

**People v Anderson**

2006 NY Slip Op 30697(U)

August 7, 2006

Sup Ct, NY County

Docket Number: 3303/05

Judge: Lewis Bart Stone

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 39

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|                                     |   |                |
|-------------------------------------|---|----------------|
| THE PEOPLE OF THE STATE OF NEW YORK | : |                |
|                                     | : |                |
| -against                            | : | INDICTMENT NO. |
|                                     | : | 3303/05        |
| BENJAMIN ANDERSON                   | : |                |
|                                     | : | DECISION       |
| Defendant.                          | : |                |

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Hon. Lewis Bart Stone

Defendant Benjamin Anderson (“Anderson”) moved pro se on May 4, 2006, pursuant to CPL §§330.30, 330.40 and 330.50 and again pro se, in May 9, 2006, pursuant to CPL §440.10(1)(a) to vacate his judgment of conviction. His motion under various subdivisions of CPL §330, which authorize pre-sentence motions was made after sentence was imposed on April 24, 2006, and is therefore untimely and accordingly cannot be considered by this Court. His motion under CPL §440.10(1)(a), however, was timely and must be considered by this Court. Such motion seeks to set aside his judgment of conviction on the grounds of ineffective assistance of counsel, the deprivation of his right to attend the Grand Jury and objections to aspects of preliminary hearings in the case. The People oppose the motion.

Anderson's conviction emanated out of an incident on June 20, 2005, when Anderson followed two men onto a subway platform, grabbed one of them, and demanded money. When one refused, Anderson put his hand under his shirt and stated to the other: "give me your money or I'll blow your brains out," whereupon such victim gave Anderson money. Anderson fled the station and was arrested the next day after being identified by the victim from whom he took the money. Anderson was indicted for one count of Robbery in the First Degree and one count of Attempted Robbery in the First Degree. PL §160.15(4). Prior to submitting the case to the jury, upon application of defense counsel, the Court reduced the count of Attempted Robbery in the First Degree and submitted a lesser included offense of Attempted Robbery in the Third Degree to the jury. On April 10, 2006, the jury found Anderson guilty of Robbery in the First Degree and Attempted Robbery in the Third Degree. On April 24, 2006, Anderson was sentenced to an indeterminate sentence of twenty years to life on his conviction of First Degree Robbery, as a persistent violent felon, and an indeterminate sentence of one and one-half years to three years on his conviction of Attempted Robbery in the Third Degree, such sentences to run concurrently to each other.

CPL §440.10 provides a remedy for errors not reflected in the record and not known at the time of judgment that would, as a matter of law, undermine the

conviction. However, the provision was not designed as a substitute for a direct appeal. People v. Harris, 109 AD2d 351 (2d Dept. 1985), app denied, 66 NY2d 919 (1986); See CPL §440.10(2). Moreover, the court must deny a motion to vacate judgment when “...sufficient facts appear on the record...to have permitted...adequate review of the ground or issue raised upon the motion.” CPL §440.10(2)(c). Thus, claims of ineffective assistance of counsel which rest on information outside the record should be raised by way of a motion to vacate judgment, while such claims which can be resolved on the trial record are properly reviewed on direct appeal. See People v. Brown, 45 NY2d 852 (1978); People v. Jones, 55 NY2d 771 (1981); See People v. Orr, 240 AD2d 213 (1<sup>st</sup> Dept. 1997), app denied 90 NY2d 942.

CPL §440.10(3)(a) permits a court to deny a motion to vacate a judgment without a hearing if a defendant could have readily, with due diligence, placed on the record before sentencing sufficient facts to provide an adequate basis for appellate review. People v. Friedgood, 58 NY2d 467 (1983); People v. Berezansky, 229 AD2d 768 (3<sup>rd</sup> Dept. 1996).

Anderson’s claims are contained in a “form” motion in which blanks for dates and reasons for the motion have been filled in. His claims are solely based on his statements in the motion that:

Whereas, the judgment should be vacated because of fraud, and ineffective counseling, (772C) Penal Law and defendant was not presented in before the Grand Jury and did not sign any waiver at this period. The defendant was not also entitled to attend the preliminary hearing, and was also a violation of defendant's rights.

The Court must deny this motion both procedurally and on the merits. As Anderson provides no sworn affidavits or exhibits to support his claims, they are insufficient to form the basis of relief. As the claims (other than the claim of insufficient counsel) must have been clearly known to him and not placed on the record prior to the sentence, they have been waived.

While the right to effective assistance of counsel is guaranteed by both the Federal and State Constitutions, an unsuccessful result at trial does not automatically indicate ineffective representation. U.S. Const., 6<sup>th</sup> Amend; N.Y. Const., Art. I, §6. Generally, the question of effective representation "is satisfied when the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal the attorney provided meaningful representation." People v. Baldi, 54 NY2d 137 (1981). Defendant has the burden to show that the representation was less than meaningful or that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 US 668 (1984). Anderson has failed to


satisfy this burden.

The Court finds that Anderson's claim of insufficient counsel lacks merit. In reviewing the record, the Court finds that counsel's representation was both meaningful and effective. Counsel filed omnibus motions seeking suppression of various statements and identification, as well as examination of the Grand Jury minutes. This Court held pre-trial hearings where counsel made numerous objections and examined the witnesses extensively. After the People's direct case, counsel successfully moved this Court to submit to the only the lesser included charge of Attempted Robbery in the Third Degree, a non-violent class E felony instead of one count of Attempted Robbery in the First Degree, a violent class C felony. The Court must also deny the motion to vacate judgment on this ground since Anderson has provided no grounds to support his claim of ineffective assistance of counsel other than the statement of such claim. His claim that he "was not presented in before the Grand Jury" and "did not sign any waiver," while true, is irrelevant. Anderson served no notice at arraignment or any other time that he wished to testify pursuant to CPL §190.50, nor did he ever place on the record any request to do.

Accordingly, the motion is denied.

This opinion constitutes the decision and order of the Court.

DATED: AUGUST 7, 2006  
NEW YORK, NEW YORK

A handwritten signature in cursive script, reading "Lewis Bart Stone", written in black ink. The signature is fluid and extends to the right with a long horizontal flourish.

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Hon. Lewis Bart Stone  
Justice of the Supreme Court