

People v Shearer

2007 NY Slip Op 34614(U)

September 10, 2007

Supreme Court, Westchester County

Docket Number: Ind. No. 03-0708

Judge: Robert DiBella

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

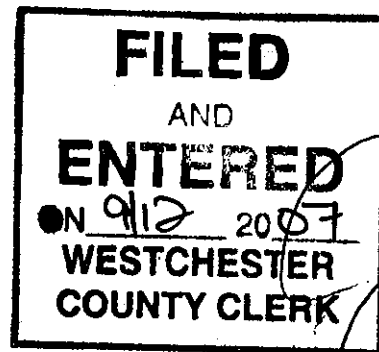
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THE PEOPLE OF THE STATE OF NEW YORK

- against -

GIL SHEARER,

Defendant

-----X
DIBELLA, J.



DECISION AND ORDER

Ind. No. 03-0708

The defendant moves pursuant to Criminal Procedure Law § 440.10 for an Order vacating the judgment of his conviction. The People oppose the application. The application is denied.

On January 26, 2004, the defendant pled guilty under Indictment 0708-03 to Murder in the Second Degree. On March 3, 2004, this court sentenced the defendant to an indeterminate term of fifteen years to life imprisonment. The defendant appealed and on May 2, 2006, the Appellate Division, Second Department, affirmed the defendant's conviction. He then sought leave to appeal to the Court of Appeals. While this application was pending he filed a motion to vacate his conviction under CPL § 440.10. In a Decision and Order dated July 12, 2006, this court (Cacase, J.) denied the motion. On July 24, 2006, the Court of Appeals denied his application for leave to appeal.

The defendant again moves to vacate his conviction under CPL § 440.10. In his motion he claims that counsel was ineffective for misinforming him as to the elements of depraved indifferent murder (PL 125.25(2)) and for not moving to withdraw his plea prior

PEOPLE v. GIL SHEARER
Ind. No. 03-0708

to sentence. He further claims that his plea was not knowing and voluntary because he did not understand the elements of depraved indifferent murder.

Under CPL §440.10(2)(a), this court must deny a motion to vacate a judgment of conviction when “[t]he ground or issue raised in the motion was previously determined on the merits upon an appeal from judgment.” Under CPL §440.10(2)(c), the court must also deny such a motion where “[a]lthough 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.” The court may deny a motion to vacate a judgment where the defendant could have raised the claims in his motion in a prior CPL §440 motion but failed to do so. CPL §440.10(3)(c).

The defendant’s claim that he did not knowingly and voluntarily plead guilty is a claim reviewable on direct appeal. Hence, the court must deny this claim on this basis. See CPL § 440.10(2). Moreover, this court has reviewed the transcript of defendant’s plea colloquy and finds that the terms of the plea agreement were sufficiently set forth on the record and that the defendant entered a knowing, voluntary and intelligent plea of guilty. See People v. Tatro, 8 A.D.3d 823, 824 (3rd Dept. 2004).

The defendant’s claims of ineffective assistance of counsel are also procedurally barred because the defendant could have raised these claims in his prior motion to vacate his conviction under CPL §440.10. Hence, the court rejects these claims on this basis. See CPL § 440.10(3).

PEOPLE v. GIL SHEARER
Ind. No. 03-0708

Moreover, the defendant's ineffective assistance of counsel claims are deficient on the merits. In evaluating such claims, this court must view the proceedings in their totality and determine whether the defendant received "meaningful representation." People v. Benevento, 91 N.Y.2d 708 (1998). The defendant has the burden of demonstrating that he was deprived of meaningful representation and that he suffered actual prejudice as a result of counsel's deficient representation. See Matter of Leo UU, 288 A.D.2d 711, 713, (3rd Dept. 2001). The allegations set forth in support of defendant's claims fail to make that showing.

Defendant's claim that counsel did not adequately understand and explain the elements of depraved indifferent murder is conclusory and not supported by sworn allegations of fact. Moreover, he fails to substantiate his claim that the alleged ineffective assistance of counsel impacted the voluntariness of his plea. The defendant pled guilty as part of a negotiated plea. He made the decision to plead guilty in the midst of trial after the People had presented the testimony of six witnesses. The defendant concedes that prior to trial he had confessed to shooting and causing the death of another. Finally, the minutes of the defendant's plea allocution indicate his satisfaction with counsel and that his decision to plead guilty was knowing and voluntary.

In exchange for his guilty plea the defendant was promised and received the minimum sentence permissible for Murder in the Second Degree, fifteen years to life. In addition, part of the negotiated plea was that this sentence would run concurrent to whatever sentence the defendant received on a pending felony drug case. Notably, the defendant was also charged with Manslaughter in the First Degree, a Class B felony. A

PEOPLE v. GIL SHEARER
Ind. No. 03-0708

conviction on this charge could have resulted in a maximum sentence of twenty-five years imprisonment.

While the defendant claims that his conduct did not amount to depraved indifferent murder, he does not raise a claim of actual innocence to the charge of Manslaughter in the First Degree or the other charged offenses, does not include any analysis of the strength of the People's case, available defenses and/or the likelihood of an acquittal at trial. See People v McDonald, 296 A.D.2d 13, 19, aff'd 1 N.Y.3d 109 (citing the absence of any colorable claim of innocence as a basis for rejecting defendant's claim of prejudice); see also People v Stewart, 307 A.D.2d 533, 535 (3rd Dept. 2003). Hence, the totality of the circumstances surrounding defendant's plea fail to demonstrate that he was deprived of meaningful representation. See People v Ford, 86 N.Y.2d at 404. ("In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel"); Matter of Thompson v. Gibeault, 305 A.D.2d 873, 875 (3rd Dept. 2003).

A court may deny a motion pursuant to CPL § 440 without a hearing if the defendant fails to bring forward sufficient factual allegations to create an issue of fact or fails to allege any ground constituting a legal basis for the motion. CPL §440.30 (1),(4); People v. Crippen, 196 A.D.2d 548 (2nd Dept. 1993); People v. Bacchi, 186 A.D.2d 663 (2nd Dept. 1992). Bare allegations are insufficient to carry this evidentiary burden. People v. Spencer, 32 N.Y.2d 446 (1973). Defendant does not submit sworn allegations substantiating the essential facts necessary to support his current claims and fails to assert a legal basis for

PEOPLE v. GIL SHEARER
Ind. No. 03-0708

the motion. See CPL §440.30 (4)(b); People v. Wells, 265 A.D.2d 589 (2nd Dept. 1999); People v. Leka, 209 A.D.2d 723 (2nd Dept. 1994). Accordingly, the court finds it unnecessary to conduct a hearing to resolve this matter. See CPL § 440.30 (4).

Based upon the foregoing, defendant's motion is denied.

In reaching this decision the court considered the following papers:

(1) Defendant's Motion to Vacate Judgment and Affidavit in Support dated June 4, 2007;

(2) The People's Affirmation in Opposition with Attachments;

This constitutes the Decision and Order of the court.

Dated: White Plains, New York
September 10, 2007



HON. ROBERT DIBELLA, A.J.S.C.

To: Janet DiFiore
Westchester County District Attorney
111 Dr. Martin Luther King, Jr. Blvd.
White Plains, New York 10601
Attn: A.D.A. Joe Latino

Gil Shearer 04-A-1423
Auburn Correctional Facility
135 State Street
PO Box 618
Auburn, NY 13024