

<b>People v Summerville</b>
2007 NY Slip Op 31652(U)
June 7, 2007
Supreme Court, Kings County
Docket Number: 0004298/2002
Judge: Charles J. Heffernan
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS  
CRIMINAL TERM : PART 38

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

Indictment No. 4298/02

-against-

Decision and Order

DARRYL SUMMERVILLE,

Defendant

-----X  
CHARLES J. HEFFERNAN, JR., J.

This case presents the question whether defendant's *pro se* motion made pursuant to Criminal Procedure Law ("CPL") § 440.10 to vacate his judgements of conviction should be granted. For the reasons which follow, the motion should be denied.<sup>1</sup>

**INTRODUCTION**

Defendant was charged, under Kings County Indictment Number 4298/02, with two counts of Murder in the Second Degree (Penal Law § 125.11[1], [2]), one count of Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03 [2]), one count of Criminal Possession of a Weapon in the Third Degree (Penal Law § 265.02[4]), one count of Reckless Endangerment in the First Degree (Penal Law § 120.25), two counts of Assault in the First

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<sup>1</sup> Filing of the opinion was delayed because of the absence of this Court on medical leave from March 27, 2007 to June 4, 2007.

Degree (Penal Law § 120.10[1], [3], and three counts of Assault in the Third Degree (P. L. § 120.05[1], [2], [4]).

After a jury trial, defendant was convicted of Murder in the Second Degree (Penal Law § 125.25[2]), Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03 [2]), Reckless Endangerment in the First Degree (Penal Law § 120.25), and Assault in the Second Degree (Penal Law § 120.25[2]).<sup>2</sup>

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<sup>2</sup> The relevant facts of the case, as reflected by the trial record are as follows:

On April 9, 2002, at 9:30 p.m., on the front steps of the building at 478 Quincy Street in Brooklyn, defendant had a verbal dispute with Raymond Clarida and Trevor Herne. Defendant pulled out a gun and shot Mr. Herne in the leg and Gloria Aiken Logan – an elderly woman returning home from church – in the buttocks and head, killing her.

Clarida and Herne were drinking beer on the front steps of the building at 478 Quincy Street off the corner of Throop Avenue (transcript pages 152-53). A Lincoln Navigator SUV pulled up on front of the building, and a man named “Mel” and another man Clarida did not know climbed out of the SUV, entered the deli across the street, and left with the SUV shortly afterwards (transcript pages 153-155).

About ten minutes later, Mel returned, on foot, with defendant and approximately eight other men (transcript pages 153, 155-157). Mel accosted Herne, stood right in front of him, and accused him of encroaching on his drug turf (transcript pages 158, 160). Mel sold cocaine at the opposite corner, at Quincy Street and Marcus Garvey Boulevard, and Herne and Clarida sold drugs at the corner of Quincy Street and Throop Avenue (transcript pages 158-159). While Mel was arguing with Herne, defendant climbed onto the adjoining steps in front of 480 Quincy Street and stood within three feet of Clarida, at which time Clarida noticed that defendant had a gun in his hand, which he was concealing with his sleeve (transcript pages 158, 161, 196). When Clarida saw the gun, he told defendant that he could have the location (transcript page 161). Defendant raised his arm and aimed the gun at Clarida, whose back was toward Throop Avenue (transcript pages 162-164). Clarida then heard three gunshots ring out in rapid succession, as though emanating from an automatic gun (transcript pages 163, 202).

Clarida ran across the street to a store at the corner of Quincy Street and Throop Avenue and asked a man in the store named Rambo to call for an ambulance because someone had been shot (transcript pages 164, 179-180). After asking Rambo to call 911,

On May 20, 2003, defendant was adjudicated a second felony offender and sentenced to concurrent indeterminate terms of imprisonment of twenty-five years to life on the murder conviction, three and one-half to seven years on the reckless endangerment conviction, concurrent determinate terms of imprisonment of fifteen years on the weapon-possession conviction, and five years on the assault conviction.

Defendant unsuccessfully appealed his conviction to the Appellate Division, Second Department. People v Summerville, 22 AD3d 692 (2d Dept 2005).

On December 27, 2005, defendant was denied leave to appeal to the Court of

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Clarida left the store and saw that defendant and his gang were gone (transcript pages 165-166). Clarida went across the street, retrieved his hat, returned to the front of the store, and then went back across the street to see how Herne, who was lying on the ground, was faring (transcript pages 166-167, 180). Herne told Clarida that he had been shot in his leg (transcript pages 167, 183). Clarida then saw a woman lying on the crosswalk at the corner of Quincy Street and Throop Avenue (transcript page 168). Blood was running from the woman's head (transcript page 168). The area where the woman was lying was in the line of fire of defendant's gun when defendant had aimed it at Clarida (transcript pages 184-185). Clarida then went to his mother's house (transcript page 168).

Meanwhile, Darnell Smith, a former New York City probation officer - - who on his way home from work that evening had seen Clarida and Herne on the stoop in front of 480 Quincy Street - - was in his home at 467 Quincy Street when he too heard gunshots (transcript pages 104-105, 112, 120, 123-24). Mr. Smith called 911 and looked out of the window where he saw a group of kids running by (transcript pages 105, 123-24). Mr. Smith went outside and saw defendant holding a gun and walking on his side of the block toward Marcus Garvey Boulevard (transcript pages 106-07, 123, 127). Mr. Smith went back inside his house and observed defendant pass by his house and cross the street where he joined two others on his way towards Marcus Garvey Boulevard (transcript pages 108, 135).

At trial, Clarida testified that he had known defendant for about two years before the shooting (transcript page 185). At trial, the prosecutor asked Mr. Smith how many times before the shooting had Mr. Smith seen defendant (transcript page 110). Mr. Smith replied that it was "difficult to say" but that he would see him often - - every other day or once a week - - for perhaps two years before the shooting (transcript page 110). On cross-examination, Mr. Smith conceded that his estimate of how often he would see defendant was nothing more than a guess (transcript page 127).

Appeals. People v Summerville, 6 NY3d 759 (2005).

On December 19, 2006, defendant moved this court pursuant to CPL § 440.10 to vacate the judgement, and pursuant to CPL § 440.20 to set aside the sentence. The People filed opposition papers on January 29, 2007.

## **THE POSITIONS OF THE PARTIES**

### **DEFENDANT'S POSITION:**

Defendant argues that his conviction should be vacated based upon recent holdings of the Court of Appeals concerning depraved indifference murder. Defendant relies on People v Feingold, 7 NY3d 288 (2006) to support his contention.

The Court of Appeals decision in Feingold, which overruled People v Register, 60 NY2d 270 (1983), held that the depraved indifference to human life is the culpable mental state necessary to support a conviction for Reckless Endangerment in the First Degree (Penal Law § 120.25). Defendant contends that this element was not proven against him at trial. Further, he argues that the law in Feingold should be retroactively applied to his case.

### **THE PEOPLE'S POSITION:**

The People note that in affirming defendant's judgment of conviction, the Appellate Division held that his claim that the evidence was legally insufficient to show that he acted with depraved indifference was unpreserved for appellate review and that, in any event, the evidence was legally sufficient to establish defendant's guilt. The Appellate Division explained that "the evidence produced at trial that the defendant fired a gun on a public

street in the direction of at least two individuals, and in close proximity to several others, was legally sufficient to establish that he acted with a "depraved indifference to human life." People v Summerville, 22 AD3d 692, (2d Dept 2005).

The People observe that the Appellate Division additionally held that defendant's sentence was not excessive, and that his remaining contentions, raised in his supplemental *pro se* brief, were either unpreserved for appellate review or without merit.

The People next note that by *pro se* papers dated September 20, 2004, defendant filed an earlier motion to vacate his judgment of conviction. In support of that motion, defendant claimed that his judgment of conviction should be vacated because his trial attorney failed to impeach the testimony of Clarinda and Smith that they had known defendant for about two years prior to the shooting.<sup>3</sup> By decision and order dated November 12, 2004, the motion was summarily denied.

Turning to the instant motion, the People note that defendant claims, as he did on appeal, that the evidence was legally insufficient to support his conviction for depraved indifference murder.

The People argue that defendant's claim that the trial evidence was legally insufficient to support the depraved indifference element of depraved indifference murder is procedurally barred because defendant raised the claim on direct appeal to the Appellate

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Specifically, defendant contended that his attorney could have established that defendant was incarcerated twice during the twenty-four month period prior to the shooting, once for about nine and one-half months and once for about three and one-half months. Defendant also contended that the prosecutor was aware of the periods during which defendant was incarcerated and thus knowingly suborned perjury by permitting Clarinda and Smith to testify that they had known defendant for two years prior to the shooting.

Division, and that Court rejected the claim on its merits. See CPL § 440.10(2)(a); People v Summerville, 22 AD3d 692 (2d Dept 2005). Specifically, in rejecting defendant's legal insufficiency claim, the Appellate Division held that:

In any event, viewing the evidence in the light most favorable to the prosecution (see People v Contes, 60 NY2d 620, 454 NE2d 932, 467 NYS2d 439), we find that it was legally sufficient to establish the defendant's guilt of depraved indifference murder beyond a reasonable doubt (see People v Sanchez, 98 NY2d 373, 777 NE2d 204, 748 NYS2d 312). The evidence produced at trial that the defendant fired a gun on a public street in the direction of at least two individuals, and in close proximity to several others, was legally sufficient to establish that he acted with a "depraved indifference to human life." Id.

Accordingly, because the Appellate Division expressly rejected defendant's claim on its merits, the claim is unreviewable herein. See CPL § 440.10(2) (a); People v Kandekore, 300 AD2d 381 (2d Dept 2002); People v Dover, 294 AD2d 594 (2d Dept 2002).

The People contend that defendant incorrectly argues that the claim is not procedurally barred because there has been, in defendant's view, a retroactive change in the law. Pursuant to CPL § 440.10(2)(a), a court must deny a post-conviction motion to vacate a judgment of conviction where the claim raised in the motion was already rejected on direct appeal from the judgment of conviction, unless "there has been a retroactively effective change in the law controlling such issue." In this case, there has been no retroactively effective change in the law controlling the issue. Accordingly, the claim remains procedurally barred.

The People next note that the law with respect to the depraved indifference element

of depraved indifference murder has not changed retroactively. The Court of Appeals, in Policano v Herbert, 7 NY3d 588 (2006), has recently held that, although there has been a change in the law with respect to the depraved indifference element of depraved indifference murder (see People v Feingold, 7 NY3d 288 [2006]), the change in the law may not be applied retroactively. See Policano, 7 NY3d at 603 (“This raises the question whether our post-Sanchez case law [with respect to the elements of depraved indifference murder] applies retroactively to defendant’s case . . . We conclude that it does not”).

Furthermore, because defendant’s jury charge claim was unpreserved for appellate review, the claim remains procedurally barred on collateral review regardless of whether the Court of Appeals in Feingold made a retroactive change in the law of depraved indifference murder. The procedural bar against raising for collateral review a claim that was already denied on direct appeal can be overcome only if there has been a retroactive change in the law “controlling such issue.” CPL § 440.10(2)(a) [Emphasis supplied]. In this case, even if there was a retroactive change in the law of depraved indifference murder, it is not controlling of the issue in defendant’s case because the Appellate Division held that the claim was unpreserved.

Accordingly, the People aver, since the Court of Appeals in Feingold undisputedly did not remove the preservation requirement for claims relating to the legal sufficiency of the evidence of depraved indifference murder convictions, any alleged change in the underlying law of depraved indifference murder does not control the issue in defendant’s case. Thus, for example, had defendant raised the claim on direct appeal after Feingold was decided, the Appellate Division would still have been able to reject the claim, notwithstanding its merits, on the ground that it was unpreserved. Accordingly, any

change in the law of depraved indifference murder is not controlling of defendant's case because defendant failed to preserve the issue for review.

The People cite People v Hill, 220 AD2d 905 (3d Dept 1995), as support for the conclusion that a change in the underlying law does not control the issue on a collateral motion to vacate a judgment of conviction if the claim is unpreserved for appellate review. See also People v Perez, 162 Misc 2d 750, 754-57 (Sup Ct, Kings Co 1994).

Moreover, the People continue, the Legislature did not intend, when enacting CPL § 440.10(2)(a), to put a defendant whose appeal was already decided prior to the law being changed in a better position on collateral review than a defendant who raises the claim on direct review after the law was changed.

Furthermore, the People assert, even under current law, the trial evidence in this case was legally sufficient to support a finding that defendant acted with a requisite level of depravity to satisfy the depraved indifference element of depraved indifference murder. Since defendant endangered the lives of more than one person, Feingold is unavailing to defendant.

In sum, the People submit, defendant's claim is procedurally barred because the Appellate Division expressly rejected such claim on its merits. Defendant's claim that the law changed retroactively after his appeal was decided is incorrect because the Court of Appeals has held that the change in the law may not be applied retroactively. In any event, the evidence remains legally sufficient to support defendant's conviction even under present law. Accordingly, the claim should be summarily denied.

## THE LEGAL ANALYSIS

The People's position is well taken.

CPL § 440.10(2)(c) provides as follows:

2. Notwithstanding the provision of subdivision one, the court must deny a motion to vacate a judgment when:

Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, **no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him;** [Emphasis supplied]

That statute, which addresses the situation where an issue could have been raised on an appeal from the judgment but was not, has no exception for post-appeal changes in the law. Contrastingly, CPL § 440.10(3)(b), explicitly authorizes reconsideration of a ground previously determined on the merits where there has been a "retroactively effective change in the law controlling such issue."

The operative question, then, is that which the People have cogently addressed in their submission: does Feingold have retroactive effect? If it does, defendant would now qualify for CPL § 440.10 relief consideration since he could not be fairly held chargeable with failing to raise in a prior motion or proceeding a ground rooted in a principle of law that had not then evolved. Conversely, if Feingold has retrospective application, a different result would ensue.

The Court of Appeals has resolved the question in Policano v. Herbert, 7 NY3d 588 (2006), holding that where a depraved indifference murder case accorded with the law of New York State at the time when the conviction became final, the change in that law recited in Feingold i.e., that depraved indifference to human life is a culpable mental state does not apply retroactively. Policano, 7 NY3d at 588 (2006).

In light of this unambiguous holding, defendant's motion to vacate judgement or set aside the verdict based upon the retroactive application of Feingold, pursuant to CPLR § 2221 is denied in all respects.

Defendant's remaining contentions are without merit.

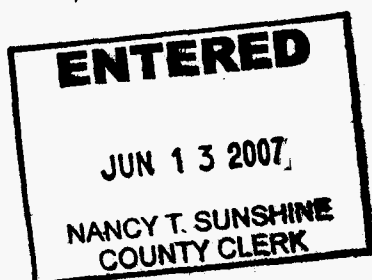
Defendant has now filed multiple motions with respect to this issue. The present ruling is the final ruling of this Court, and any further request for relief by defendant should be filed at the Appellate Division.

### CONCLUSION

For the foregoing reasons, the motion for an order to vacate the judgement of conviction pursuant to CPL § 440.10 is denied.

This opinion shall constitute the decision and order of this court.

Dated: Brooklyn, New York  
June 7, 2007



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CHARLES J. HEFFERNAN, JR.  
Acting Justice of the Supreme Court