

SUPREME COURT OF THE STATE OF NEW YORK  
CRIMINAL TERM: PART K-16

P R E S E N T: HON. BARRY KRON,  
Judge.

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THE PEOPLE OF THE STATE OF NEW YORK

- against-

Indictment No.: 3336-96

TERRENCE TAYLOR,

Motion: To Vacate Judgment of  
Conviction

Defendant.

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DEFENDANT PRO SE  
For the Motion

RICHARD A. BROWN, D.A.

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BY: LAURA T. ROSS, A.D.A.  
Opposed

Upon the foregoing papers, the motion is denied. See the accompanying memorandum.

Kew Gardens, New York  
Dated: November 2, 2007

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BARRY KRON  
A.J.S.C

SUPREME COURT, QUEENS COUNTY  
CRIMINAL TERM, PART K-16

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- against-

Indictment Nos.: 3336-96

BY: BARRY KRON, A.J.S.C.

TERRENCE TAYLOR,

Defendant.

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The following constitutes the opinion, decision and order of the Court.

Defendant seeks an order of the Court to vacate his judgment of conviction pursuant to CPL § 440.10 upon the grounds that he received ineffective assistance of counsel and that the indictment was defective. Specifically, defendant asserts that his attorney failed to prepare a defense, failed to investigate misconduct regarding the prosecutor allegedly entering the room with the deliberating jurors and threats made to his prior attorney and failed to present an affirmative defense regarding the weapon involved in the robbery. Defendant also claims that the indictment was defective because his name does not appear in the body of the counts and it was not signed.

In response, the People have filed an affirmation in opposition, dated October 24, 2007. They argue that defendant's motion should be denied because defendant's application is facially insufficient, subject to procedural bars and without merit.

For the reasons stated herein, defendant's motion is denied.

**FACTS**

On October 17, 1996, an indictment was filed against defendant charging him with Robbery in the First Degree (P.L. § 160.15[4]) and Robbery in the Third Degree (P.L. § 160.05). The incident underlying the charges occurred on November 27, 1995 in Queens County (see Court file).

On November 14, 1999, defendant was convicted, after a jury trial, of Robbery in the First

Degree.<sup>1</sup> On December 13, 1999, defendant was sentenced as a persistent violent felony offender to an indeterminate term of imprisonment of 23 years to life.

### **POST TRIAL PROCEDURAL HISTORY**

Defendant's conviction was affirmed by the Appellate Division on May 28, 2002 (294 A.D.2d 607 ( 2<sup>nd</sup> Dept. 2002)) and leave to appeal was denied by the Court of Appeals on August 6, 2002 (98 N.Y.2d 713(2002)).

### **DECISION**

Criminal Procedure Law §§ 440.30 (4)(d) provides that a motion to vacate a judgment and set aside a sentence may be denied, when the court reaches the merits if:

(d) An allegation of fact essential to support the motion (i) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true.

Here, a review of the Court file indicates that defendant's name was in the caption of the indictment, that the wording of the body of the indictment was sufficient and that the indictment was signed by the Foreman and the District Attorney (People v. Armlin, 6 N.Y.2d 231(1959); People v. Brothers, 66 A.D.2d 954(3d Dept. 1978)). Thus, his allegation of defects in the indictment is refuted by the court record and is unlikely to be true (See Court file).

Defendant's additional claims that his attorney was ineffective is based only on his own self-serving statements. The allegations that his attorney did not adequately prepare a defense and that he did not investigate an alleged telephone threat made to his prior attorney and alleged prosecutorial misconduct, are not supported by any evidence other than defendant's bald unsubstantiated claims. In fact, the letter from defendant's prior attorney submitted with the defendant's motion indicates that the matter of the threat was referred to the District Attorney's Office for investigation. Additionally, defendant does not submit any evidence that the event involving the prosecutor entering the room with the deliberating jury actually occurred.

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<sup>1</sup>Robbery in the Third Degree was charged as a lesser included count.

Thus, for these reasons outlined herein, defendant has not shown that there is a reasonable possibility that his allegations are true and this Court denies defendant's motion without a hearing after considering the merits (CPL § 440.30 (4)(d)).

Moreover, the procedure to be followed in seeking to vacate a judgment of conviction is outlined in Criminal Procedure Law § 440.30. Pursuant to this statute, the motion papers, if they are "based upon the existence or occurrence of facts, must contain sworn allegations thereof" (See CPL § 440.30(1)). Here, defendant's attached unsworn letter from his prior attorney and his letter to his trial attorney do not meet this criteria. Defendant has not conformed to the statute and bases his assertions only upon his own allegations, which he does not support with any affidavit. For this reason, the Court summarily denies defendant's application and no hearing is necessary because it is procedurally barred (See CPL § 440.30(4)(b); People v. Spencer, 272 A.D.2d 682 (3<sup>rd</sup> Dept. 2000); see also People v. Fortune, 2001 N.Y. slip op. 40067U, 2001 N.Y. Misc. LEXIS 471 (Kings Cty. Sup. Ct. July 2, 2001); People v. Culpepper, 149 Misc.2d 550 (N.Y. Sup. Ct. 1990)).

Furthermore, CPL § 440.10(2)(c) provides that the Court must deny the application where sufficient facts appear on the record to have permitted review of the issue on appeal, but the defendant failed to raise the issue upon an appeal perfected by him. Thus, defendant's remedy for his claims that his attorney failed to raise an affirmative defense regarding the gun, that the weapon was not a dangerous instrument and that the indictment was defective should have been by way of his appeal because the arguments are on the record claims. Because defendant failed to raise these claims on appeal, his application is denied (See CPL 440.10 (2)(c)).

In any event, defendant has failed to demonstrate that his counsel was ineffective. To sustain such a claim under the Federal Constitution, a defendant must satisfy the two-prong test enunciated in Strickland v Washington, 466 US 668: first, he must demonstrate that counsel's performance fell below prevailing norms (see Hill v Lockhart, 474 US 52); second, he must have sustained prejudice by reason of such deficient performance (Id., at 59). Defendant has failed to meet either of these prongs.

Under the slightly different standard of New York State constitutional law, defendant's assertions that counsel was ineffective based upon his alleged failure to investigate, prepare, and present a defense are also without merit. Under that standard, the constitutional requirement of

effective assistance of counsel will have been met "[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of representation, reveal that the attorney provided meaningful representation "(People v Benevento, 91 NY2d 708, 712, quoting People v Baldi, 54 NY2d 137, 147; see also, People v Berroa, 99 NY2d 134, 138; People v Henry, 95 NY2d 563, 565).

In the instant case, defendant fails to explain the reasoning behind his claims that counsel's performance was flawed. Rather, defendant simply makes unsupported and speculative allegations with regards to actions taken or not taken by counsel. This Court, having presided over the trial is satisfied that counsel's performance met both the federal and state standard of meaningful representation. During trial, counsel was knowledgeable about the facts, gave a detailed opening statement, cross-examined the People's witnesses, raised objections, called a witness for the defense, introduced photographs into evidence, gave a substantive summation and participated in readbacks during jury deliberations. These facts demonstrate that all of counsel's actions constituted legitimate trial tactics and strategy and thus, defendant was provided with meaningful representation.

Accordingly, the Court has reviewed all of defendant's contentions and finds them to be either procedurally barred or without merit. Defendant's motion is denied in its entirety.

The Clerk of the Court shall distribute copies of this order to defendant at his place of detention and to the District Attorney.

Kew Gardens, New York  
Dated: November 2, 2007

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BARRY KRON  
A.J.S.C