

People v Hoyle

2008 NY Slip Op 30561(U)

January 16, 2008

Supreme Court, Kings County

Docket Number: 0001982/2002

Judge: Cheryl E. Chambers

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM, PART 18

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

-against-

DECISION AND ORDER
Kings County
Indictment Numbers 219/02,
1982/02, and 160/03

GABRIEL HOYLE,

Defendant.

-----X
CHERYL E. CHAMBERS, J.S.C.

Defendant pro se moves pursuant to CPL 440.10 to vacate (1) the judgment which convicted him, upon a guilty plea, of criminal possession of a weapon in the third degree, under Indictment Number 219/02; (2) the judgment which convicted him, upon a guilty plea, of robbery in the third degree, under Indictment Number 1982/02; and the judgment which convicted him, upon a jury verdict, of robbery in the first degree, under Indictment Number 160/03. Defendant also moves pursuant to CPL 440.20 to set aside the sentences imposed. Defendant's motions are denied.

FINDINGS OF FACT

On April 18, 2002, defendant pleaded guilty, under Indictment Number 219/02, to criminal possession of a weapon in the third degree, and, under Indictment Number 1982/02, to robbery in the first degree. Prior to entry of the plea, the court informed defendant that it would consider youthful offender treatment: if the court decided not to treat defendant as a youthful offender, he would be allowed to withdraw his plea to robbery in the first degree and he would be sentenced to six months in jail and five years probation on the remaining charge of robbery in

the third degree. In response to the court's question, defendant agreed that he had had sufficient time to discuss the matter with his attorney.

On June 3, 2002, the court denied defendant youthful offender treatment. In accordance with the plea agreement, the court vacated the plea to robbery in the first degree and sentenced defendant, on the remaining count of robbery in the third degree, to six months in jail and five years probation. Also on June 3, 2002, defendant was sentenced to six months in jail and five years probation under Indictment Number 219/02. The sentences were ordered to run concurrently to each other. Defendant did not appeal from either judgment.

Defendant was indicted under Kings County Indictment Number 160/03 for a gunpoint robbery committed on November 30, 2002 on Eastern Parkway in Brooklyn. Defendant was convicted by a jury of robbery in the first degree. He was sentenced on August 4, 2005, to fifteen years in prison.

Defendant appealed from the judgment, claiming only that the court's instructions to the jury during jury selection were erroneous. The judgment was affirmed (*People v Hoyle*, 32 AD3d 864 [2d Dept 2006]) and leave to appeal to the Court of Appeals was denied (*People v Hoyle*, 7 NY3d 926 [2006]).

Defendant moved to vacate the judgment and dismiss the indictment on the ground that the sentence was illegal in that it did not include a term of post-release supervision. Defendant's motion was denied by Decision and Order dated July 6, 2007. On August 9, 2007, the court corrected its clerical error and imposed 2 ½ years of post-release supervision upon defendant, who was present in court, and represented by counsel.

Defendant now moves to vacate the judgments entered under Indictment Numbers 219/02 and 1982/02 on the ground that his constitutional right to the effective assistance of counsel was violated when counsel failed to advise defendant that he was entitled to be adjudicated a youthful offender.

Defendant moves for a second time to vacate the judgment entered under Indictment Number 160/03. He contends that his constitutional right to the effective assistance of counsel was violated when counsel failed to (1) object to the victim's testimony regarding his identification of defendant at a lineup; (2) move to dismiss the indictment pursuant to CPL 30.30; and (3) move to dismiss the count of robbery in the first degree at the trial on the ground that the evidence was insufficient¹. He also claims that he was improperly sentenced as a predicate felony offender after the court did not afford him the opportunity to contest the constitutionality of his prior convictions.

CONCLUSIONS OF LAW

I. Indictment Numbers 219/02 and 1982/02

The court may deny a motion to vacate judgment without a hearing if "[a]n allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof" (CPL 440.30 [4] [c]). Defendant's allegation that his counsel failed to advise him regarding youthful offender treatment is "conclusively refuted" by defendant's own statement in the plea minutes that he had had sufficient time to consult with his attorney regarding, inter alia, youthful offender treatment (*see People v Vellucci*, 13 NY2d 665, 666[1963], cert denied 375 US 868

¹ Defendant also claims that he was arrested for possession of a weapon without probable cause. No weapon was recovered from defendant in connection with the 2003 robbery arrest. The court is therefore unable to determine this claim.

[1963] [plea and sentence minutes are unquestioned documentary proof of promises made by the judge at plea and sentence]). Defendant's motions on this ground are, therefore, denied.

II. Indictment Number 160/03

A. Ineffective Assistance of Counsel

"If it appears by conceded or uncontradicted allegations of the moving papers or of the answer, or by unquestionable documentary proof, that there are circumstances which require denial [of a motion to vacate judgment] pursuant to subdivision two of section 440.10 . . . the court must summarily deny the motion" (CPL 440.30 [2]).

CPL 440.10 (2) (c) mandates denial of a motion to vacate a judgment when:

[a]lthough sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon an 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 on an appeal actually perfected by him.

"[W]here the question of justification for failure to raise the issue when it could have been dealt with on direct review is relevant . . . sworn allegations of fact must directly address [that matter] or the motion is subject to summary denial" (Preiser, Practice Commentaries [McKinney's Cons Laws of NY, Book 11A. CPL 440.30 at 47, citing, e.g., *People v McDonald*, 1 NY3d 109, 115 [2003] and *People v Friedgood*, 58 NY2d 467, 471-472 [1983]).

In his affidavit, and in his memorandum of law, defendant refers solely to facts in the record of the proceedings in support of his claim that counsel was ineffective. The People also refer solely to facts in the record of the proceedings in their affidavit and memorandum of law submitted in opposition to defendant's motion. Defendant does not address the issue of

justification for his failure to raise the issue of ineffective assistance of counsel on his direct appeal. Defendant's motion, to the extent it is based on his claim that trial counsel was ineffective, is, therefore, denied.

B. Sentence

Defendant's allegation that he was sentenced as a predicate offender is "conclusively refuted" by the sentencing minutes which show that that the People did not file a predicate felony offender statement and the court did not adjudicate defendant a predicate offender (*see People v Vellucci*, 13 NY2d at 666). Moreover, the sentence of 15 years imposed by the court falls within the authorized sentence of five to 25 years authorized for a defendant convicted of the class B violent felony offense of robbery in the first degree (Penal Law 70.02 [1] [a], [2], and [3] [a]). Defendant's motion on this ground is, therefore, denied (CPL 440.30 [4] [c]).

For all of the foregoing reasons, defendant's motions are denied.

This constitutes the decision and order of the court.

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, NY 11201 for a certificate granting leave to appeal from this determination. This application must be made within thirty days of service of this decision. Upon proof of financial inability to retain counsel and to pay the costs and expenses of the appeal, the defendant may apply to the Appellate Division for the assignment of counsel and

for leave to prosecute the appeal as a poor person and to dispense with printing. Application for poor person relief will be entertained only if and when permission to appeal or a certificate granting leave to appeal is granted (22 NYCRR 671.5).

Dated: January 16, 2008

ENTER

Cheryl J. Chambers

J.S.C.

ENTERED
FEB - 6 2008
NANCY T. SUNSHINE
COUNTY CLERK