

People v Thomas

2007 NY Slip Op 31573(U)

June 7, 2007

Supreme Court, Kings County

Docket Number: 0005244/1997

Judge: Cassandra M. Mullen

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 KINGS: CRIMINAL TERM PART 11**

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

DECISION

-against-

Indictment # 5244/97
5544/97 and 8516/97

Judge Cassandra M. Mullen

FRANK THOMAS

Dated: June 7, 2007

Defendant
-----X

FINDINGS OF FACT

The Pro Se Defendant, Frank Thomas, is moving to vacate the judgement of conviction, pursuant to CPL 440.10. Mr. Thomas pled guilty to Burglary in the 2nd Degree (on indictment number 8516-97) on October 2, 1997 before Judge Minardo. On December 19, 1997 Mr. Thomas was sentenced to an indeterminate term of 4-8 years on indictment number 8516-97 to run concurrently with 5244-97 and 5544-97.

The conviction stemmed from an arrest of Defendant on May 7, 1997. Pursuant to that arrest, Defendant gave a statement in which he confessed to breaking into a second house that February and a third house the day before the arrest.

Defendant seeks to vacate the judgement on the ground that his crime did not contain the necessary elements of Burglary in the 2nd degree. Under Penal Law §140.25 "A person is guilty of burglary in the second degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein, and when:

1. In effecting entry or while in the building or in immediate flight therefrom, he or another participant in the crime:

- a) Is armed with explosives or a deadly weapon; or
- b) Causes physical injury to any person who is not a participant in the crime; or
- c) Uses or threatens the use of a dangerous instrument; or
- d) Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; or

2. The building is a dwelling.

The defendant claims that because there was no proof that he was ever in the dwelling and because the firearm alleged to be used in the burglary was found in the backyard of the dwelling alleged to be burglarized, he could not have been found guilty of Burglary in the 2nd degree. He also seeks that the conviction be vacated on the ground that 1) He did not understand the charges; 2) He did not understand the consequences of a guilty plea; 3) Ineffective assistance of counsel; 4) Defendant was not sentenced according to guidelines.

The defendant committed this armed violent felony while out on parole for two prior violent felony convictions.

CONCLUSIONS OF LAW

I. Claim that Evidence Cannot Support Charge

As proof of defendant's claim that his admission and plea were insufficient to support the charge of burglary in the 2nd degree, defendant attached his written statement to the police. Said statement, which is dated May 7, 1997, states "Today Reggie had told me about this house on St. John St. I said I don't know then I told him I just going to watch out that's it so he open the basement door and I jumped down into the basement, he ran up stairs and grabbed a cable box, games, phone, a Tucksetoe and I standed there and watch him take that stuff. But when the cops

came I ran throw the back yard and came out on Lincoln Pl. I told the cops that I was wrestle with one of the suspects but he got away. (note: Reggie ran in the house with the gun) then once he came inside he had gave it to me that how I lost the gun in the backyard.”

Defendant’s guilty plea forfeited his claim regarding the factual predicate for the burglary conviction. *People v Lucas*—NYS 2d—WL 738485 (N.Y.A.D. 1 Dept.) 2007; *People v Taylor* 65 NY2d 1 (1985); *People v Mendez* 25 AD3d 346 (2006) .

II. Claim that Defendant Was Not Sentenced According to Guidelines

A court’s jurisdiction to entertain a motion pursuant to CPL 440.10 must be specifically based upon at least one of the eight grounds set forth in that section. “Neither the statute nor its predecessor, the writ of error coram nobis, provides a remedy for a defect which appears on the record.” *People of the State of New York v Cooks* 113 AD2d 975 (1985) citing *People v Donovan*, 107 AD2d 433. “Pursuant to CPL 440.10(2)c, a court must deny a post judgement motion to vacate a conviction when sufficient facts appear in the record so that an issue may be adequately reviewed on a direct appeal and the defendant unjustifiably failed to raise the claim on appeal.” *People v Byrdsong* 234 AD2d 468 (1996). Defendant has set forth no facts in his affidavit regarding the sentencing indicating that the alleged defect regarding the sentencing does not appear on the record .

Defendant’s motion to vacate the judgement of conviction based upon alleged failure to be sentenced according to guidelines is denied.

III Claim of Ineffective Counsel Based Upon Alleged Failure to Adequately Advise Defendant of Charges and Consequences of Guilty Plea

Pursuant to 440.30(1) if a motion to vacate a judgement pursuant to section 440.10 "...is based upon the existence or occurrence of facts, the motion papers must contain sworn allegations thereof, whether by the defendant or by another person or persons. Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, ~~provided that in the latter event the affiant must state the sources of such information and the~~ grounds of such belief."

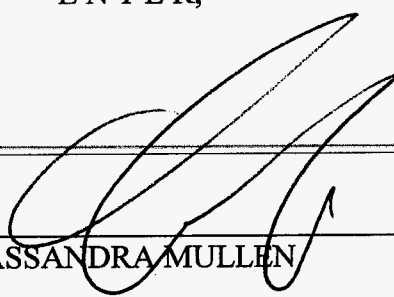
CPL 440.30(4)(b) permits a court to deny a motion to vacate a judgement without a hearing if the moving papers do not contain sworn allegations to all essential facts.

Defendants complete recitation of facts supporting his motion (aside from his claim that there is no factual basis for the burglary conviction) is as follows: "This Motion is now being submitted because defendant had no knowledge of a 440.10 motion and lacked basic knowledge of the law. Never had the opportunity to review my case in whole (all documents) because I was always given simply my "rap sheet". Until my fiancee went and looked up my case. Pulled the file and sent me a copy. From numerous assaults inflicted on defendant by different inmates at different times. Defendant's mind frame and health wasn't stable. But now I am stable and competent to file and proceed as necessary." The remainder of the defendant's motion is boilerplate recitation of cases.

Defendant fails to meet his burden under 440.30(1). There is no sworn allegation of facts supporting a claim of ineffective counsel.

Defendant's motion to set aside the verdict is denied in it's entirety.

ENTER,

A handwritten signature in black ink, appearing to be 'Cassandra Mullen', written over a horizontal line.

CASSANDRA MULLEN