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MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS : CRIMINAL TERM : PART K-8

X
THE PEOPLE OF THE STATE OF NEW YORK : BY: ROBERT CHARLES KOHM, J.
: :
-against- : DATE: JANUARY 8, 2001
: :
RAMON RAMOS, : INDICT. NO. 4193/96
: :
Defendant. :
X

Defendant makes this motion, pro se, for an order vacating the judgment of conviction and to set aside the sentence.

Defendant was charged with robbery in the third degree and criminal possession of stolen property in the fifth degree. He waived his right to a jury trial and was tried before this court. At the conclusion of the trial, defendant was found guilty of both counts. He was sentenced as a persistent felony offender to an indeterminate term of imprisonment of fifteen years to life on the robbery conviction, which was ordered to run concurrently to a definite term of imprisonment of one year on the possession of stolen property conviction.

Defendant appealed the judgment of conviction to the Appellate Division, Second Department and claimed, that the evidence was legally insufficient at the trial and he should not have been sentenced as a persistent felon.

The Appellate Division affirmed defendant's judgment of conviction. The court held that the evidence adduced at trial was legally sufficient to establish defendant's guilt beyond a reasonable doubt and the verdict was not against the weight of the evidence. The court further held that the trial court properly exercised its discretion and sentence the defendant as a persistent felony offender. Defendant requested leave of the Court of Appeals to appeal the decision of the Appellate Division. Application for leave to appeal to the Court of Appeals was denied.

Defendant made a motion to vacate the judgment of conviction. He argued, inter alia, in support of that motion, that he was denied effective assistance of counsel based on the following grounds: his attorney failed to obtain Rosario material and failed to ask for a missing witness charge. Also, defendant wasn't properly represented at sentencing and he should not have been sentenced as a persistent felon.

In a decision and order dated January 3, 2000, this court denied the motion. The court held that defendant's trial counsel was not ineffective and defendant was properly adjudicated a persistent felony offender. Defendant applied, in the Appellate Division, Second Department for permission to appeal the order of this court, denying his motion. On April 6, 2000, the Appellate Division denied the application.

Defendant now makes this motion to vacate of conviction and maintains that he was denied effective assistance of

counsel, inter alia, on the following grounds: defense counsel failed to make a record of defendant's concerns that he felt the Wade hearing minutes were tampered with; defense counsel failed to elicit testimony from Officer Sweezy regarding his false testimony and false police reports; defense counsel failed to cross-examine Officer Cerchero as to false testimony and false police reports, and defense counsel's summation was inadequate.

There is not merit to defendant's arguments.

A motion to vacate a judgment of conviction must be denied if there are sufficient facts on the record to have allowed adequate review of the issue on direct appeal but no such appellate determination occurred because defendant unjustifiably failed to raise the issue on appeal (CPL 440.10[2][c]). A motion to vacate a judgment of conviction should not be "employed as a substitute for direct appeal" when defendant was in a position to raise the issue on appeal, but failed to do so (People v Cooks, 67 NY2d 100, 103).

Section 440.10(3)(c) of the CPL provides that the court may deny a motion to vacate a judgment when a previous motion was made and defendant was in a position to raise the ground or issue underlying the present motion but did not do so. Defendant, in his prior motion to vacate his judgment of conviction, could have raised the issues.

A contention of ineffective assistance of counsel requires proof of true ineffectiveness rather than mere

disagreement with strategies or tactics (People v Benn, 68 NY2d 941). Defendant has not shown that he had ineffective assistance of counsel at his trial. Counsel's representation of defendant did not prejudice the defense or defendant's right to a fair trial (see, People v Benevento, 91 NY2d 708; People v Flores, 84 NY2d 184; People v Hobot, 84 NY2d 1021; People v Baldi, 54 NY2d 137).

Defendant is attempting to use this motion to vacate the judgment of conviction as a method of appeal. However, this motion may not be used as a vehicle for an additional appeal (People v Howard, 12 NY2d 65, cert denied 374 US 840; People v Shapiro, 3 NY2d 200; People v Balsamo, 11 AD2d 1040).

Based on the foregoing, the motion to vacate the judgment of conviction is denied.

Order entered accordingly.

The clerk of the court is directed to mail copies of this decision and order to the defendant at his place of incarceration and to the District Attorney.

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ROBERT CHARLES KOHM, J.S.C.

Short Form Order

SUPREME COURT - STATE OF NEW YORK
CRIMINAL TERM - PART K-8 - QUEENS COUNTY
125-01 QUEENS BLVD. KEW GARDENS, NY 11415

P R E S E N T:

HON. ROBERT CHARLES KOHM
Justice

_____		X
THE PEOPLE OF THE STATE OF NEW YORK	:	
	:	Ind. No. <u>4193/96</u>
-against-	:	
	:	Motion <u>VACATE JUDGMENT OF</u>
RAMON RAMOS,	:	<u>CONVICTION</u>
	:	
Defendant.	:	
	:	
_____		X

The following papers numbered
1 to 5 submitted in this motion.

RAMON RAMOS, PRO SE
For The Motion

HON. RICHARD A. BROWN, D.A.
BY: JEANNETTA ALEXANDER, ADA
Opposed

	Papers Numbered
Notice of Motion/Affidavit _____	<u>1 - 2</u>
Affirmation in Opposition _____	<u>3</u>
Reply and Memorandum of Law _____	<u>4 - 5</u>

Upon the foregoing papers, and in the opinion of the court herein, defendant's motion to vacate the judgment of conviction is denied. See the accompanying memorandum.

GLORIA D'AMICO
Clerk

Date: January 8, 2001

ROBERT CHARLES KOHM, J.S.C.