

People v Monserrate

2007 NY Slip Op 34316(U)

December 28, 2007

Supreme Court, Kings County

Docket Number: 0003901/1999

Judge: Charles J. Heffernan

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

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THE PEOPLE OF THE STATE OF NEW YORK,

Indictment No. 3901/1999

:

-against-

:

Decision and Order

JUAN MONSERRATE,

Defendant

:

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CHARLES J. HEFFERNAN, JR., J.

This case presents the question whether defendant's motion for an order to set aside sentence imposed, pursuant to CPL § 440.20 should be granted.

For the reasons which follow, the motion should be denied.

INTRODUCTION

Defendant was convicted by a jury of Robbery in the Second Degree, Robbery in the Third Degree, Grand Larceny in the Fourth Degree and two counts of Criminal Impersonation in the First Degree.

On March 6, 2000 defendant was sentenced as a persistent violent felony offender to concurrent prison terms of twenty years to life for Second Degree Robbery, three and one-half to seven years for Third Degree Robbery, two to four years for Fourth Degree Grand Larceny, and to four years for each count of Criminal Impersonation.

On November 4, 2002, the Appellate Division affirmed the conviction. People v Monserrate, 299 AD2d 371 (2d Dept. 2000) *lv denied* People v Monserrate, 99 NY2d 561 (2002).

Having exhausted State remedies, defendant sought a federal writ of habeas corpus pursuant to 28 U.S.C. 2254(d)(1). On March 22, 2007, the United States district Court for the Eastern District of New York denied defendant's application.

Defendant now moves this court for an order vacating his sentence on the grounds that the sentencing court violated his Sixth amendment rights pursuant to Cunningham v. California, 127 S Ct 856 (2007).

STATEMENT OF FACTS

On May 10, 1999, at about 1:15 a.m., Natalia Podkuyko and her friend Boris Abramov were sitting in Mr. Abramov's car on Third Avenue near the corner of 84th Street in Brooklyn. Defendant, who was accompanied by a woman, parked his car alongside their car, thus blocking their car in the parking space in which it was parked. Defendant walked over to their car, identified himself as a police officer, and demanded Mr. Abramov's identification papers. When Mr. Abramov answered that he first wanted to see defendant's police identification, defendant reached into Mr. Abramov's car and grabbed the keys from the ignition. Mr. Abramov handed his wallet to Ms. Podkuyko, and defendant grabbed the wallet from her hands. When Mr. Abramov attempted to call the police on his cell phone, defendant grabbed the phone, attempted to take it from Mr. Abramov, and broke off its antenna. Defendant removed the money from Mr. Abramov's wallet and threw the wallet back into the car. As defendant fled, he ordered Mr. Abramov and Ms. Podkuyko not to

move.

The next day, on May 11, 1999, at about 8:25 a.m., Christopher Amon, a student at Poly Prep Country Day School in Brooklyn, parked his car in the school parking lot. After Mr. Amon got out of his car, defendant, who was accompanied by a woman, parked his car behind Mr. Amon's car. Defendant identified himself as a police officer and asked Mr. Amon for his identification papers. Mr. Amon refused to give defendant his identification papers. Meanwhile, Timothy Prakope, a fellow student of Mr. Amon who had witnessed the incident, asked defendant what he wanted. Defendant told Mr. Prakope to leave, and when Mr. Prakope refused, defendant put his hand in his waistband and shook what appeared to be a gun. Mr. Prakope asked defendant whether he had a gun, and defendant responded by pulling out the handle of what appeared to be a gun. Defendant then turned to Mr. Amon and ordered him to come closer to him. Mr. Amon saw a silver reflection of what he believed was a gun and came closer. When he came closer, Mr. Amon saw the black handle of a gun in defendant's waistband. Defendant demanded Mr. Amon's money and ATM card. When Mr. Amon complied, defendant asked Mr. Amon for the pin number to the ATM card. Mr. Amon gave defendant a fake pin number. Defendant drove away in a red car with the license plate number R744US. The police stopped defendant and the woman less than an hour later in a red car with the same license plate number. The police brought Mr. Amon and Mr. Prakope to the location where they were detaining defendant and the woman, and Mr. Amon and Mr. Prakope identified defendant and the woman as the robbers.

For the above acts, defendant was charged by Kings county Indictment Number 3901/99 with two counts of Robbery in the Second Degree (P.L. § 160.10[1], [2] [b]) (May

11, 1999), two counts of Robbery in the Third Degree (P.L. § 160.05) (May 10 & May 11, 1999), one count of Attempted Robbery in the Third Degree (P.L. §§ 110.00/160.05) (May 10, 1999), two counts of Grand Larceny in the Fourth Degree (P.L. § 155.30[05]) (May 10 & May 11, 1999), three counts of Petit Larceny (P.L. § 155.25) (May 10 & May 11, 1999), two counts of Criminal Impersonation in the First Degree (P.L. § 190.26) (May 10 & May 11, 1999), and two counts of Criminal Impersonation in the Second Degree (P.L. § 190.25[3]) (May 10 & May 11, 1999).

On January 12, 2000, the jury found defendant guilty of one count of Robbery in the Second Degree (P.L. § 160.10[2]); one count of Robbery in the Third Degree (P.L. 160.05); one count of Grand Larceny in the Fourth Degree (P.L. § 155.30[5]); and two counts of Criminal Impersonation in the First Degree (P.L. § 190.26) (617-620).

On March 6, 2000, the court sentenced defendant, as a persistent violent felony offender, to concurrent terms of imprisonment of twenty years to life on the second-degree robbery conviction, three and one-half to seven years on the third-degree robbery conviction, and two to four years on each of the remaining convictions (S. 5, 7) (Starkey, J., at trial and sentence).

Defendant appealed from his judgment of conviction. In his brief on appeal, defendant raised two claims: (a) that the showup identification should have been suppressed, on the ground that the showup procedure was unduly suggestive; and (b) that the evidence of defendant's conviction of third-degree robbery for the May 10, 1999 robbery was supported by legally insufficient evidence.

By decision and order dated November 4, 2002, the Appellate Division unanimously affirmed defendant's judgment of conviction. People v Monserrate, 299 AD2d 371 (2d

Dept. 2002). The Appellate Division held that the showup procedure was not unduly suggestive and that the evidence was legally sufficient to support defendant's judgment of conviction of third-degree robbery for the May 10, 1999 robbery. *Id.*

On December 18, 2002, defendant was denied leave to appeal to the Court of Appeals. People v. Monserrate, 99 N.Y.2d 561 (2002).

By papers dated December 30, 2003, defendant applied in the United States District Court for the Eastern District of New York for a writ of habeas corpus. In his petition, defendant claimed that (a) the showup identification should have been suppressed, on the ground that the showup procedure was unduly suggestive; and (b) that the evidence of his conviction of third-degree robbery for the May 10, 1999 robbery was unsupported by legally sufficient evidence.

Defendant's application for a writ of habeas corpus was denied.

For the reasons set forth, defendant's motion to set aside the sentence should be denied.

THE LEGAL ANALYSIS

Defendant's claim that his adjudication as a persistent violent felony offender violated the holding of Cunningham v. California, 127 S Ct 856, is meritless. Defendant's argument that the court violated his Sixth Amendment right at sentencing by considering his past convictions stands in contrast to the very case he relies upon in his papers. The Supreme Court has held that a sentencing court may consider a defendant's recidivism at sentencing even though that defendant's recidivism was not proved to a jury beyond a

reasonable doubt, Almendarez-Torres v United States, 523 US 224, 239 (1998). This holding was explicitly upheld in Apprendi v. New Jersey, 530 US 466, 488-89 (2000). Additionally, the Supreme Court again upheld this ruling in the case defendant relies on here, Cunningham v. California, 127 S Ct 856, 864 (2007).

Under New York's persistent violent felony offender statute, a defendant is a persistent violent felony offender, and may therefore receive an enhanced sentence, if the defendant has been convicted of a violent felony offense and has previously been subjected to two or more predicate violent felony convictions. P.L. § 70.08(1). Nothing more is required. Thus, a determination by a sentencing court, as opposed to a jury, that a defendant is a persistent violent felony offender does not violate the Supreme Court's ruling in Apprendi because it falls within the Almendarez-Torres exception to that rule. See People v. Renna, 13 AD3d 398 (2d Dept. 2004) (citing Almendarez-Torres among other cases); see also People v. Rosen, 96 NY2d 329, 334-355 (2001) (upholding persistent felony offender statute, P.L. § 70.10, because enhanced sentence is based upon "defendant's prior felony convictions—an explicitly noted exception to the general rule in Apprendi"), Cert. denied, 534 U.S. 899 (2001); People v. Adelman, 36 AD3d 926, 928 (2d Dept. 2007) (citing Rosen in upholding P.L. § 70.08 against Apprendi challenge);

Thus, defendant's sentence did not violate Apprendi or Cunningham because the only determination the sentencing court was required to make to impose the enhanced sentence was the simple fact of defendant's prior convictions. Indeed, in a recent case, the Supreme Court held that a defendant's claim "that the simple fact of his prior conviction was required to be found by a jury" is "baseless." United States v. James, 127 S Ct 1586, 1600 n8 (2007). Accordingly, in this case, in which the enhanced sentence was dependent

solely on the fact of defendant's prior convictions, a jury was not necessary to make that determination. Accordingly, defendant's motion is denied.

CONCLUSION

For the foregoing reasons, the motion for and Order to Set Aside Sentence pursuant to CPL § 440.20 should be denied.

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

Dated: Brooklyn, New York
December 28, 2007



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

ENTERED
JAN - 3 2008
NANCY T. SUNSHINE
COUNTY CLERK