).

Consequently, before putting forth a duress claim, defense counsel should make sure that his/her client does not have convictions in his/her closet or prior bad acts in the belfry that are SIMILAR in nature to the crime for which he/she is currently being tried. Such evidence will not only diffuse the (affirmative defense) but may also increase the possibility that the jury will consider the evidence for an otherwise improper purpose (i.e., "once a criminal, always a criminal"). Should the People attempt to introduce evidence of dissimilar crimes or bad acts, the defense should vigorously object as such evidence would serve only to paint the defendant as an incorrigible and indiscriminate criminal.

CJI

In this regard, the CJI states: "In determining whether the defendant was coerced into committing this crime, you may consider whether he was predisposed to commit conduct of this nature and not a person whose will needed to be overcome. On this issue, there has been evidence… that on another occasion, the defendant engaged in criminal conduct (or was convicted of a crime) of the same nature. (Such) evidence was offered solely in an attempt to establish that the defendant was predisposed to engage in criminal conduct and thus was not coerced into committing the crime. If you find the evidence believable, you may consider it (only) for that limited purpose."

In *People v Calvano*, supra, the Court of Appeals in this undercover drug sale case, approved of the People's introduction of an uncharged attempted drug transaction that occurred between two charged incidents of alleged drug sales (on November 11th and 19th respectively) to rebut the defendant's claim of ENTRAPMENT with respect to the first incident and DURESS in connection with the second one.

As to the former, the defendant claimed that he had been framed by the confidential informant (CI) and regarding the later, he capitulated to threats and physical compulsion from law enforcement. Consequently, the People argued that they were entitled to refute such evidence by evidence of his on-going intent (i.e., disposition) to commit acts of such nature.

Quoting from *Sorrels v US*, (287 US 435, 451-452 [1932), the Court said that "…if a defendant seeks acquittal by reason of entrapment (or duress), he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If, as a consequence, he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense."

With claims of entrapment and/or duress, the defendant, in the court's interpretation, is arguing that his/her will and volition were overborne (thus suggesting no criminal intent), so the People should be allowed to prove a disposition that is contrary to his claim of innocence.

The court's position was unaffected by the fact that the uncharged incident (of 11/15) in which the defendant sold what he claimed was heroin, occurred after (rather than before) the first charged incident (for which the defendant was acquitted), or that the white powder involved in that intervening transaction came up negative for a controlled substance.

In short, proof of the defendant's alleged criminal act between 11/11 and 11/19 was deemed to be relevant to the jury's consideration of the defendant's disposition and volition.

SOME CASES

In *People v Campos*, (108 AD2d 751 [2nd Dept 1985]), the Second Department in this felony murder prosecution, held that the defendant failed to establish duress because his claim that his codefendant threatened to stab him and destroy his car (if the defendant didn't drive him to the intended crime scene), was not susceptible to immediate effectuation on account of the codefendant not having a weapon on him at the time. The court also noted that the defendant voluntarily rejoined the codefendant (after driving a friend home). As such, in the court's view, he had voluntarily re-immersed himself in a situation where he could be subject to duress. (Citing, inter alia, *People v Amato*, supra).

In *People v Brown*, 68 AD2d 503 [2nd Dept 1979]), the Second Department affirmed the defendant/inmate's conviction for Escape 2d degree, ruling that the trial court properly denied his offer-of-proof in support of his claims that his escape (from a hospital to which he'd been taken for ulcer treatment) was both legally justified (to avoid imminent injury from guards and unlivable jail conditions) and the product of duress, (death threats from prison guards and other inmates).

On April 18th, 1973, the defendant was transported from Missouri (where he was serving a long sentence for assault) to the Brooklyn House of Detention (BHOD) pending trial on a murder charge. At the trial of the escape charge, the defendant offered to call an inmate to testify that he overheard a prison guard threaten the defendant's life after which the defendant complained of chest pains. He also proposed to call several lawyers to testify about litigation that they had initiated against the BHOD for allegedly deplorable conditions (in particular, on the floor where the defendant was housed) that prompted one judge to express concern about inmates trying to escape from such a hell hole.

The defendant objected to the trial court's refusal to permit such evidence (on the grounds of relevance) and argued on appeal that his escape represented his only hope of protecting himself from imminent personal harm (from guards who reportedly threated him and said that he didn't deserve to live).

The court found that the defendant escaped from a hospital (where he faced no immediate harm), the alleged threats were non-specific, and a threat supposedly made by a detective who was transporting him to New York was five months old. Nor did allegedly bad jail conditions justify an escape, especially where there was no record of any prior complaints about the situation from the defendant. And, after he fled, he made no effort to turn himself in to authorities.

With respect to the duress claim, the court noted that there was no evidence of any actual or threatened physical harm when the defendant was at the hospital where he had been taken for treatment of his health-related complaints.

The dissenting justice, (Suozzi, J.), disagreed with the majority's conclusion that the defendant's offer-of-proof was insufficient to bring his justification and duress claims to the jury for its resolution. In particular, the fellow inmate, in the dissenter's view, should have been permitted to testify that from 4/18/73 to the date of the defendant's escape from the hospital (while under guard) five months later, the defendant had been subjected to several threats on his life from prison guards. As such, there was a question of fact whether the defendant escaped on account of fear from imminent physical harm.

In *People v Morrison* (133 AD3d 892 [2nd Dept 2015]), the Second Department held that the trial court properly denied the defendant's request for a duress instruction in this felony marijuana possession and conspiracy case because the defendant relied only on unspecified threats of future violence rather than of harm capable of immediate realization. (Citing *People v Moreno*, 58 AD3d 516 [1st Dept 2009], and *People v Amato*, supra).

In *Moreno*, the First Department held that the trial court properly determined as a matter of law that duress did not apply in this class A felony drug case (in which the defendant arranged for the shipment of over 400 kilos of cocaine from Texas to New York) because the defendant's claim was based upon alleged threats from drug dealers that were made long before the crime in question. In the court's view,

the defendant failed to show any imminent threat, nor did he seek the assistance of law enforcement. (citing *People v Staffieri*, supra).

DURESS AND CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

In *People v Banks* (129 AD3d 401 [1st Dept 2015]), the defendant challenged the denial of his motion to withdraw his guilty plea to Conspiracy 2nd degree and three counts of Criminal Sale of a Controlled Substance 2nd degree in satisfaction of an indictment charging him (along with several codefendants) with 35 counts of felony sale of cocaine and PCP over several months.

The defendant alleged that his attorney failed to inform him that he could assert a duress claim at trial against his codefendants who, he claimed, had threatened him and his family over the course of several months. In his moving papers, the defendant stated that had he been so advised, he would not have taken the plea. He also claimed that the codefendants had coerced him to participate in a global plea disposition (which the People no longer required by the time of the plea).

The court noted that to withdraw a guilty plea based on ineffective assistance of counsel, the defendant must show that there is a reasonable probability that he would not have taken the plea but for counsel's ineffectiveness and, instead, would have proceeded to trial (citing, inter alia, *Underhill v Lockhart*, 474 US 52, 59 [1985]).

The First Department rejected the defendant's arguments, finding his claim unpersuasive that he would have proceeded to trial on a multi-count indictment (which exposed him to a potential sentence of life in prison), relying on a dubious duress claim after having received the benefit of a favorable plea disposition.

In the court's assessment, the defendant had failed to make out a prima facie showing of the required threatened imminent use of unlawful physical force because he did not allege the existence of force or a threat that was capable of immediate exercise of realization (citing *People v Hai Guang Zhi*, 268 AD2d 443 [2nd Dept 2000]). Moreover, the surveillance video tape that he cited as evidence of the threats depicted events that occurred months before the crimes in question.

The court also found that his duress claim was undermined by his failure to seek police assistance during his 15-month participation in the illegal drug activity under investigation (citing *People v Moreno*, supra). And, had the defendant been allowed to claim duress at a trial, the court pointed out that his 2008 guilty plea to criminal possession of a controlled substance in Pennsylvania would likely have been admitted in rebuttal of his claim that his conduct in this case was coerced.

The court was similarly unmoved by the defendant's claim that he was threatened into pleading guilty by his codefendants.

PENAL LAW § 40.00 IS CONSTITUIONAL

In *People v Bastidas*, (67 NY2d 1006 [1986]), the Court of Appeals held that duress does "not serve to negate any facts of the crime which the State (must) prove in order to convict" (citing *Patterson v New York*, 432 US 197, 207 [1977]). Rather, the Court continued, it is "a separate issue in disproof of intent," and since the State is required in the first instance to prove intent, Penal Law § 40.00 which is an affirmative defense, is constitutional.

As the CJI points out, if the People do not meet their burden, the jury must find the defendant not guilty and that's that. It is only if the People prove their case that the jury may then determine from the evidence (whether produced by the People or the defendant), whether the defendant acted under duress and therefore should be absolved of the crime.

FINAL THOUGHT

Successful defense cases based on duress are not particularly easy to come by because the jury must be satisfied that the defendant (and/or his significant others) were subject to unlawful physical force (or imminent threats of same) close in time to the criminal conduct in question. A defendant who purposely or foolheartedly places himself in a position where coercion is likely to occur is unlikely to prevail as is one who has committed similar criminal acts (or has been convicted of a similar crime) in the past.

Nevertheless, now that the criminal justice system appears to be a bit more sympathetic to matters of mental health, addiction and in particular the plight of domestic violence victims who commit crimes, counsel may, in appropriate cases, be able to persuade a jury that, at the time of the criminal conduct, the defendant was subject to substantial physical, sexual or psychological abuse inflicted by a family/household member which abuse was a substantial contributing factor to the criminal conduct. (See Domestic Violence Survivors Justice Act).

Even if a relevant defense (e.g., justification) or affirmative defense such as duress does not carry the day, (or even if it wasn't raised at trial), such factors may come in handy on judgment day (in DV-related cases at least), where counsel can hopefully persuade the court to impose a more humane sentence under PL 60.12.