

**People ex rel. Cotterell v Graham**

2007 NY Slip Op 31856(U)

July 1, 2007

Supreme Court, Kings County

Docket Number: 0004074/1994

Judge: Jill Konviser

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under Civil Practice Law and Rules 70 and, in the alternative, as a motion to vacate the judgment under Criminal Procedure Law §440.10. Under either circumstance, the defendant's motion is without merit.

#### **A. Procedural History**

The defendant filed a direct appeal of his conviction with the Appellate Division, Second Department, in which he alleged that: (1) the evidence was legally insufficient to establish his guilt and the verdict was against the weight of the evidence; (2) he was denied his right to be present at the Sandoval hearing; (3) the hearing court improperly denied his motion to suppress identification evidence; (4) the prosecutor's summation deprived him of a fair trial; (5) he improperly received a consecutive sentence as a result of his reckless endangerment conviction; and, (6) the sentences imposed were excessive.

On June 29, 1998, the Appellate Division, Second Department, unanimously affirmed the defendant's conviction. People v. Cotterell, 251 A.D.2d 679 (2d Dept. 1998). Leave to appeal to the New York Court of Appeals was denied on October 1, 1999. People v. Cotterell, 92 N.Y.2d 948 (1998) (Kaye, C. J.).

#### **B. The Matter Before the Court**

The defendant has filed a pro se petition for a writ of habeas corpus under Article 70 of the Civil Practice Law and Rules. The basis of the petition is that the indictment upon which the defendant's convictions are premised was defective in that the

individual counts contained therein referred to him as the "defendant" rather than by his actual name.

The petition for a writ of habeas corpus is dismissed as the law is well-settled that a writ of habeas corpus may not be used to review "questions that could have been raised by direct appeal or by a collateral attack in the court of the petitioner's conviction." People ex. rel. Barnes v. Fischer, 303 A.D.2d 526 (2d Dept.), lv. denied, 100 N.Y.2d 507 (2003) quoting People ex rel. Pearson v. Garvin, 211 A.D.2d 690, 691 (2d Dept 1995); see People ex rel. Maldonado v. Artuz, 267 A.D.2d 411 (2d Dept. 1999); People ex rel. Sommer v. Mann, 235 A.D.2d 562 (2d Dept. 1997); People ex rel. Smith v. Hanslmaier, 237 A.D.2d 473 (2d Dept. 1995); People ex rel. Benbow v. Scully, 189 A.D.2d 844 (2d Dept. 1993).

In this case, the defendant's claim that the indictment was defective because his actual name was not set forth in each count of the indictment was one that could have been raised on direct appeal to the Appellate Division. See People ex rel. Curry v. Girdich, 290 A.D.2d 912, 913 (3d Dept.), lv. denied, 98 N.Y.2d 602 (2002) (habeas corpus petition dismissed because the claim underlying the petition, inter alia, that the indictment was defective because it failed to "name" the defendant "in the body of the indictment" could have been raised on direct appeal); People ex rel. Dorsey v. Scully, 189 A.D.2d 794 (2d Dept.), lv. denied, 81 N.Y.2d 709 (1993) (habeas corpus petition dismissed because the claim underlying the petition, that indictment was "jurisdictionally defective," could have been

raised on direct appeal); see also People ex rel. Wright v. Miller, 16 A.D.3d 746 (3d Dept.), lv. denied, 5 N.Y.3d 703 (2005); People ex rel. Batista v. Walker, 198 A.D.2d 865 (4<sup>th</sup> Dept. 1993), lv. denied, 83 N.Y.2d 752 (1994); People ex rel. Grant v. Scully, 190 A.D.2d 543 (1<sup>st</sup> Dept. 1993), lv. denied, 92 N.Y.2d 946 (1998).

As such, the petition for a writ of habeas corpus is dismissed. People ex rel. Barnes v. Fischer, 303 A.D.2d at 526; People ex rel. Curry v. Girdich, 290 A.D.2d at 913; People ex rel. Dorsey v. Scully, 189 A.D.2d at 794.

The defendant fares no better if his motion is treated as a motion to vacate the judgment of conviction under C.P.L. §440.10. C.P.L. §440.10(2)(c) provides that a court must deny a defendant's motion to vacate the judgment of conviction when sufficient facts appear on the record to permit appellate review of the issue raised, but the defendant has unjustifiably failed to raise the issue on direct appeal to the Appellate Division. People v. Cochrane, 27 A.D.3d 659 (2d Dept.), lv. denied, 7 N.Y.3d 787, cert. denied, 127 S. Ct. 436 (2006); People v. Jossiah, 2 A.D.3d 877 (2d Dept. 2003), lv. denied, 2 N.Y.3d 742 (2004); see People v. Cooks, 67 N.Y.2d 100, 103 (1986) (a motion to vacate a judgment of conviction cannot be "employed as a substitute for direct appeal when defendant. . . could readily have raised it on appeal but failed to do so (C.P.L. §440.10[2][c]).").

In this case, the indictment was part of the appellate record and a claim that it was defective could have been raised on direct

appeal. People v. Nunez, 264 A.D.2d 487 (2d Dept. 1999); see People v. Maldonado, 34 A.D.3d 497, 498 (2d Dept. 2006), lv. denied, 8 N.Y.3d 847 (2007). The defendant, however, unjustifiably failed to raise this claim on direct appeal. As such, the motion to vacate the judgment on the ground that the indictment was defective because the defendant's actual name was not set forth in each count of the indictment is barred by C.P.L. §440.10(2)(c). People v. Byrdsong, 234 A.D.2d 468 (2d Dept. 1996), lv. denied, 89 N.Y.2d 1033 (1997).

In any event, the defendant's claim is without merit. The Criminal Procedure Law does not specifically require the defendant's actual name to be set forth in each count of the indictment. See C.P.L. §200.50. Moreover, where, as here, a defendant's name is included in the caption of the indictment, such indictment passes muster even if the defendant's name is not set forth in the body of that indictment. See Downey v. Hale, 67 F.2d 208 (1<sup>st</sup> Cir. 1933), cert. denied, 291 U.S. 662 (1934) (holding that under predecessor to C.P.L. §200.50 indictment was sufficient even though defendant's actual name was set forth in the caption rather than in the body of the indictment); Franco v. Walsh, \_\_ F.Supp.2d \_\_, 2002 WL 596355 (S.D.N.Y. April 17, 2002) (Schwartz, D.J.), aff'd 73 Fed. Appx. 517, 2003 WL 22056234 (2d Cir. September 4, 2003) (habeas petitioner's claim under New York law that trial counsel was ineffective for failing to argue that the indictment was defective because defendant's name was not set forth in each count of the indictment was rejected -- the indictment complied with C.P.L. §200.50 in that

the defendant's name was set forth in the caption of the indictment); People v. Brothers, 66 A.D.2d 954 (3d Dept. 1978); People v. Riedd, 160 Misc.2d 733, 738 (Sup Ct. Bronx Co. 1993); People v. Toro, 147 Misc.2d 991, 993 (Sup. Ct. Bronx Co. 1990); see also People v. Iannone, 45 N.Y.2d 589, 592 (1978). Moreover, as the People have demonstrated in their motion papers, the cases upon which the defendant relies are inapposite.

**C. Conclusion**

The defendant's motion, whether treated as a petition for a writ of habeas corpus or a motion to vacate the judgment of conviction is without merit. Accordingly, the petition for a writ of habeas corpus is dismissed without a hearing and, alternatively, the motion to vacate the judgment of conviction under C.P.L. §440.10 is denied without a hearing.

This constitutes the Decision and Order of the Court.

The Clerk of the Court is directed to mail copies of this decision and order to the defendant at his place of incarceration and to the Kings County District Attorney.

Brooklyn, New York  
June 20, 2007

  
J.S.C.  
HON. JILL KONVISER

**ENTERED**  
  
JUN 21 2007  
  
NANCY T. SUNSHINE  
COUNTY CLERK