

**People v Kelly**

2007 NY Slip Op 34157(U)

December 10, 2007

Supreme Court, Kings County

Docket Number: 0006571/1986

Judge: Charles J. Heffernan

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 38

-----X  
THE PEOPLE OF THE STATE OF NEW YORK,

: Indictment No. 6571/86

-against-

:  
Decision and Order

SHANNON KELLY,

Defendant

:

-----X  
CHARLES J. HEFFERNAN, JR., J.

The case before this Court presents the question of whether defendant's motion for an order setting aside the verdict pursuant to Criminal Procedure Law § 440.20(1), on the ground that defendant was illegally sentenced as a persistent violent felony offender after adjudication as a predicate violent felony offender, should be granted. For the reasons which follow, defendant's motion should be denied.

**INTRODUCTION**

Defendant was charged, under Kings County Indictment Number 6571/86, with two counts of Murder in the Second Degree (Penal Law § 125.25[1], [3]), two counts of Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03), and two counts of Criminal Possession of a Weapon in the Third Degree (Penal Law § 265.02[4]).

After a jury trial, defendant was convicted of Murder in the Second Degree (Penal Law § 125.25[3]), two counts of Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03[2]), and two counts of Criminal Possession of a Weapon in the Third Degree (Penal Law § 265.02[4]).

On December 15, 1987, defendant was adjudicated a second violent felony offender and sentenced to concurrent indeterminate terms of imprisonment of twenty-five years to life for Murder in the Second Degree, seven-and-one-half to fifteen years on one count of Criminal Possession of a Weapon in the Second Degree, six to twelve years for the second count of Criminal Possession of a Weapon in the Second Degree, three-and-one-half to seven years for one count of Criminal Possession of a Weapon in the Third Degree, and three to six years for the second count of Criminal Possession of a Weapon in the Third Degree.

### **LEGAL ANALYSIS**

Defendant brings this motion pursuant to CPL § 440.20(1), which provides in pertinent part: "At any time after the entry of a judgment, the court in which the judgment was entered may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law."

Defendant argues that his sentence was unlawful because he was adjudicated a predicate violent felony offender but sentenced as a persistent violent felony offender, receiving a sentence of twenty-five years to life for a weapons possession charge. Defendant does not provide any authority to support this assertion other than to reference pages 14-15 of the sentencing minutes.

In opposition, the People provide a clearer portrait of what occurred at defendant's sentencing. The first important fact that was omitted in defendant's moving papers was that, in addition to weapons charges, defendant was also convicted of Murder in the Second Degree. Further, the People examine what is, admittedly, a rather imprecise

paragraph from the sentencing minutes that reads as follows:

[Defendant] was very intimately involved with this case. I would say besides robbery he was more intimately involved with this robbery than the other defendants. He has to pay for that, and he will do that by serving the maximum sentence of 25 years to life on possession of a gun, his gun, second degree; seven and a half to 15, the possession of Mr. Brodie's gun, acting in concert [sic]; possession second degree, six to 12, his gun; possession third degree, to maximum, three and a half to seven; and on Mr. Brodie's gun possession third degree, three to six. (Sentencing Transcript, p. 13-14).

The plain language of this statement by the sentencing court lends itself to the interpretation that defendant was sentenced to twenty-five years to life on a weapons charge. However, as the People demonstrate, this excerpt comes after a discussion of defendant's conviction under the felony murder statute. A reading of the entire sentencing transcript makes clear that the court was sentencing defendant to twenty-five years to life on his Murder in the Second Degree conviction.

Additionally, the People have attached the court's Sentence and Order of Commitment form for defendant to their papers as Exhibit B. That form shows that the sentence of twenty-five years to life was imposed lawfully as to the conviction of Murder in the Second Degree. Furthermore, that document also puts to rest the issue raised by defendant in his motion as it clearly indicates defendant was sentenced as a second violent felony offender, and all of the sentences accord with that designation.

The full sentencing transcript, when read in context, leaves no ambiguity regarding what sentence was imposed on defendant. The sentencing court's paperwork further underscores the lawful nature of the sentence imposed. Finally, defendant undertook to intentionally mislead this court by omitting a material fact pertaining to his motion,

specifically, that he was convicted of Murder in the Second Degree. Based on these factors, there is no reasonable possibility that defendant's allegations concerning his sentence have any merit. Thus, there is no necessity for a hearing on this matter. See, CPL § 440.30(4).

Defendant's motion is denied.

**CONCLUSION**

For the foregoing reasons, the motion for an order to vacate his sentence pursuant to CPL § 440.20 is denied.

This opinion shall constitute the decision and order of this court.

Dated: Brooklyn, New York  
December 10, 2007



CHARLES J. HEFFERNAN, JR.  
Acting Justice of the Supreme Court

**ENTERED**  
DEC 17 2007  
NANCY T. SUNSHINE  
COUNTY CLERK