

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

P R E S E N T: HON. SEYMOUR ROTKER,
Justice.

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THE PEOPLE OF THE STATE OF NEW YORK

- against-

Indictment No.: 687-85

MONA GRAVES,

Motion: To Reargue Court's Decision
on CPL § 440.10 Motion

Defendant.

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JOHN BRIAN MACREERY, ESQ.
For Defendant on the Motion

RICHARD A. BROWN, D.A.

BY: A.D.A. WILLIAM C. MILACCIO
Opposed

Upon the foregoing papers, and due deliberation had, the motion is denied. See accompanying memorandum this date.

Kew Gardens, New York
Dated: June 17, 2005

SEYMOUR ROTKER
JUSTICE SUPREME COURT

SUPREME COURT, QUEENS COUNTY

CRIMINAL TERM, PART K-19

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THE PEOPLE OF THE STATE OF NEW YORK

BY: SEYMOUR ROTKER, J.S.C.

- against -

Indictment No.: 687-85

MONA GRAVES,

Defendant.

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

By motion dated May 18, 2005, defendant seeks to reargue this Court's decision dated April 21, 2005 in which the Court denied her motion to vacate the judgment of conviction pursuant to CPL § 440.10.¹ Defendant claims that the Court failed to address an issue raised by her, namely, that defendant did not share the necessary mental culpability with Frank Johnston, who was found guilty in a separate trial of intentional and depraved indifference murder, and therefore, her conviction should be vacated.² Specifically, defendant argues that since she was found guilty of depraved indifference murder and not found guilty of intentional murder, she did not possess the requisite mental culpability to be found guilty and her conviction should be vacated. Thus, in

¹See Decision, dated April 21, 2005, which is annexed as part of the Court file.

²Frank Johnston was tried separately and was convicted of two counts of murder in the second degree (intentional and depraved indifference), and related charges, on January 12, 1987. His conviction was affirmed on appeal and his leave application to the Court of Appeals was denied.

On appeal, Johnston had claimed that the trial court erred in charging the jury on intentional murder and depraved indifference murder in the conjunctive as opposed to in the alternative. Nevertheless, defendant's conviction was affirmed since the defendant's challenge to the court's charge was not preserved and the appellate court declined to review his claim in the interest of justice. See People v. Johnston, 166 A.D.2d 667 (2d Dept. 1990).

essence, defendant's argument is that her guilt was not proven beyond a reasonable doubt based upon insufficiency of the evidence alleging that the People did not prove all of the necessary elements to sustain a conviction.

In response to defendant's motion for reargument, the People have filed an affirmation in opposition dated June 10, 2005, whereby they assert that defendant's motion should be denied in its entirety because it is not properly a motion to reargue³, her application is procedurally barred, and, in any event, meritless.

For the reasons stated herein, defendant's motion to reargue is denied.⁴

POST TRIAL PROCEDURAL HISTORY⁵

After her trial conviction, defendant appealed to the Appellate Division claiming that the evidence was legally insufficient to sustain the conviction. The Appellate Division rejected this claim and also found that the verdict was not against the weight of the evidence. See People v. Graves, 159 A.D.2d 637, 553 N.Y.S.2d 33 (2d Dept. 1990).⁶

³The People correctly note that although defendant cited the following Court of Appeals cases in her motion to vacate her judgement: People v. Payne, 3 N.Y.3d 266 (2004); People v. Gonzalez, 1 N.Y.3d 464 (2004); People v. Hafeez, 100 N.Y.2d 253 (2003); People v. Sanchez, 98 N.Y.2d 373 (2002); and People v. Gallagher, 69 N.Y.2d 525 (1987), defendant never raised the issue as to the retroactive application of these cases to the claims raised in her CPL § 440 motion which she now seeks to reargue.

⁴A recitation of the facts and procedural history can be found in this Court's April 21, 2005 decision.

⁵For purposes of clarity, this section from the Court's April 21, 2005 decision is duplicated, with some minor additions.

⁶Furthermore, the Appellate Division held that testimony admitted at trial concerning a prior conversation between the father of the victim [Charles Germano] and the driver of the car [Frank Johnston] about the return of the victim's engagement ring and about death threats the driver [Johnston] made against the victim were properly admissible. The Appellate Division

The Appellate Division also held that defendant's claim that the trial court erred in failing to give a charge on identification was not preserved since no request was made for such charge and no objection was made at the conclusion of the trial court's charge to the jury. In any event, the Appellate Division determined that review of this issue in the interest of justice was not warranted and that any other claims raised by defendant in her appeal were meritless.⁷ Thus, defendant's conviction was affirmed on appeal on March 19, 1990.⁸

Thereafter, defendant sought to set aside her conviction pursuant to Criminal Procedure Law § 440. Defendant argued that her Constitutional rights were violated in that her guilt was not proven beyond a reasonable doubt and that she was otherwise denied due process of law under the Fifth and Fourteenth Amendments to the United States Constitution. See Decision, dated February 11, 1992 (Leahy, J.). This motion was denied by the Court.⁹

Defendant next filed a petition for a federal writ of habeas corpus raising the same claim she filed in her appeal and her initial CPL § 440 motion, that her guilt was not proven beyond a

deemed this testimony necessary background information which was properly elicited to enable the jury to understand the nature of the relationship between the driver and the victim. Moreover, the Appellate Division found that this testimony did not prejudice defendant since the trial court repeatedly instructed the jury that it had no relevance to the guilt or innocence of defendant.

⁷On appeal defendant raised the following issues: (1) her statement to the police should have been suppressed because her arrest was not based upon probable cause; (2) the People failed to prove her guilt beyond a reasonable doubt; (3) that testimony about threats made by Frank Johnston to the victim denied her a fair trial; (4) an identification charge should have been given to the jury; (5) the trial court's circumstantial evidence charge was inadequate and confusing; (6) the identification by Mr. Germano was tainted by the identification procedure conducted at the precinct immediately after her arrest; and (7) that there was no independent source for Mr. Germano's in-court identification.

⁸Defendant's application for leave to appeal to the Court of Appeals was denied on June 21, 1990. See People v. Graves, 76 N.Y.2d 789, 559 N.Y.S.2d 994 (1990).

⁹The Court found defendant's claims meritless and held that her guilt was proven beyond a reasonable doubt.

reasonable doubt. The writ was denied on December 4, 1996, when the court found that **her guilt was proven beyond a reasonable doubt and that the evidence supported the charge of acting in concert, which she was challenging in her application** (emphasis added). See Decision, dated December 4, 1996 (Nickerson, J.).

On January 3, 2005, defendant filed the underlying CPL § 440.10 motion to vacate her judgment of conviction, which application this Court denied.¹⁰ Based upon this denial, defendant now moves to reargue, as outlined above.

DECISION

Initially, pursuant to CPLR § 2221 (d), a motion for leave to reargue:

2. shall be based upon matters of **fact or law allegedly overlooked or misapprehended by the court** in determining the prior motion, but **shall not include any matters of fact not offered on the prior motion**. . . . (emphasis added).

Thus, defendant must meet this burden to be entitled to reargue the Court's denial of her motion to vacate the judgment of conviction. Defendant has failed in two respects and is therefore, not entitled to reargument.¹¹

Defendant's claim that this Court failed to address an issue raised in her initial CPL § 440

¹⁰In her CPL § 440 application, defendant claimed that her conviction should be vacated because: (1) the prosecution failed to provide exculpatory information; (2) the prosecution failed to turn over prior statements of witnesses; (3) she was denied effective assistance of counsel; (4) prosecutorial misconduct occurred; and (5) her guilt was not established beyond a reasonable doubt. Notably, defendant again raises the claim that her guilt was not proven beyond a reasonable doubt.

¹¹Motion for reargument is addressed to sound discretion of court that decided prior motion and may be granted on showing that court overlooked or misapprehended facts or law or for some other reason mistakenly arrived at its earlier decision. Long v Long, 251 A.D.2d 631, 675 N.Y.S.2d 557 (2d Dept. 1998).

motion is meritless. A motion to reargue is not a means by which the unsuccessful party can obtain a second opportunity to argue issues previously decided or to present new or different arguments relating to previously decided issues. See Amato v. Lord & Taylor, Inc., 10 A.D.3d 374, 781 N.Y.S.2d 125(2d Dept. 2004); McGill v. Goldman, 261 A.D.2d 593, 691 N.Y.S.2d 75 (2d Dept. 1999).

Defendant has failed to show that this Court “overlooked” or “misapprehended” any law or any facts when determining her motion to vacate the conviction. Defendant alleges that this Court failed to address her legal sufficiency claim. This is incorrect.

Defendant’s claim arguing that legal sufficiency did not exist, that she could not have been found guilty of depraved indifference murder since Frank Johnston was found guilty of intentional, remains the same. Defendant’s repetitious argument, that she could not have possessed the requisite intent because she was not found guilty of intentional murder and Frank Johnston was, is an argument raised by the defendant numerous times prior to this underlying CPL § 440 motion. The determination was made that legally sufficient evidence existed, as was found by the Appellate Division and by the court’s hearing her motions, which raised the same issue. Because this legal sufficiency claim was addressed before on appeal, as this Court properly held, it was and remains subject to a mandatory bar pursuant to CPL § 440.10 (2)(a), in addition to a permissive procedural bar. See CPL § 440.10(3)(b). Thus, this Court was and is mandatorily barred from addressing this claim. There are no new facts to consider and, as discussed, no new law. This Court considered defendant’s claims as raised in her CPL § 440 motion and did not overlook or misapprehend the law or the facts.

Furthermore, defendant now argues, for the first time, that her legal sufficiency claim should be reviewed by this Court in the interest of justice because Court of Appeals cases cited by her should be given retroactive effect.¹² Defendant asserts that these cases clarify the distinction between intentional and depraved indifference murder and apply to her situation and thus, should be given retroactive effect. Defendant is raising this argument, for retroactivity, for the **first time**

¹²See footnote 3, *supra*.

in her present motion seeking reargument. This is **improper on a motion to reargue** (emphasis added). See CPLR § 2221(d)(2). Thus, for this reason also, reargument is denied.

In any event, there has been no finding that the Court of Appeals' cases cited by defendant are to be given retroactive effect. See People v. Crichlow, 15 A.D.3d 674, 794 N.Y.S.2d 904 (2d Dept 2005).¹³ Thus, this Court did not misapprehend the law.¹⁴

Accordingly, defendant's motion for reargument is denied in its entirety.

A copy of this decision forwarded to the District Attorney and Counsel for defendant.

Kew Gardens, New York
Dated: June 17, 2005

SEYMOUR ROTKER
JUSTICE SUPREME COURT

¹³In Crichlow, the Second Department granted leave to the defendant to serve and file a brief on the issue of whether his second degree murder conviction was in violation of People v. Payne, *supra*, and, on the issue of whether Payne is to be given retroactive effect to apply to a judgment previously affirmed on appeal. Since the issue of retroactivity has been left open, if it is found by the Second Department that retroactivity applies and defendant has a legitimate claim, defendant can pursue the appropriate relief, if any, in the future as warranted.

¹⁴Notably, there has been no change in the law on depraved indifference murder or accessory liability which is the basis of defendant's conviction.