

People v Mendoza

2007 NY Slip Op 30661(U)

March 21, 2007

Supreme Court, New York County

Docket Number: 0005860/1998

Judge: Lewis Bart Stone

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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- : DECISION

ANTONIO MENDOZA : Ind. 5860/98

Defendants. :

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Lewis Bart Stone, J:

Defendant Antonio Mendoza ("Mendoza") moves pro se pursuant to CPL §440.10 to vacate his judgment of conviction. Mendoza was convicted, after a jury trial, of Burglary in the Second Degree, a violent felony, and Criminal Possession of Stolen Property in the Fifth Degree. On March 23, 2000, the Honorable Budd G. Goodman sentenced Mendoza as a mandatory persistent felony offender to concurrent indeterminate prison terms of twenty years to life on each the Burglary count and one year on the Stolen Property count. On his direct appeal, Mendoza claimed that the procedures used to adjudicate him a persistent violent felony offender were constitutionally deficient, and that the sentence was excessive. The Appellate Division affirmed the conviction, holding in part that the trial court properly exercised its discretion in sentencing the defendant as a mandatory persistent felon.

People v. Mendoza, 293 AD2d 326 (1st Dept. 2002), lv. denied. 98 NY2d 678 (2002).

On June 2, 2004, Mendoza filed a CPL §440.20 motion seeking to set aside the 20-year sentence, requesting that he be sentenced as a violent predicate felon as opposed to a mandatory persistent violent felon, and also seeking an order for an investigator to find witness and also requesting for an evidentiary hearing. That motion was denied by the Judge Goodman on August 11, 2004.

The instant motion seeks to vacate the judgment of conviction on the grounds that the indictment was defective in part because the date the indictment was issued was different than the date that the grand jury heard evidence as well as other procedural errors. Mendoza also requests that the Court assign an investigator to locate witness and requests an evidentiary hearing.

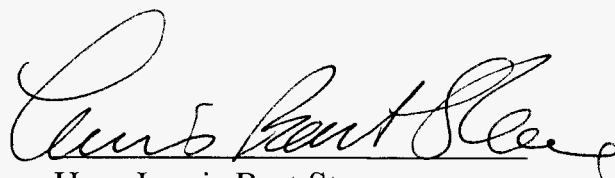
Mendoza's motion must be denied. CPL §440.10 provides a remedy for errors not reflected in the record and not known at the time of judgment that would, as a matter of law, undermine the conviction. However, the provision was not designed as a substitute for a direct appeal. People v. Harris, 109 A.D.2d 351 (2d Dept. 1985), app. den., 66 N.Y.2d 919 (1986). See, CPL §440.10(2). A trial court must deny a motion to vacate where "although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon 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 take or perfect an appeal during the prescribed period." CPL §440.102(2)(c). Mendoza could have raised these grounds in his appeal but failed to do so.

Mendoza also claims that his indictment contained procedural errors and inconsistencies in form and on these grounds the conviction should be set aside. However, Mendoza provides no support for these claims and the Court denies the motion on the grounds that the moving papers are unsupported by affidavit or other evidence. See CPL §440.30 (4). Mendoza's request for an investigator is also denied. Accordingly, the motion to vacate judgment is denied.

This constitutes the Decision and Order of the Court.

DATED: MARCH 21, 2007
NEW YORK, NEW YORK

A handwritten signature in black ink, appearing to read "Lewis Bart Stone", written in a cursive style.

Hon. Lewis Bart Stone
Justice of the Supreme Court