

People v Brown

2007 NY Slip Op 31410(U)

May 31, 2007

Supreme Court, New York County

Docket Number: 0004247/2003

Judge: Lewis Bart Stone

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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

- against- : DECISION

ANTHONY BROWN, :
 : Ind. No. 4247/03
Defendant. :

----- X

For the People: Karen Edelman, Esq.

For the Defendant: Pro se

Lewis Bart Stone, J:

Defendant Anthony Brown, ("Brown"), moves pursuant to CPL §§440.10 and 440.20 to set vacate his conviction and sentence. The People oppose the motion. On January 29, 2004, following a jury trial, Brown was found guilty of Robbery in the Second Degree (P.L. §160.10(1)(2)and on November 5, 2004, he was sentenced as a second felony offender to a determinate sentence of fifteen years. The conviction was affirmed, People v. Brown, 32 AD3d 737 (1st Dept., 2006); lv. to app den, 8 NY3d 844 (2007).

Brown now claims that he was improperly sentenced as a second felony offender. He also claims that his conviction should be set aside based on ineffective

assistance of counsel and fraud on the part of the prosecution.

This conviction relates to Brown's robbery at a grocery store at 81st Street and Third Avenue in Manhattan. At trial, Ms. Yee Jin Kim, the proprietor of the store, testified that while working there on July 29, 2003, she saw Brown enter the store carrying a shopping bag. Brown went to the salad bar, filled a container with food, and then took a soda from a shelf. Brown left the store without paying whereupon Ms. Kim followed him out of the store.

Ms. Kim followed Brown out into the street and yelled at him to stop, pay for the items and to allow her to look in the bag. Brown refused and told her to "get the fuck away." Brown walked away, threatening to kill Ms. Kim; Ms. Kim continued to follow Brown for about a block. An eyewitness, Ms. Buono, testified that Brown struck Ms. Kim with his arm and with a closed fist, which knocked Ms. Kim backward. Ms. Kim said she felt dizzy and felt as if she had been hit "by a huge log." Brown struck her a second and third time in the same manner. Ms. Kim stated that when she was struck the third time, she felt pain in her head, dizzy, and like it was "an electric shock in her head." She had to lean on a car to prevent from falling and could not walk. Ms. Buono also stated that she observed Ms. Kim crying, sweating and with a flushed face. An ambulance treated Ms. Kim at the scene but she did not go to the hospital. She did not return to work that day but did return the next day. Ms.

Kim took “over the counter” medication for a headache and pain and had stiffness to her neck which lasted approximately one week. Brown was apprehended a short time later after taking a taxicab from the scene.

CONCLUSIONS OF LAW

Brown asserts that his sentence is illegal because he is not a second felony offender, that his sentence should be set aside, and that he should be sentenced to less time.

On August 20, 2003, at Brown’s Supreme Court arraignment, the People filed a statement of predicate felony conviction (“predicate statement”) which reflected that Brown had been previously convicted of the felony of Attempted Robbery in the Third Degree, a class E non-violent felony. That statement described in detail Brown’s incarceration and any period of time that had tolled during his incarceration. Prior to trial, the People offered a plea deal to the only count of the indictment, with a recommendation of five years incarceration, the lowest possible sentence on the plea to that charged count. That offer was rejected.

After the jury verdict and before sentencing, Brown was arraigned on the predicate statement, whereby the entire statement was read to him on the record with his counsel present, without objection. Therefore this motion must be denied as the

record is quite clear that Brown's status as a predicate was established on the record and without objection.

Brown argues that the predicate crime of Attempted Robbery in the Third Degree is not a felony but a misdemeanor, but provides no facts or law to support this claim. In 1989, when Brown was convicted of the Attempted Robbery in the Third Degree, Robbery in the Third Degree, as it is today, was a Class D felony, and an attempt to commit such crime was classified as a Class E felony, as it is today. Brown's claim is therefore incorrect.

Brown's further claim that he is not a second felony offender pursuant to CPL §70.06 because he did not receive a sentence of one year is also misplaced. Brown received a sentence of six months and five years probation for the 1989 Attempted Robbery conviction, although such conviction carried a minimum indeterminate sentence of no jail and a maximum sentence of one and one third to four years. For the purpose of determining whether a person is a second felony offender, CPL § 70.06 provides that the conviction must be for an offense for which a sentence of more than one year is authorized, irrespective of whether such sentence was imposed. Therefore, despite receiving a six-month sentence, that previous conviction can serve as the basis for Brown's second felony offender status.

Brown's claims that his counsel was ineffective is not supported by the record and is made without any sworn allegations of fact. Indeed, Brown's objection that all three of his attorneys failed to agree with him that he was not a second felony offender does not support the claim of ineffective counsel. A review of the pre-trial motions as well as the trial record indicate that Brown received effective assistance of counsel under both the State and Federal Constitutions at all stages of the proceeding.

Brown's final claim that the People committed fraud in the case also has no basis in fact. The claim is based on the predicate statement, as described above, of which Brown was on notice and voiced no objection. There is no evidence that this statement is incorrect or fraudulent, and Brown's motion to set aside the conviction on this ground is also denied.

The motion is denied. This constitutes the Decision and Order of the Court.

DATED: MAY 31, 2007
NEW YORK, NEW YORK



Hon. Lewis Bart Stone
Justice of the Supreme Court