

People v West

2007 NY Slip Op 30602(U)

April 10, 2007

Supreme Court, Kings County

Docket Number: 0000877/1996

Judge: Cheryl E. Chambers

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM, PART 18

-----X
THE PEOPLE OF THE STATE OF NEW YORK,

-against-

DECISION AND ORDER
Kings County
Indictment Number 877/96

KHALID WEST,

Defendant.

-----X
CHERYL E. CHAMBERS, J.S.C.

Pursuant to CPL 440.10, defendant moves pro se to vacate the judgment of conviction entered against him on March 18, 1997 upon a jury verdict. Defendant's motion is denied because it is procedurally barred.

FINDINGS OF FACT

At approximately 4:40 p.m. on January 17, 1996, during a confrontation outside an apartment building at 390 Sutter Avenue in Brooklyn, defendant shot at Lloyd and Brian Slowe, injuring Brian. For these acts, defendant was charged by Kings County Indictment Number 877/96 with two counts each of attempted murder in the second degree, attempted robbery in the first degree, attempted assault in the first degree, assault in the second degree, and endangering the welfare of a minor, and one count each of reckless endangerment in the first degree, and criminal possession of a weapon in the second and third degrees. A jury found defendant guilty of two counts of attempted murder, and of criminal possession of a weapon in the second degree.

On March 18, 1997, defendant was sentenced, as a second felony offender, to concurrent prison terms of 25 years on the attempted murder counts and 15 years on the possession of a weapon count. Defendant appealed from the judgment of conviction, claiming that he was denied

his right to be present at sidebar questioning of potential jurors and that his right to present a defense was violated by the court's preclusion of a photograph of someone defendant claimed was the shooter. The judgment of conviction was affirmed (*People v West*, 277 AD2d 263 [2d Dept 2000]), and leave to appeal to the Court of Appeals was denied (*People v West*, 96 NY2d 740 [2001]).

By his present motion defendant seeks an order vacating the judgment of conviction on the ground that his conviction of two counts of attempted murder in the second degree violated the Double Jeopardy Clauses of the New York State and United States Constitutions. He contends that because both counts were "based on the same transaction and sufficiently related," prosecution on the second count was barred, citing *Brown v Ohio*, 432 US 161, 169 (1977). He states that he "relies on the record." Defendant also contends that both counts must be dismissed on a ground that is not intelligible.

CONCLUSIONS OF LAW

A motion to vacate a judgment of conviction is properly denied without a hearing when defendant fails "to sustain his burden of proof that issues of fact outside the record existed sufficient to entitle him to relief pursuant to CPL 440.10" (*People v Crippen*, 196 AD2d 548 [2d Dept 1993], *lv denied* 82 NY2d 848 [1993]). Here, defendant has not alleged any nonrecord facts. He admittedly "relies on the record."

Moreover, CPL 440.10 (2) (c) mandates denial of a motion to vacate a judgment when:

[a]lthough sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon an 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 . . . raise such ground or issue upon an appeal actually perfected by him.

“The purpose of [this] provision is to prevent CPL 440.10 from being employed as a substitute for direct appeal when defendant could readily have raised [an issue] on appeal but failed to do so (CPL 440.10[2][c]) [citations omitted]” (*People v Cooks*, 67 NY2d 100, 103 [1986]).

Defendant’s claim is based on facts in the record; the claim could have been raised on direct appeal yet defendant chose not to do so. Defendant has offered no justification or explanation for his failure to raise the issue on direct appeal.

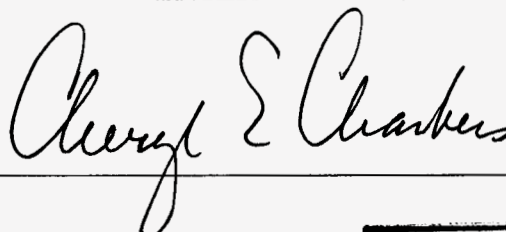
For the foregoing reasons, defendant’s motion is denied.

This constitutes the decision and order of the court.

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, NY 11201 for a certificate granting leave to appeal from this determination. This application must be made within thirty days of service of this decision. Upon proof of financial inability to retain counsel and to pay the costs and expenses of the appeal, the defendant may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Application for poor person relief will be entertained only if and when permission to appeal or a certificate granting leave to appeal is granted (22 NYCRR 671.5).

Dated: April 10, 2007

ENTER



Cheryl E. Chambers

