

People v Torres

2007 NY Slip Op 32767(U)

August 9, 2007

Supreme Court, New York County

Docket Number: 0005753/1990

Judge: Bruce Allen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

Ind. No. 5753/90

LUIS TORRES,

Defendant.

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For the People: Paul Harvey
Luis Torres, *pro se*
JUSTICE BRUCE ALLEN:

Following a jury trial, the defendant was found guilty of Criminal Possession of a Controlled Substance in the First Degree, seven counts of Criminal Possession of a Controlled Substance in the Third Degree, two counts of Criminal Possession of a Controlled Substance in the Fourth Degree, and Conspiracy in the Second Degree. On December 13, 1990, Judge Leslie Crocker Snyder sentenced him to a term of 25 years to life on the count of Criminal Possession of a Controlled Substance in the First Degree. That sentence was made to run consecutively to consecutive terms of 12½ to 25 years each on two of the Criminal Possession of a Controlled Substance in the Third Degree counts, for a total sentence of 50 years to life. The judge also imposed a fine of one million dollars. On appeal, the conviction was affirmed. People v. Torres, 224 AD2d 269 (1st Dept 1996). In 2006, this court resentenced the defendant on the Criminal Possession of a Controlled Substance in the First Degree count to a term of 20 years to run concurrent with the other sentences, thus reducing his total sentence to 25 to 50 years.

The defendant has now filed a motion to vacate judgment and sentence pursuant to CPL §§440.10 and 440.20.

With respect to the motion to vacate sentence, the defendant contends that it was illegal

for the court to impose consecutive sentences for the two counts of Criminal Possession of a Controlled Substance in the Third Degree. Since the Appellate Division affirmed the sentence on direct appeal, it appears that the defendant is procedurally barred under CPL §440.20(2) from raising this claim now. The issue was also raised previously in the defendant's motion to be resentenced. In any event, the imposition of consecutive sentences was legal, since the counts covered two different stashes of drugs recovered from two different locations, and thus were not part of the same criminal transaction.

As the People note in the response, almost all of the issues raised in the §440.10 motion were raised or could have been raised on direct appeal. Therefore, under §440.10(2)(c), this court must deny a motion based on those issues. In any event, none of the claims made by the defendant raise an issue of fact that would require a hearing.

Several of the defendant's claims revolve around the Seychel hearing, following which Judge Snyder determined that there was probable cause for a search warrant executed on June 2, 1989. The defendant contends that he was denied his right to the effective assistance of counsel due to the absence of his attorney, Robert Dunn, at the hearing. It appears from the defendant's motion papers that he has some misunderstanding of the nature of a Seychel hearing. Prior to the hearing, defense counsel may submit proposed questions. However, the hearing itself is held ex parte with the district attorney and the People's witnesses. Defense counsel is not present, and has no opportunity to question the witnesses, to learn their identities, or to see the affidavit in support of the warrant.

It is true that just prior to the hearing, Judge Snyder noted that Mr. Dunn had not submitted any proposed questions. However, a judge conducting a Seychel hearing is under a duty to consider all challenges that might be raised on a defendant's behalf. People v. Castillo, 80

NY2d 578. There is no reason to believe that Judge Snyder did not ask the questions that defense counsel could reasonably be expected to propose. The Appellate Division reviewed the sealed record of the Seychel hearing and found it satisfactory. Contrary to the defendant's assertion, co-defendant's counsel did not "stand in" for Mr. Dunn at the hearing.

The defendant further contends that the People knowingly used false information concerning his alleged participation in a drug sale in the affidavit in support of the warrant. This contention is entirely speculative, since the defendant has not seen the affidavit. Further, whether or not the defendant took part in an alleged sale would not have been material; the issue was whether there was probable cause to believe that there were drugs present at the target premises. Similarly, what crime that the defendant had been charged with was irrelevant to the issuance of the subsequent search warrant for the defendant's safety deposit box.

Defendant's contention that statements made by Diane Rodriguez and Susan Chang were not "against penal interest" because each received favorable treatment from the prosecution is incorrect. People v. Thomas, 68 NY2d 194.

The defendant contends that the People committed a Brady violation by failing to turn over statements by Diane and Jaris Rodriguez that they had access to the defendant's apartment. Defendant contends that this material was exculpatory because it raised the possibility that the Rodriguezes could have placed drugs in the apartment while the defendant was away. Leaving aside the issue of whether the material could be considered "exculpatory", it was not Brady material because the defendant would have known that the Rodriguezes had access to his apartment. People v. Doshi, 250 AD2d 431 (1st Dept 1995). Similarly, the defendant contends that counsel was ineffective for failing to make arguments based on the possibility that the Rodriguezes could have placed the drugs in the apartment while he was away. However, the

defendant does not say that he ever informed counsel that the Rodriguezes had access to his apartment.

The defendant also claims that defense counsel was ineffective for failing to pursue a missing witness charge with respect to Susan Chang. As the People note, all the facts on which the defendant relies in making this argument were part of the record, and thus it could have been raised on direct appeal. Further, the defendant has not established the absence of any reasonable tactical explanation for counsel's decision not to pursue the charge, People v. Cheatom, 295 AD2d 959 (4th Dept 2002); People v. Cruz, 165 AD2d 205 (1st Dept 1991).

Accordingly, the motion is denied.

August 9, 2007

A handwritten signature in cursive script, appearing to read "Bruce Allen", written in black ink. The signature is positioned above a horizontal line.

HON. BRUCE ALLEN