

People v Smith

2007 NY Slip Op 31379(U)

April 13, 2007

Supreme Court, New York County

Docket Number: 0005584/2005

Judge: Lewis Bart Stone

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notice of Smith's intention to appear as a witness before the grand jury. Subsequently, counsel informed the Assistance District Attorney by telephone that he was withdrawing the notice. Approximately two weeks later, in Part F in Criminal Court, counsel, in the presence of Smith, informed the court that he had withdrawn "cross-notice." Smith was subsequently indicted for Criminal Possession of a Controlled Substance in the Third Degree, Penal Law §220.16(12).

On or about November 29, 2005, Smith's newly retained attorney, Ronald Hart, subsequently filed a motion to dismiss the indictment on the grounds that Smith was not accorded an opportunity to appear and testify before the Grand Jury. Smith argued in that motion that his rights were violated pursuant to CPL §190.50 and also sought to dismiss the indictment "in the interest of justice" on the theory that original counsel's unauthorized withdrawal of "cross-notice" amounted to ineffective assistance of counsel. On February 1, 2006, the Honorable Gregory Carro denied Smith's motion to dismiss, finding that Smith's rights under CPL§190.50 had not been violated and that his Sixth Amendment right to effective assistance of counsel had also not been violated by counsel's actions.

Subsequently, this Court held a hearing on Smith's motion to suppress the cocaine found on his person. By decision dated June 23, 2006, the motion was denied. Smith subsequently plead guilty as a predicate felon to the indicted charge. In consideration of the plea, Smith executed a waiver appeal on the record and in

writing, and was promised a sentence of five and one half years with one and one half years of post release supervision, which he received on August 7, 2006. Smith has filed a notice of appeal.

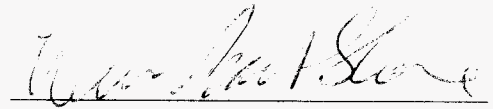
CPL §440.10(3)(b) permits a court to deny a motion to vacate a judgment without a hearing if a defendant raised the same issue in a prior motion. The motion before Judge Carro raised the same grounds as in the instant motion and was denied. Smith is therefore barred from re-arguing this claim.

CPL §440.10 also 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 “the judgment is, at the time of the motion, appealable or pending appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal.” CPL§440.10(2)(b). Thus, claims of ineffective assistance of counsel which rest on information in the 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 (1st Dept. 1997), app denied 90 NY2d 942. Sufficient facts concerning Smith’s claims appear on the record and may be reviewed on appeal.

Accordingly, the motion is denied.

This opinion constitutes the Decision and Order of the Court.

DATED: APRIL 13, 2007
NEW YORK, NEW YORK

A handwritten signature in cursive script, appearing to read "Lewis Bart Stone", written over a horizontal line.

Hon. Lewis Bart Stone
Justice of the Supreme Court