

People v McCray

2007 NY Slip Op 31576(U)

June 1, 2007

Supreme Court, Kings County

Docket Number: 0008478/2005

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. 8478/2005

JOSEPH MCCRAY,

Defendant,

-----X
Ingram, J.

In a November 3, 2006 pro se motion and January 2, 2006 [sic 2007] supplemental motion, Defendant moved to vacate the judgment of conviction pursuant to C.P.L. § 440.10(1)(a), (b), (c), (d), and (f) on the following grounds, that: 1) the Court lacked jurisdiction because the indictment was defective; 2) the People committed fraud in that they introduced evidence at trial that was false and known to be false by the People; 3) Defendant was denied due process of law; 4) the People withheld Brady and Rosario material from the defense; 5) one of the People's witness threatened the jury; and 6) Defendant received ineffective assistance of counsel. In papers dated February 2, 2007, the People opposed. Based on Defendant's moving and supplemental papers, the People's papers in opposition, the trial transcript, the court file and the applicable law, this Court denies Defendant's motion in its entirety.

Background

Odis Myers and his wife purchased 1053 Flatbush Avenue, Brooklyn for thirty-two (\$32,000) thousand dollars in 1977. In February 2002, Defendant forged the names of Mr. Myers and his wife¹ and recorded the deed, holding himself out to be the owner of the property. Mr. Myers discovered

¹ In addition to Mr. and Mrs. Myers' names being misspelled on the deed by Defendant, Mr. Myers' wife, Esther Myers, was deceased at the time of the fraudulent conveyance.

the forged deed and immediately contacted his lawyer, Phillip November, and the deed was declared null and void. In 2004, Stephen Falcone purchased the property from Mr. Myers for Five Hundred and Ninety (\$590,000) Thousand dollars. Nonetheless, Defendant returned to the property after it was sold to Mr. Falcone and changed the locks to the premises. When he was questioned by NYPD Detective Steven Grafakos, Defendant claimed that Mr. and Mrs. Myers had given him the property.

On August 2, 2006, Defendant was convicted, after jury trial before this Court, of Grand Larceny in the Second Degree, Falsifying Business Records in the First Degree, Offering a False Instrument for Filing in the First Degree, two counts of Criminal Mischief in the Third Degree, two counts of Criminal Trespass in the Second Degree, and Criminal Possession of a Forged Instrument in the Second Degree. On October 26, 2006, Defendant was sentenced to a prison term of four to twelve years on the count of Grand Larceny, two and a third to seven years on the Criminal Possession of a Forged Instrument; one and a third to four years on the count of Falsifying Business Records; one and a third to four on the count of Offering a False Instrument; one and a third on each count of Criminal Mischief and one year on each count of Criminal Trespass, each to run concurrently.

The Court's Decision

C.P.L. § 440.10(1) sets forth several grounds upon which a court may vacate a judgment of conviction. However, even if Defendant raises one of these grounds, the court must still deny the motion if sufficient facts appear on the record to have permitted appellate review and there is an “unjustifiable failure to take or perfect an appeal.” C.P.L. 440.10(2)(c); see also People v. Cochrane, 27 A.D.3d 659, 660 (2d Dept. 2006); People v. Jossiah, 2 A.D.3d 877 (2d Dept. 2003), lv denied, 2 N.Y.3d 742 (2004). Only in the unusual situation, where sufficient facts do not appear on the

record, is a C.P.L. § 440.10 motion to vacate a judgment available as a means of review. People v. Cooks, 67 N.Y.2d 100 (1986).

In addition, a court may deny the motion if Defendant does not allege any ground constituting a legal basis; Defendant's allegations are either directly contradicted by the official court records and/or documentary proof; are made solely by Defendant and are unsupported by any other evidence or affidavit; or are factually and legally insufficient. C.P.L. § 440.30(4).

Defendant's first claim alleges that his conviction is void because the Court lacked jurisdiction due to a defective indictment. Defendant bases his argument on the fact that Count Three of the indictment, which accused Defendant of the crime of Offering a False Instrument for Filing in the First Degree, contained an apparent typographical error. The indictment listed the charge as Penal Law §175.10, instead of Penal Law § 175.30. The parties agreed to amend the indictment to indicate the proper Penal Law section, pursuant to C.P.L. § 200.70, which makes provisions for the amendment of an indictment with respect to defects, errors or variances from proof "relating to matters of form." C.P.L. § 200.70(1).

Defendant cites People v. Lee, 100 A.D.2d 357 (1st Dept. 1984) in order to support his argument that he was prejudiced by the amendment of the indictment, however, his interpretation of Lee is misguided. In Lee, the People attempted to amend the indictment in order to charge the defendant with Manslaughter in the First Degree instead of Murder in the Second Degree. The First Department held that this attempted amendment was "ineffective because it changed the theory of the prosecution." Lee, 100 A.D.2d at 358. In the instant matter, the amendment of the indictment was purely technical and did not change the theory of the prosecution as reflected in the evidence before the Grand Jury which filed it, therefore, this Court had jurisdiction upon which to try

Defendant. This Court also finds that Defendant's claims, as they relate to withheld Brady and Rosario material and fraudulent evidence introduced at trial, are denied pursuant to C.P.L. §440.30(1), 440.30(4)(a),(b). Defendant fails to articulate the nature of the Brady and Rosario material allegedly withheld and fails to allege sufficient facts or documentation which support his contention. C.P.L. § § 440.30(1), 440.30(4)(a),(b). Accordingly, his claim is too vague to address and should be denied because the allegations are merely conclusory and are not supported by any evidentiary facts. C.P.L. § 440.30(4)(b); People v. Session, 34 N.Y.2d 254 (1974). In addition, Defendant fails to provide any substantive basis to support his self-serving allegations that the People introduced fraudulent evidence at trial and that this evidence was known by the People to be fraudulent. In support of his allegations, Defendant proffered his sworn affidavit and various documents to establish that the People presented fraudulent evidence- a deed, mortgage, an agreement and a final order issued by Justice Laura Jacobson - at trial. This Court finds Defendant's sworn affidavit, which contains mere conclusory allegations, is wholly insufficient as factual support for Defendant's claims that his conviction was procured by fraud. C.P.L. §§ 440.30(4)(b),(d). Therefore, his motion based on these claims must be denied as well. C.P.L. § 440.30(4)(b); People v. Brown, 56 N.Y.2d 242 (1982).

Defendant also claims that Stephen Falcone, a witness for the People, mumbled something threatening while exiting the witness stand walking past the jury. Upon being informed of this incident, the Court conducted a full inquiry of each juror separately, on the record with the parties and attorneys in open court. The comment, although inappropriate, was not a threat to the jury, but was something to the effect of "put him away". The comment was heard only by two jurors and one alternate juror. After speaking with each juror individually, the jurors assured the Court that it would

not have any impact on their deliberations. The Court also gave a curative instruction to all the jurors to ignore any comment made by the witness as he left the courtroom. Additionally, this claim is procedurally barred because the facts underlying the claim are reviewable from the record or could with due diligence by Defendant have readily been made to appear on the record in a manner providing adequate basis for review on appeal. C.P.L. §440.10(2)(b),(2)(c), (3)(a). The Court also severely chastised the witness in open court out of the presence of the jury.

Defendant also moves to vacate the judgment on the grounds that he was denied his constitutional right to receive effective assistance of counsel. Defendant alleges that his lawyer provided ineffective assistance of counsel by (1) failing to effectively cross-examine witnesses and object to “fraudulent” evidence, (2) failing to object to the People’s use of an overhead screen to view documents; and (3) failing to make pre-trial motions, including a request to inspect the Grand Jury minutes.

This Court rejects this branch of Defendant’s motion and finds that defense counsel provided him with meaningful assistance throughout all proceedings. The Federal and State Constitutions guarantee the right to effective assistance of counsel. Claims of ineffective assistance of counsel are evaluated in light of counsel’s “role [of] ensur[ing] that the trial (including any preliminary proceedings) is fair.” Strickland v. Washington, 466 U.S. 668, 685 (1984). Counsel renders effective assistance when “the evidence, the law and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation.” People v. Baldi, 54 N.Y.2d 137, 147 (1981). “To prevail on a claim of ineffective assistance, defendants must demonstrate that they were deprived of a fair trial by less than meaningful representation; a simple disagreement with strategies, tactics or the scope of possible

cross-examination, weighed long after the trial, does not suffice.” People v. Flores, 84 N.Y.2d 184, 187 (1994); People v. Benn, 68 N.Y.2d 941, 942 (1986).

A review of the record demonstrates that defense counsel objected appropriately to all evidence presented by the People and effectively cross-examined the People’s witnesses. Defendant’s claim regarding his lawyer’s failure to object to the People’s use of an overhead screen is summarily denied. There were no grounds for defense counsel to object to the People’s use of the Court’s overhead projector and screen to display documents which were in evidence. In addition, sufficient facts appear on the record to permit this claim to be reviewed by direct appeal. C.P.L. § 440.10(2)(b), (c).

This Court rejects Defendant’s contention that assigned counsel provided ineffective assistance by failing to file pre-trial motions or move to inspect the Grand Jury minutes. It is well settled that “ a showing that counsel failed to make a particular pretrial motion generally does not, by itself, establish ineffective assistance of counsel.” People v. Rivera, 71 N.Y.2d 705, 709 (1988). Defendant did not establish which pretrial motion defense counsel failed to request, nor has he made the required showing that there was no strategic or legitimate explanation for counsel’s failure to request a particular hearing. Rivera, 71 N.Y.2d at 709. Furthermore, court records indicate that the Grand Jury minutes were examined by the Court and deemed to be sufficient in all respects. C.P.L. § 440.30(4)(b),(c). Defense counsel’s strategic decisions and trial tactics did not amount to ineffective assistance. This Court is not persuaded that defense counsel’s performance was so ineffective as to vacate a judgment of conviction which was amply supported by the evidence. People v. Shannon, 92 A.D.2d 554 (2d Dept. 1983).

Accordingly, Defendant's motion to vacate his judgment of conviction pursuant to C.P.L. § 440.10 is denied in its entirety.

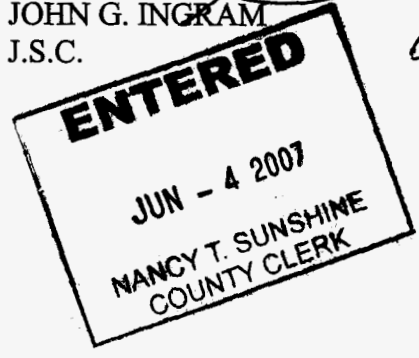
This opinion constitutes the Decision and Order of this Court.

Dated: June 1, 2007
Brooklyn, New York



Handwritten signature of John G. Ingram in cursive script.

JOHN G. INGRAM
J.S.C.



Entered stamp with text: ENTERED, JUN - 4 2007, NANCY T. SUNSHINE, COUNTY CLERK