

**People ex rel. Green v Graham**

2007 NY Slip Op 32423(U)

August 2, 2007

Supreme Court, Kings County

Docket Number: 0000114/1991

Judge: Jill Konviser

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: CRIMINAL TERM PART 26

-----X  
THE PEOPLE OF THE STATE OF NEW YORK, :  
ex rel. CLARENCE GREEN, :

Petitioner, :

-against- :

HAROLD D. GRAHAM, Superintendent, :  
Auburn Correctional Facility, :

Respondent. :

Ind. No. 114/91

-----X  
JILL KONVISER, JUSTICE:

After a jury trial before a now retired judge, the defendant was convicted of murder in the second degree, Penal Law §125.25(1); criminal possession of a weapon in the second degree, Penal Law §265.03; and criminal possession of a weapon in the third degree, Penal Law §265.02(4). On May 5, 1992, the defendant was sentenced to concurrent prison terms of twenty-five years to life on the murder count, five to fifteen years on the second-degree weapons possession count and two and one-third to seven years on the third degree weapons possession count.

The defendant has filed a pro se petition for a writ of habeas corpus on the ground that the indictment was defective in that each count included therein referred to him as "defendant" rather than by his actual name. The People oppose the defendant's petition. The defendant has filed a reply memorandum. The Court, in its discretion, has considered the defendant's motion and his reply

memorandum, both as a petition for a writ of habeas corpus 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, through counsel, filed a direct appeal of his conviction with the Appellate Division, Second Department, in which he alleged that his due process rights were denied. The defendant also filed a pro se supplemental brief in which he alleged: (1) the trial court erred when it denied his motion to suppress his written and videotaped statements; (2) his right to due process was violated when his coerced confession was introduced against him at trial; (3) the evidence at trial was legally insufficient; and, (4) a Rosario violation committed by the People required the granting of a new trial.

On February 14, 1995, the Appellate Division, Second Department, unanimously affirmed the defendant's conviction. People v. Green, 212 A.D.2d 630 (2d Dept. 1995). Leave to appeal to the New York Court of Appeals was denied on October 1, 1999. People v. Green, 86 N.Y.2d 735 (1998) (Ciparick, J.).

The defendant later filed a motion to vacate the judgment of conviction pursuant to C.P.L. §440.10 with the trial court in which he alleged: (1) the prosecutor failed to turn over certain Brady and

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Rosario material; (2) his arrests and the statements he made to the police were obtained in violation of Payton v. New York, 445 U.S. 573 (1980); (3) the statements he made to the police were coerced; and, (4) the verdict was based on legally insufficient evidence. The defendant's motion to vacate the judgment of conviction was denied in its entirety on February 5, 1999.

The defendant also filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York that was dismissed as time-barred on March 29, 2002. Green v. Bennett, \_\_\_ F.Supp.2d \_\_\_, 2002 WL 1268002 (E.D.N.Y. March 29, 2002) (Raggi, 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).

Alternatively, the defendant's claims are also barred by C.P.L. §440.10(3)(c). Under this section a court may deny a motion to vacate the judgment when the defendant has filed a previous motion to vacate the judgment pursuant to C.P.L. §440.10 and "was in a position adequately to raise the ground or issue underlying the present motion but did not do so." In this case, the defendant filed an earlier pro se motion to vacate the judgment of conviction that was denied on February 5, 1999. The defendant's current claims are based entirely on circumstances that occurred before the defendant's earlier motion to vacate the judgment of conviction pursuant to C.P.L. §440.10 was filed. Therefore, he was able to raise his current claim in his earlier motion. As such, it is barred from this Court's consideration by C.P.L. §440.10(3)(c).

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

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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**

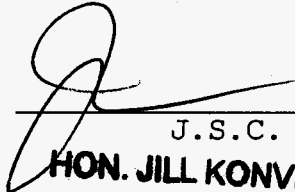
The defendant's motion, whether treated as a petition for a writ of habeas corpus or a motion to vacate the judgment of conviction is without merit. Accordingly, the petition for a writ of habeas corpus is dismissed without a hearing and, alternatively,

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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.

Dated: Brooklyn, New York  
August 2, 2007

  
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J.S.C.  
**HON. JILL KONVISER**

