

People v Bush

2008 NY Slip Op 30412(U)

February 5, 2008

Supreme Court, Kings County

Docket Number: 0012658/1996

Judge: Vincent M. Del Giudice

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART 25

Decision and Order

Indictment No:
12658-1996

PEOPLE OF THE STATE OF NEW YORK

-against-

Hon. Vincent Del Giudice
Dated: February 5, 2008

EUGENE BUSH

On January 22, 1998, the defendant was convicted of criminal possession of a weapon in the second degree. On February 10, 1998, the defendant was sentenced to a lengthy term of imprisonment (Friedman, J.).¹

The defendant's conviction, and sentence, was upheld by the Appellate Division, Second Judicial Department (*People v Bush*, 278 AD2d 334). Leave to appeal was denied (*People v Bush*, 96 NY2d 757).

Subsequent to his direct appeals, the defendant filed an application for a writ of *error coram nobis*, on the ground of ineffective assistance of appellate counsel. That application was denied (*People v Bush*, 43 AD3d 1174).

In a motion received by this court², dated December 13, 2007, the defendant again moves to vacate his judgment of conviction, pursuant to CPL 440.10 (1)(a) and (h). Defendant claims that the indictment was defective because his actual name was not set forth in each count of the indictment, thereby rendering the

¹ Defendant received an indeterminate term of twenty-five years to life imprisonment.

²This court received the defendant's motion as part of its Miscellaneous Motion calendar.

indictment jurisdictionally defective, pursuant to CPL 200.50 (7)(a).³

Pursuant to CPL 440.10, the court in which judgment was entered may vacate such judgment upon certain specific enumerated grounds. Defendant claims the court did not have jurisdiction of the action or person of the defendant, in violation of CPL 440.10 (1)(a).

Notwithstanding the claims raised by the defendant in his motion, pursuant to CPL 440.10 (2), the court must deny the motion whenever :

(c) 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.

In addition, CPL 440.10 (3) states that notwithstanding the merits of the defendant's claims, the court may deny the defendant motion to vacate judgment whenever:

(a) Although facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter

³Although defendant's moving papers contained numerous judicial and statutory citations, none were provided in support of his current claim.

prior to sentence and the ground or issue in question was not subsequently determined upon appeal ...

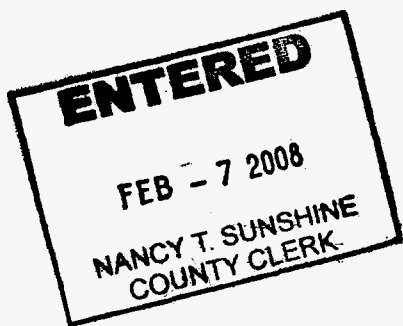
This court has carefully reviewed the defendant's moving papers.

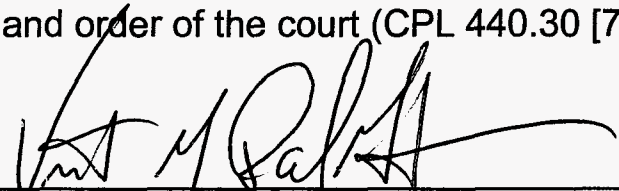
The defendant's jurisdictional claim could have been raised on direct appeal but the defendant failed to raise such issue (*People ex rel. Curry v Girdich*, 290 AD2d 912, 913, *lv denied* 98 NY2d 602; *People v Nunez*, 264 AD2d 487; *see also People v Maldonado*, 34 AD3d 497, 498, *lv denied* 5 NY3d 830).

In any event, the defendant's claim is without merit. The Criminal Procedure Law does not specifically require the defendant's actual name be set forth in each count of the indictment (CPL 200.50). Where, as here, a defendant's name is included in the caption of the indictment, such is sufficient, even if his name is not set forth in the body of the document (*Downey v Hale*, 67 F2d 208 [1st Cir 1933], *cert denied* 291 US 662; *People v Brothers*, 66 AD2d 954, 955; *People of the State of New York v Graham*, 2007 NY Slip Op 32423[U] [Sup Ct Kings County 2007]; *People of the State of New York, ex rel. Phillip Cotterell v Graham*, NY Slip Op 31856[U] [Sup Ct Kings County 2007]).

Accordingly, defendant's motion to vacate the judgment entered against him is denied (CPL 440.30 [2] and [3]).

This constitutes the decision and order of the court (CPL 440.30 [7]).





Vincent M. Del Giudice
Judge of the Court of Claims

Acting Supreme Court Justice

Dated: February 5, 2008
Brooklyn, New York