SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 52

THE PEOPLE OF THE STATE OF NEW YORK

-against-

Indictment No. 358/94

IVAN BARTON,

DECISION AND ORDER

Defendant.

THOMAS FARBER, J.:

This is defendant's fourth motion pursuant to CPL §440.10. On May 31, 1995, defendant was convicted, after a jury trial[1], of three counts each of Robbery in the First Degree and Robbery in the Second Degree. He was sentenced as a predicate felon to three concurrent terms of 12 ½ to 25 years for Robbery in the First Degree, consecutive to three concurrent terms of 6 - 12 for Robbery in the Second Degree. Defendant's conviction was affirmed on appeal by the Appellate Division, First Department, however the Appellate Division ordered that the sentences for Robbery in the Second Degree run concurrent with the sentences for Robbery in the First Degree. *People v. Barton,* 248 AD2d 211 (1st Dept 1998). Leave to appeal to the Court of Appeals was denied. *People v. Barton*, 93 NY2d 850.

Defendant's first *pro se* motion to vacate the judgement of conviction was filed on or about October 25, 1997 and August 26, 1997. The defendant argued that he was denied his right to a speedy trial, that he was incompetent to stand trial because he did not have his glasses, and that he was denied his right to the effective assistance of counsel. The motion was denied by the Hon.

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[1]Honorable Howard E. Bell presided over defendant's trial. Judge Bell has since retired.

Dorothy Cropper[2] on January 12, 1998, on the grounds that defendant's claims were supported only by conclusory allegations or were a matter of record and therefore cognizable on his appeal, which, at that time, was pending. *See* CPL §440.30(4).

Defendant's second CPL §440.10 motion was filed in May, 1998. Defendant claimed that the prosecutor used "false methods and chicanery" to procure the conviction. According to defendant, the prosecutor improperly used an unsigned confession and illegally seized evidence against him at trial. The motion was denied by the Honorable Jeffery M. Atlas on the ground that the claims could have been raised on appeal and were thereafter foreclosed. *See* CPL §440.10(2)(b).

The third CPL §440.10 motion was filed in October, 2003. That motion was again denied by the Honorable Jeffrey M. Atlas on December 2, 2003. In his decision Justice Atlas stated that the "claims were made and adjudicated previously in a motion dated May 14, 1998 and a decision dated March 17, 1999.

In this, his fourth motion, defendant claims that during the proceedings resulting in the judgment of conviction he was unable to understand or participate in the proceedings because of a mental disease or defect. Defendant claims that numerous outbursts made by him on the record leading up to and during trial should have alerted both the trial judge and his attorney that he was psychologically unfit. According to defendant, defense counsel's failure to request a CPL §730 exam constituted ineffective assistance of counsel. In support of his claims defendant states that he was diagnosed with "Schizophrenia, paranoid type, undifferentiated" on August 29, 1995, approximately three months after the judgment of conviction was obtained. Defendant also alleges that he has been admitted to inpatient hospitalization on eight occasions beginning on January 10,

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[2] Justice Cropper has since retired.

1996.

For the reasons set forth herein, defendant's motion must be denied.

DISCUSSION

CPL §440.10(2)(c) states, in relevant part, that a 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 raise such ground or issue upon an appeal actually perfected by him. . . . (emphasis added).

As previously noted, defendant appealed his conviction. On appeal, defendant's appellate counsel argued (1) that his guilt was not proven beyond a reasonable doubt; (2) that the trial Judge should have granted a mistrial after defendant acted out in the courtroom; (3) that the trial judge failed to give a missing witness charge and the charge on circumstantial evidence was insufficient; and (4) that the defendant's sentence should be reduced in the interest of justice.

The Appellate Division rejected all of defendant's arguments. The Court stated that it was in the trial court's discretion not to order a mistrial after defendant's outburst in front of the jury, which was defendant's attempt to disrupt the trial. The Court also stated that in "light of the overwhelming evidence against defendant, there is no reasonable possibility that the exchange between defendant and the court had any effect on the verdict." (Citations omitted.) The appellate court also stated that it was proper for the trial court to have denied defendant's request for a missing witness charge and that the circumstantial evidence charge was fair. As previously noted, the Court modified defendant's sentenced to run concurrently. *People v. Barton*, 248 AD2d 211, *supra.*

Defendant did not raise any of the issues he raises in the motion now before this Court on

appeal. Accordingly, this Court is constrained to deny defendant's motion. *People v. Cuadrado*, 37 AD3d 218, 221 (1st Dept 2007), *lv granted* 8 NY3d 951. A motion to vacate a judgment of conviction should not be used as a substitute for a direct appeal or as a device to raise issues that could have been raised on an appeal that has already been perfected. *People v. Cooks*, 67 NY2d 100, 103 (1986); *People v. Dover*, 294 AD2d 594 (2d Dept 2002), *lv denied* 98 NY2d 767; *People v. Jackson*, 266 AD2d 163 (1st Dept 1999), *lv denied* 94 NY2d 921. The outbursts that defendant claims indicated that he was unfit to proceed were on the record and nothing prevented the defendant from raising these issues on appeal. *People v. Nunez*, 264 AD2d 487 (2d Dept 1999).

Additionally, CPL §440.10(3)(c) states that the court may deny a 440 motion when:

> Upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.

Defendant filed three prior motions pursuant to CPL §440.10 and had three prior chances to raise his current arguments with the Court. He never raised the issues he now raises. Accordingly, this Court will exercise its discretion and deny defendant's motion pursuant to CPL 440.10 (3)(c). *See People v. Cochrane*, 27 AD3d 659 (2d Dept 2006), *lv denied* 92 NY2d 895; *People v. Brown*, 24 AD3d 271 (1st Dept 2005), *lv denied* 4 NY3d 828. Assuming *arguendo* that defendant was not able to raise the issue of his mental competency until he was diagnosed with schizophrenia, he claims he was first diagnosed in August, 1995, approximately two years prior to filing his first CPL 440 motion. Defendant has claimed no justification for failing to raise these issues earlier. *See People v. Brayley*, 265 AD2d 826 (4th Dept 1999), *lv denied* 94 NY2d 901.

Even if this Court were to review defendant's claims on the merits, the motion to vacate the judgment would still be denied. The decision to order a competency examination under CPL

§730.30 is within the Court's discretion. *People v. Russell*, 74 NY2d 901, 902 (1989). A defendant is presumed competent and the Court is under no obligation to order an examination unless there is reason to believe the defendant is an incapacitated person. *People v. Morgan*, 87 NY2d 878 880 (1995); *People v. Amlin*, 37 NY2d 167, 168 (1975); CPL §730.10(2).

Here, the record indicates that the defendant had a rational and factual understanding of the proceedings against him. *See People v. Francabandera*, 33 NY2d 429, 436 (1974). Although defendant claims there were numerous "outbursts," only one outburst occurred in the presence of the jury. The other "outbursts" were occasions when the defendant spoke to the trial judge out of the presence of the jury, generally to request a new attorney.

Prior to opening statements and outside the presence of the jury the defendant asked counsel to read a letter written by him to the Court. The letter indicated defendant's belief that the denial of his CPL §30.30 motion was in error, and cited the fact that he had been incarcerated for approximately 14 months. He also interposed an objection to the Court's allowing the Grand Jury minutes to be amended. The letter stated defendant's belief that he was " somewhat paranoid about these proceedings" and that he was getting "railroaded" by his attorney and the Court. The letter was coherent and well written and did not in any way suggest that defendant was incompetent or that his mental condition warranted a 730 exam.

Thereafter, during a trial recess the defendant requested to speak to the trial judge, but the Court, at that time, did not permit it. (TT pp102-103).

On a third occasion when the jury was absent, the defendant again complained about his attorney. The trial judge discussed the reasons for defendant's complainants and found there was no basis for dismissing defendant's attorney and suggested that defendant would not be satisfied with

any attorney. (TT pp 223-229).

The only outburst that occurred in front of the jury came at the end of the People's case. Defendant jumped up and stated: "I object to these proceedings. This man (defense counsel) has been clearly conspiring against me from the beginning of this trial." (TT p 307). There then ensued a conversation, in front of the jury, between the defendant and the Court where the trial judge directed the defendant to sit down and defendant continued to stand and complain that his attorney was working against him. The conversation continued for some time until the trial judge called a recess and excused the jury. The effect of this outburst on the trial was raised on defendant's appeal. Defendant argued that the trial judge's extended colloquy with him during this outburst deprived him of a fair trial. However the Appellate Division stated that the court "properly exercised its discretion in denying defendant's motion for a mistrial based upon the verbal exchange between defendant and the court in the presence of the jury, which was orchestrated by defendant's attempts to disrupt the trial . . . .In light of the overwhelming evidence against defendant, there is no reasonable possibility that the exchange between defendant and the court had any effect on the verdict[3]." (Citations omitted).

Defendant's conduct during trial, although disruptive of the proceedings, did not require that the court order a CPL §730.30 examination without other evidence of incompetency. *People v. Johnson*, 204 AD2d 188 (1st Dept 1994), *appeal denied* 83 NY2d 968 (outbursts in front of the jury did not require that the Court order a competency examination). In this case, there was no reason for the trial court to order a competency examination. The fact that defendant complained about his attorney and may have mistrusted his attorney and the court is not evidence that he did not have a

[3] The court also gave curative instructions mentioned after the outburst and again in its final charge.

rational and factual understanding of the proceedings against him. Moreover, the fact that months after the trial defendant received a psychiatric diagnosis, and while in prison was admitted to the hospital for psychiatric treatment, does not indicate that during the trial defendant was legally incompetent.

Similarly, trial counsel was not ineffective for not requesting a CPL §730 examination when there was insufficient evidence to indicate that defendant was incompetent at the time trial.

Based on all of the foregoing, defendant's forth CPL §440.10 motion to vacate the judgment of conviction is, in all respects, denied.

This opinion constitutes the decision and order of the Court.

Dated: November 29, 2007
New York, New York

J.S.C.