

People v Calderon

2007 NY Slip Op 33831(U)

October 30, 2007

Supreme Court, Kings County

Docket Number: 0003126/1977

Judge: Jill Konviser

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The defendant has now filed a pro se motion to vacate the judgment of conviction pursuant to C.P.L. §440.10 on the ground that his convictions of murder in the second degree and manslaughter in the first degree violate the Double Jeopardy clauses of the State and Federal Constitutions and that trial counsel was ineffective for failing to raise this claim at trial. For the reasons that follow, the defendant's motion to vacate the judgment of conviction is denied.

Discussion

A motion to vacate the judgment of conviction must be denied either when “[t]he ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment.” see C.P.L. §440.10(2)(a), or when sufficient facts appeared on the record to permit appellate review of the issue raised, but the defendant unjustifiably failed to raise the issue on direct appeal to the Appellate Division. See C.P.L. §440.10(2)(c); 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 also 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 Court is unsure of the precise claims that the defendant raised on direct appeal as the Appellate Division, Second Department, affirmed his conviction without opinion and neither the People nor the Court have been able to locate the briefs

filed with the Appellate Division with respect to the defendant's direct appeal.³ Nonetheless, the defendant's current claims, that the jury's verdict violates the principles of double jeopardy and that counsel was ineffective for failing to raise this claim at trial are obviously claims that are based upon the trial record, and, thus, were capable of being raised by the defendant on direct appeal. See People v. Williams, 181 A.D.2d 846 (2d Dept. 1992). As such, the defendant's record-based claims are barred from this Court's consideration either because they were rejected on direct appeal by the Appellate Division, see C.P.L. §440.10(2)(a), or because sufficient facts appeared on the record to permit appellate review of these claims but the defendant unjustifiably failed to raise them in his direct appeal to the Appellate Division. C.P.L. §440.10(2)(c). Accordingly, the defendant's motion to vacate the judgment on the grounds that the verdict violates the principles of double jeopardy and that trial counsel was ineffective for failing to raise this claim at trial are record-based claims barred from this Court's consideration by C.P.L. §§440.10(2) (a), (c). People v. Byrdson, 234 A.D.2d 468 (2d Dept. 1996), lv. denied, 89 N.Y.2d 1033 (1997); People v. Kelly, 110 A.D.2d 856 (2d Dept, 1985).

Alternatively, the defendant's claim is 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." See People v. Thomas, 147 A.D.2d 510 (2d Dept.), lv. denied, 74 N.Y.2d 669

³The Court made inquiries to the Clerk's Offices of the Appellate Division, Second Department and the Kings County Supreme Court regarding the whereabouts of the Appellate Division briefs in this case, which were filed almost thirty years ago. Those Offices informed the Court that they were unable to locate the briefs. The Kings County District Attorney's Office also informed the Court that it too was unable to locate the briefs.

(1989). In this case, the defendant filed an earlier motion to vacate the judgment of conviction on August 8, 1985. The defendant's current claim is based entirely on circumstances that occurred before his earlier motion was filed. Therefore, the claim now before the Court could have been included in his earlier motion. As such, it is now barred from this Court's consideration by C.P.L. §440.10(3)(c).

In any event, the defendant's claims are wholly without merit. The Double Jeopardy Clause, as embodied in the State and Federal Constitutions, "protects only against the imposition of multiple criminal punishments for the same offense." People v. Wood, 95 N.Y.2d 509, 513 (2000), quoting Hudson v. United States, 522 U.S. 93, 99 (1997). The "applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each requires proof of an additional fact which the other does not." People v. Wood, 95 N.Y.2d at 513, quoting Blockburger v. United States, 284 U.S.2d 299, 304 (1932).

If each of the offenses contain an element which the other does not, they are not the "same offense" under the rule enunciated by Blockburger and any claim of constitutional double jeopardy fails.

People v. Woods, 95 N.Y.2d at 513. See People v. Bryant, 92 N.Y.2d 216, 229 n.3 (1998); Rutledge v. United States, 517 U.S. 292, 297 (1996).

In this case, the offenses of which the defendant were convicted -- felony murder and first-degree manslaughter -- are not the "same offense" under the Blockburger rule as each offense contains an element that the other does not. Felony murder, under Penal Law §125.25(3) requires proof that a death was caused during the commission of a

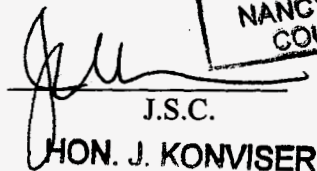
specified felony whereas first degree manslaughter, under Penal Law §125.20(1), requires proof of intent to cause serious physical injury to another person, but does not require proof of an underlying felony. As each of these offenses require proof of different elements, the fact that the defendant was convicted of both felony murder and first-degree manslaughter does not violate the Double Jeopardy Clause as embodied in the State and Federal Constitutions. See Hodreth v. Donnelly, __ F.Supp.2d __, 2006 U.S. Dist. LEXIS 24753 at 9-10 (N.D.N.Y. May 1, 2006) (Sharpe, J.) (holding that the defendant's conviction under New York law of first-degree manslaughter and felony murder did not violate the Double Jeopardy Clause); United States ex. rel. Richards v. Bartlett, __ F. Supp. __, 1993 WL 372267 (E.D.N.Y. September 9, 1993) (Glasser, J.) (same).

As the defendant's double jeopardy claim is without merit, his additional claim that trial counsel was ineffective for failing to raise the double jeopardy claim at trial is rejected.

The defendant's motion to vacate the judgment of conviction pursuant to C.P.L. §440.10 is denied.

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
October 30, 2007


J.S.C.
HON. J. KONVISER

