

People v Bailey

2007 NY Slip Op 30608(U)

April 7, 2007

Supreme Court, Kings County

Docket Number: 0008147/2001

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 8147/01

LOUIS BAILEY,

Defendant.

-----X

CHERYL E. CHAMBERS, J.S.C.

Defendant moves, pursuant to CPL 440.20, for an order setting aside the sentence of twelve years imprisonment imposed on March 27, 2003 upon his conviction of criminal possession of a weapon in the second degree. He also seeks to be resentenced as authorized upon a conviction of criminal possession of a weapon in the third degree. He contends that the sentence imposed was unauthorized because the People did not prove his guilt of criminal possession of a weapon in the second degree by legally sufficient evidence. Defendant's motion is denied because it is procedurally barred.

STATEMENT OF FACTS

Defendant was charged by Indictment Number 8147/01 with attempted murder in the second degree, assault in the first degree, and criminal possession of a weapon in the second degree. The People alleged that on October 18, 2001, defendant shot Eric Smith in the chest, groin, and thigh, using a .45 caliber semi-automatic pistol. Defendant admitted shooting Smith, but claimed he was justified. Defendant surrendered the weapon used in the shooting to the police.

At trial, defendant was acquitted of attempted murder in the second degree and assault in the first degree, and convicted of criminal possession of a weapon in the second degree. On March 27, 2003, defendant was sentenced to twelve years imprisonment.

Defendant appealed his conviction on the ground, *inter alia*, that, in light of the acquittals, the verdict was repugnant, and that, therefore the evidence of his guilt was legally insufficient. The Appellate Division affirmed the judgment of conviction, ruling that the evidence was legally sufficient to support his conviction (*People v Bailey*, 19 AD3d 431 [2d Dept 2005]). Leave to appeal to the Court of Appeals was denied (*People v Bailey*, 5 NY3d 785 [2005]).

Defendant now moves to set aside the sentence imposed on the ground that it was unauthorized because the People did not prove his guilt of criminal possession of a weapon in the second degree by legally sufficient evidence. He argues that, in light of the acquittals, the jury necessarily found that he did not possess the weapon with intent to use it unlawfully; consequently, the intent element of criminal possession of a weapon in the second degree was not proven by legally sufficient evidence. He also seeks to be resentenced to a term of imprisonment authorized for conviction of criminal possession of a weapon in the third degree.

CONCLUSIONS OF LAW

CPL 440.20 (1) provides, in relevant part, that “[a]t any time after the entry of a judgment, the court in which the judgment was entered may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law.” “Collateral relief on matters leading to the entry of the conviction – plea or verdict – is to be obtained by motion to vacate judgment under CPL § 440.10” (Preiser, Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 440.20, at 9).

The sentence imposed was authorized by Penal Law 60.05 (4) and 70.02 (3) (b) upon a conviction of criminal possession of a weapon in the second degree, a class C violent felony offense. Defendant does not allege any illegality in the imposition of the sentence, nor does he allege that it is otherwise invalid as a matter of law. Rather, his complaint is with the verdict. Therefore, defendant's motion to set aside the sentence pursuant to CPL 440.20 is denied.

Construing defendant's motion as one to vacate the judgment pursuant to CPL 440.10 does not change the result. A motion to vacate judgment must be denied when the ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment (CPL 440.10 (2) (a); *People v Shih Wei Su*, 267 AD2d 260 [2d Dept 1999], *lv denied* 94 NY2d 925 [2000]; *People v Baxter*, 262 AD2d 1068 [4th Dept 1999] *lv denied* 93 NY2d 1014 [1999]). Here, defendant claimed on direct appeal that in light of the acquittals, the verdict was repugnant, and that, therefore the evidence of his guilt was legally insufficient. The Appellate Division ruled on the merits of his claim, holding that the evidence was legally sufficient. Therefore, defendant's motion must be denied.

To the extent defendant's claim differs from the claim he raised on direct appeal in any detail, CPL 440.10 (2) (c) mandates denial of the motion. The statute provides, in relevant part, that a motion to vacate a judgment must be denied 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 could have framed the issue on direct appeal as he has on this motion. Therefore his motion must be denied.

For 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 7, 2007

ENTER

Cheryl S. Chambers

J.S.C.

ENTERED
APR 6 2007
NANCY T. SUNSHINE
COUNTY CLERK