

People v Thompson

2008 NY Slip Op 30550(U)

January 31, 2008

Supreme Court, Kings County

Docket Number: 0010989/2006

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:
10989/2006

PEOPLE OF THE STATE OF NEW YORK

-against-

Hon. Vincent Del Giudice
Dated: January 31, 2008

PETER THOMPSON

On April 23, 1998, the defendant was convicted of robbery in the first degree. Prior to sentence, the trial court issued a written decision denying the defendant's motion to set aside the verdict (*People v Thompson*, 177 Misc2d 803). On June 2, 1998, the defendant was sentenced to a lengthy term of imprisonment (Kriendler, J.).¹

The defendant's conviction, and sentence, was upheld by the Appellate Division, Second Judicial Department (*People v Thompson*, 276 AD2d 811). Leave to appeal was denied (*People v Thompson*, 96 NY2d 739).

Subsequent to his direct appeals, the defendant filed a motion to vacate judgment before the trial court (CPL 440.10). That application was denied, apparently without a published decision.

In a motion received by this court², dated November 20, 2007, the defendant again moves to vacate his judgment of conviction, pursuant to CPL 440.10. Defendant claims that during the summation, the prosecutor became an unsworn

¹ Defendant received an indeterminate term of twelve-and-a-half to twenty-five years imprisonment.

² Since the trial court judge has retired, this court received the defendant's motion as part of its Miscellaneous Motion calendar.

witness against the defendant by arguing facts not presented at trial. In addition, the defendant claims the prosecutor purposefully withheld *Rosario* material from the defense. He argues transcripts from his co-defendant's parole revocation hearing should have been disclosed by the prosecutor at the defendant's trial.

Pursuant to CPL 440.10, the court in which judgment was entered may vacate such judgment upon certain specific enumerated grounds. As best as can be stated herein, defendant claims the judgment was obtained in violation of his right to not have any unsworn witnesses present evidence against him have and to have all *Rosario* material disclosed prior to trial (CPL 440.10 [1][h]).

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

(a) The ground or issue raised upon the motion was previously
 determined on the merits upon an appeal from the judgment

.....

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

(b) The ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state, other than an appeal from the judgment ...

(c) 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.³

This court has carefully reviewed the defendant's motion papers. The defendant's current claims must be denied based on one or more of the procedural bars set forth above.

With respect to the defendant's summation argument, the defendant unjustifiably failed to address this issue prior to sentence and the ground or issue in question was not subsequently determined upon appeal (CPL 440.10

³Since this court does not have a copy of the trial court's decision in the defendant's previous motion to vacate judgment, I am unable to determine whether the defendant raised either, or both, of the issues raised herein at that prior proceeding. For purposes of this decision, I am deciding this case as if it was the defendant's first motion to vacate judgment.

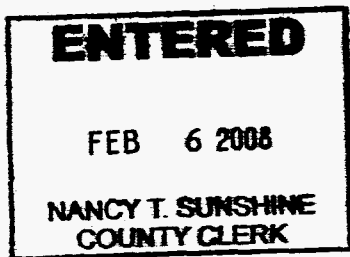
[2][c] and [3][a]).⁴


With respect to the defendant's *Rosario* claim, that issue was previously determined on the merits upon a prior motion or proceeding (CPL 440.10 [3][b]). Although the issue was raised as part of the defendant's CPL 330.30 (1) motion, the court conceded that the defendant was not present at the parole revocation proceeding and did not have actual notice of the nature and scope of the proceedings as his co-defendant did. Nevertheless, the defendant failed to prove a reasonable possibility that the prosecution's failure to disclose the *Rosario* material contributed to the verdict (*People v Jackson*, 78 NY2d 638, 649).

In addition, the defendant was in a position to raise his *Rosario* claim before the Appellate Division, where a "per se" reversal rule would have been applied (*People v Jones*, 70 NY2d 547), but he failed to do so (CPL 440.10 [2][c]).

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

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




Vincent M Del Giudice

⁴Upon his direct appeal, the Appellate Division did address defendant's claim that the prosecutor's opening statement improperly referred to an accomplice who was not produced at trial, but no reference was made that the defendant also challenged the substance of the prosecutor's summation.

Judge of the Court of Claims
Acting Supreme Court Justice

Dated: January 31, 2008
Brooklyn, New York