

MEMORANDUM

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART K-19**

THE PEOPLE OF THE STATE OF NEW YORK : BY: STEPHEN A. KNOFF
: :
: DATED: March 6, 2007
-against- :
: INDICTMENT NO. 2217/96
: :
FRED BROWN : VACATE JUDGMENT
: Defendant :

The defendant, Fred Brown, filed a motion with this Court vacating his judgment of conviction pursuant to CPL §440.10 and 440.20. In this motion, the defendant alleges that he was deprived of effective assistance of trial counsel. In this claim, the defendant specifically alleges that his trial counsel was ineffective in that counsel failed to argue that the defendant's North Carolina convictions did not qualify the defendant as a second felony offender and that trial counsel improperly advised the defendant against testifying at the trial or this indictment.

In addition, the defendant alleges that he was improperly adjudicated a second felony offender at his sentencing hearing.

The People oppose the defendant's application in its entirety. In addition, the People seek an order of this Court enjoining the defendant from filing any further pro se motions.

FACTUAL BACKGROUND

This indictment arose out of an incident that took place on June 11, 1996. On that date, the defendant, and his co-defendant Eric Williams cut through a chain-link fence that surrounded the Custom Coach Limousine Company, on Hillside Avenue, in Queens. Then, after knocking a hole in a wall, the defendant and his co-defendant entered an office and proceeded to ransack file cabinets, overturn a desk and remove keys for several limousines parked outside. Each defendant proceeded to steal a limousine. Shortly thereafter, following a high speed chase, this defendant was apprehended by police.

As a result, the defendant was charged with criminal possession of stolen property in the second degree (PL §165.52) (two counts), criminal possession of stolen property in the fourth degree (PL §165.45-5) (two counts), criminal possession of stolen property in the fifth degree (PL §165.40), criminal mischief in the third degree (PL §145.05), grand larceny in the second degree (PL §155.40) (two counts), grand larceny in the fourth degree (PL §158.30 (8) (two counts), burglary in the third degree (PL §140.20) and unauthorized use of a vehicle in the third degree (PL§165.05 (1) (two counts).

A trial was conducted, with a jury, on the above captioned indictment. Prior to deliberations, the court dismissed the criminal mischief count and the criminal possession of stolen property fifth degree property count on the prosecutor's motion. The defendant was found guilty of the remaining charges.

On February 25, 1998, the Court conducted a sentencing

hearing. The defendant was adjudicated a second felony offender. The defendant was sentenced, as follows; to an indeterminate prison term of seven and one-half to fifteen years for each count of criminal possession of stolen property second degree and each count of grand larceny count in the second degree, three and one-half to seven years for the burglary in the third degree count, two to four years for the criminal possession of stolen property fourth degree count and grand larceny fourth degree counts and to a determinate term of one year as to each of the unauthorized use of a vehicle in the third degree counts. All counts were to run concurrently, consecutive to a federal prison term.

PROCEDURAL HISTORY

In March of 1999, the defendant appealed to the Appellate Division, Second Department. Both counsel and the defendant, pro se, submitted briefs, followed by the People's opposition brief. On May 30, 2000, the Appellate Division affirmed the defendant's

conviction. (*People v Brown*, 272 AD2d 622[2d Dept.] [2000]).

The defendant sought leave to appeal to the Court of Appeals. On April 28, 2000, the Court of Appeals denied the defendant's application. (*People v Brown*, 95 NY2d 863 [2000]).

Since defendant leave application was denied, the defendant has filed seven separate post-judgment motions for collateral relief (CPL §440 motions), motions to reargue, an article 78 proceeding, stays of judgment and a recusal motion. The defendant has filed a writ of habeas corpus and a writ of error corum nobis. The defendant has filed eleven separate motions in the Appellate Division, Second Department. In addition to his writ of habeas corpus filed in the district court (E.D.N.Y.), he has also filed a civil rights lawsuit and a felony complaint in federal Court.

LEGAL DISCUSSION

Criminal Procedure Law §440.10 specifically discusses circumstances under which a defendant's conviction may be vacated

Section 440.10 (2) (a) and (c) specifically provide that the court must deny a motion to vacate a judgment when:

(a) The ground or issue raised upon the motion was previously determined on the merits upon as appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue; or

(c) Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him.

Section 440.10 (3) provides in pertinent part, that the court

may deny a motion to vacate a judgment when:

"(c) Upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so."

At the outset, this Court notes that the defendant has raised the claim that his trial counsel was ineffective in a multitude of prior submissions in state trial and appellate courts, As an example, the defendant raised this specific claim in his direct appeal. See *People v Brown, supra*. As this claim was previously raised and litigated, this Court is barred from specific review. CPL §440.10 (2) (a). In addition, this very claim has not been raised in previous CPL 440 motions. Additionally for this reason, this application cannot be reviewed CPL §440.10 (2) (c). For these reasons, the defendant's claim of ineffective assistance of trial counsel is denied.

In reviewing the defendant's challenge to his second felony offender status, this Court has examined the statutes at issue, the appropriate case law, official court records and the motion papers submitted by the parties. Court records reflect that on February 11, 1998, the defendant was arraigned as a second felony offender. Prior to the imposition of his sentence, the defendant was advised of his predicate felony; to wit: his North Carolina conviction for the possession of a stolen automobile ¹. The defendant admitted at the time of his sentence that he was the individual who committed this North Carolina offense. As the defendant made no complaint and did not challenge this issue at the time of his sentence, he cannot lawfully challenge it now PL 400.21 (3). (See *People v Kennedy*, 277 AD2d 814 [3rd Dept.] [2000]). As the defendant admitted to this prior felony, he is estopped from attacking it now. (See, *People v Davis*, 135 AD2d

¹The defendant was sentenced to a term of incarceration of three to six years for this offense.

1088 [4th Dept.] [1987]). As such, this claim is denied.

Finally, the People urge this Court to enjoin the defendant from filing further pro se motions, without the written permission of the Administrative Judge. While an extremely compelling argument by the People supports such relief, and while the granting of such relief appears to be well within this Court's discretion in view of the repetitive and arguably frivolous motion practice engaged in by the defendant, such relief is denied at this time. The defendant however would be well-advised to refrain from such motion practice in the future.

In sum, the defendant's motion is denied in all respects. The People's application is likewise denied.

The foregoing constitutes the order, opinion and decision of this court.

STEPHEN A. KNOFF, J.S.C.