

**People v Frazier**

2007 NY Slip Op 31008(U)

April 27, 2007

Supreme Court, Kings County

Docket Number: 0010815/1994

Judge: John G. Ingram

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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF KINGS: CRIMINAL TERM, PART 21

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 THE PEOPLE OF THE STATE OF NEW YORK, DECISION AND ORDER

-against-

Indictment No. 10815/94

BRENT FRAZIER,

Defendant,

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Ingram, J.

Defendant stands convicted, after jury trial in Supreme Court, Kings County on May 3, 1995 of six counts of Robbery in the Second Degree, two counts of Robbery in the First Degree, Criminal Possession of Stolen Property in the Fifth Degree, Assault in the Second Degree and two counts of Criminal Possession of a Weapon in the Fourth Degree. On April 8, 1998, Defendant was sentenced as a second violent felony offender, to an indefinite prison term of ten to twenty years for each of two counts of Robbery in the First Degree and seven and one-half to fifteen years on each of the three counts of Robbery in the Second Degree. Said five counts were to run consecutively.

In addition, Defendant was sentenced to seven and one-half to fifteen years on each of the remaining counts of Robbery in Second Degree. He also was sentenced to a prison term of one year on the count of Criminal Possession of Stolen Property, three and one-half to seven years on the count of Assault in the Second Degree, and one year on each of the counts of Criminal Possession of a Weapon in the Fourth Degree. These terms ran concurrently to each other and to the consecutive terms. Since his conviction, Defendant has pursued a myriad of post conviction remedies.<sup>1</sup>

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<sup>1</sup> Defendant was sentenced on May 15, 1995, however, the sentencing court mistakenly had sentenced Defendant on only five of the six convictions. Therefore, the Appellate Division, Second Department, vacated the sentence for robbery in the second degree and remitted the case

### The Motion Before the Court

In a *pro se* motion dated June 20, 2006, Defendant moved to have his sentence set aside pursuant to C.P.L. § 440.20 on the following grounds, that: 1) he was unlawfully adjudicated a second violent felony offender because the predicate conviction, Attempted Robbery in the Second Degree, was not a violent felony offense; and, 2) while he informed the court that he was challenging the constitutionality of his prior conviction, a hearing was never conducted as to Defendant's assertions therein. In papers dated September 8, 2006, the People opposed. On September 18, 2006, Defendant filed reply papers. In a Decision and Order dated November 3,

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for resentencing on those counts. *People v. Frazier*, 237 A.D.2d 618 (2d Dept. 1997).

On February 7, 2000, the Appellate Division denied Defendant's motion to reduce his sentence on the ground that it was excessive and affirmed the sentence. *People v. Frazier*, 269 A.D.2d 885 (2d Dept. 2000). On April 13, 2000, the Court of Appeals denied leave to appeal. *People v. Frazier*, 94 N.Y.2d 947 (2000)(Simons, J.).

Defendant sought a writ of *habeas corpus* in the United States District Court for the Eastern District of New York, which was denied on February 5, 2004. (Amon, U.S.D.J.). On January 13, 2005, Defendant's motion to the U.S. Court of Appeals for a Certificate of Appealability was denied.

By papers dated October 8, 1999, Defendant filed *pro se* motion for a writ of error *coram nobis* in the Appellate Division, claiming ineffective assistance of appellate counsel. By decision and order, dated December 27, 1999, the Appellate Division denied Defendant's motion. *People v. Frazier*, 267 A.D.2d 470 (2d Dept. 1999).

By papers dated August 29, 2000, Defendant filed a *pro se* motion for a writ of error *coram nobis* in the Appellate Division again claiming ineffective assistance of appellate counsel. The Appellate Division again denied Defendant's motion on December 4, 2000. *People v. Frazier*, 278 A.D.2d 243 (2d Dept. 2000).

By papers dated December 8, 2004, Defendant again filed a *pro se* motion for a writ of error *coram nobis* in the Appellate Division claiming his appellate attorney had a conflict of interest. The Appellate Division denied Defendant's motion on April 4, 2005. *People v. Frazier*, 17 A.D.3d 381 (2d Dept. 2005).

2006, this Court denied Defendant's first allegation that he was unlawfully adjudicated a second violent felony offender on the ground that the predicate conviction, Attempted Robbery in the Second Degree, was not a violent felony. This Court, however, did grant Defendant's request for a hearing to challenge the constitutionality of his prior conviction which was used as the basis for the second violent felony offender adjudication. This Court conducted the hearing on March 21, 2007 and Defendant testified on his own behalf. Subsequent to the hearing, defense counsel submitted papers moving for an order vacating his predicate conviction, Attempted Robbery in the Second Degree, on the ground that it was not voluntary because Defendant was not informed that he was pleading guilty to a violent felony.

#### The Court's Decision

Section 400.21 of the Criminal Procedure Law sets forth the procedure to be followed for determining whether a defendant is a second felony offender. This section places upon the People the burden of proving the existence of the previous felony conviction. C.P.L. § 400.21 (7)(a). Once the prior conviction has been established, the defendant must demonstrate by substantial evidence that the prior conviction was unconstitutionally obtained. C.P.L. § 400.21(7)(b); People v. Harris, 61 N.Y.2d 9, 16 (1983).

At the hearing, the People produced court records establishing that Defendant pled guilty in 1991 to a violent felony offense, Attempted Robbery in the Second Degree. Defendant took the stand on his own behalf. He testified that he did not know Attempted Robbery in the Second Degree was a violent felony, therefore, his plea was not a voluntary and intelligent decision. On cross-examination, however, Defendant admitted that his attorney was present at each court date, he was never denied access to his attorney, nor did he ever complain about the competency of his

attorney. In addition, even though Defendant testified that had he known that he pled to a violent felony offense, he would have taken his chances at trial, he admitted that his light sentence of six months in jail and five years probation was a factor that was involved in his decision to plead guilty. Defendant did not produce any other evidence to support his allegations. Therefore, this Court finds that Defendant did not sustain his burden of establishing that his 1991 conviction was obtained in violation of his constitutional rights. People v. Licea, 309 A.D.2d 947 (2d Dept. 2003)(reversing Supreme Court's holding that defendant's prior conviction was unconstitutionally obtained because of defendant's failure to produce evidence, such as affidavits from judge, prosecutor or defense counsel.)

Furthermore, even if the court did not advise Defendant of the possible adverse future consequences of this plea, his 1991 conviction is still deemed constitutional. The Second Department has found that it is not necessary to inform the defendant of the potential consequence that the current conviction can be used for enhanced punishment. People v. Outer, 197 A.D.2d 543 (2d Dept. 1993)(holding that defendant's plea was not rendered involuntary because court did not advise her of future enhanced punishment); People v. Tavare, 117 A.D.2d 829 (2d Dept. 1986)(holding that plea is constitutional even when defendant is not informed of potential for enhanced punishment). Accordingly, Defendant's motions are denied.

This opinion constitutes the Decision and Order of this Court.

Dated: April 27, 2007  
Brooklyn, New York

