

**People v Caraway**

2008 NY Slip Op 31075(U)

April 7, 2008

Supreme Court, Kings County

Docket Number: 0000214/1992

Judge: Jill Konviser

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: CRIMINAL TERM PART 26**

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**THE PEOPLE OF THE STATE OF NEW YORK, :**

**-against- :**

**Ind. No. 214/92**

**RAYNARD CARAWAY, :**

**Defendant. :**

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**JILL KONVISER, JUSTICE:**

On February 2, 1993, the defendant was convicted, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree. On March 9, 1993, he was sentenced to concurrent indeterminate prison terms of twenty-two years to life for the murder conviction and four to twelve years for the weapons possession conviction. On direct appeal, the defendant's conviction was unanimously affirmed. People v. Caraway, 215 A.D.2d 493 (2d Dept.), lv. denied, 86 N.Y.2d 791 (1995).

The defendant has filed a pro se motion to vacate the judgment of conviction under C.P.L. §440.10 on the ground that the felony complaint, which was generated prior to his indictment, was defective and deprived this Court of jurisdiction.<sup>1</sup> The People oppose the defendant's motion. The defendant submitted a reply memorandum, which this Court received on March 20, 2008. For the reasons that follow, the motion to vacate the judgment of conviction is denied without a hearing.

**Procedural History**

The defendant filed a direct appeal of his conviction with the Appellate Division, Second Department, in which he alleged that: (1) his guilt has not been proven beyond a reasonable doubt and that the verdict was against the weight of the evidence; (2) his right to be present at the side-bar

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<sup>1</sup>This is the third C.P.L. §440.10 motion that the defendant has filed.

questioning of prospective jurors had been violated;” (3) he was denied the effective assistance of counsel; (4) the prosecutor’s summation remarks deprived him of a fair trial; (5) the prosecutor improperly elicited evidence of an uncharged crime; and, (6) the prosecutor exercised peremptory challenges against two male black prospective jurors in contravention Batson v. Kentucky, 476 U.S. 79 (1986).

On May 8, 1995, the Appellate Division, Second Department, unanimously affirmed the defendant’s conviction. People v. Caraway, 215 A.D.2d 493 (2d Dept. 1995). The Court held that the evidence was “legally sufficient to establish the defendant’s guilt beyond a reasonable doubt” and that “the verdict of guilty was not against the weight of the evidence.” Id. With respect to the remaining issues the defendant raised, the Court held that they were “either unpreserved for appellate review, without merit, or do not require reversal.” Id. Leave to appeal to the New York Court of Appeals was denied on August 17, 1985. People v. Caraway, 86 N.Y.2d 791 (1995) (Bellacosa, J.).

On July 31, 1996, the defendant filed a pro se motion to vacate the judgment of conviction pursuant to C.P.L. §440.10 on the ground that his trial counsel was ineffective. The People opposed the defendant’s motion. On November 15, 1996, the defendant’s motion to vacate the judgment of conviction was denied in its entirety.<sup>2</sup>

On December 20, 1999, the defendant filed a petition for a writ of error coram nobis in the Appellate Division, Second Department, in which he claimed that his appellate counsel was ineffective. The People opposed the defendant’s motion. On April 17, 2000, the petition was

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<sup>2</sup>A copy of this decision is attached as Exhibit IV to the People’s Affirmation in Opposition.

unanimously denied. People v. Caraway, 271 A.D.2d 617 (2d Dept. 2000).

On March 6, 2001, the defendant filed his second pro se motion to vacate the judgment pursuant to C.P.L. §440.10. In that motion, the defendant argued that the prosecutor: (1) improperly elicited hearsay evidence; (2) failed to preserve evidence; and, (3) tainted the jury by eliciting evidence concerning the defendant's flight. The People opposed the defendant's motion. On June 1, 2001, the defendant's second motion to vacate the judgment was denied in its entirety.<sup>3</sup>

### **The Motion Before the Court**

The defendant, in his third pro se motion to vacate the judgment of conviction pursuant to C.P.L. §440.10, claims that the judgment should be vacated because the felony complaint, which was generated prior to his indictment, was defective in that it was not verified by the complainant and was based on hearsay. This claim could have been raised on direct appeal to the Appellate Division and, thus, is mandatorily barred by C.P.L. §440.10(2)(c).

C.P.L. §440.10(2)(c) provides that a court must deny a defendant's motion to vacate the judgment of conviction when sufficient facts appear on the record to permit appellate review of the issue raised but the defendant has unjustifiably failed to raise the issue on direct appeal to the Appellate Division. People v. Cochrane, 27 A.D.3d 659 (2d Dept.), lv. denied, 7 N.Y.3d 787, cert. denied, 127 S. Ct. 436 (2006); People v. Jossiah, 2 A.D.3d 877 (2d Dept. 2003), lv. denied, 2 N.Y.3d 742 (2004); see People v. Cooks, 67 N.Y.2d 100, 103 (1986) (a motion to vacate a judgment of conviction cannot be "employed as a substitute for direct appeal when defendant. . . could readily have raised it on appeal but failed to do so (C.P.L. §440.10[2][c]).").

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<sup>3</sup>A copy of this decision is attached as Exhibit V to the People's Affirmation in Opposition.

In this case, the felony complaint was part of the record and any claim that it was defective could have been raised on direct appeal. The defendant, however, unjustifiably failed to raise this claim on direct appeal. As such, the motion to vacate the judgment is mandatorily barred by C.P.L. §440.10(2)(c). People v. Byrdsong, 234 A.D.2d 468 (2d Dept. 1996), lv. denied, 89 N.Y.2d 1033 (1997).

Alternatively, the defendant's claim is also barred by C.P.L. §440.10(3)(c), which provides that a court may deny a motion to vacate the judgment when the defendant has filed a previous motion to vacate the judgment pursuant to C.P.L. §440.10 and "was in a position adequately to raise the ground or issue underlying the present motion but did not do so." In this case, the defendant filed two earlier pro se motions to vacate the judgment of conviction that were respectively denied on November 15, 1996 and June 1, 2001. The defendant's current claims are based entirely on circumstances that occurred before either of those pro se motions were filed. Therefore, he was able to raise his current claim in his earlier motions. As such, it is barred from this Court's consideration by C.P.L. §440.10(3)(c).

In any event, the defendant's claim is without merit as the felony complaint that the defendant challenges was superseded by a valid indictment. See People v. Smith, 304 A.D.2d 677 (2d Dept. 2003) (defendant's claim that a defect in the felony complaint warranted reversal of conviction was rejected because the complaint was superseded by a valid indictment); People v. Smith, 293 A.D.2d 764 (2d Dept.), lv. denied, 98 N.Y.2d 713 (2002) (same); People v. Wilkens, 176 A.D.2d 978 (2d Dept. 1991) (same).

**Conclusion**

The motion to vacate the judgment of conviction pursuant to C.P.L. §440.10 is denied in its entirety without a hearing.

This constitutes the Decision and Order of the Court. The Clerk of the Court is directed to mail copies of this Decision and Order to the defendant at his place of incarceration and to the Kings County District Attorney.

Dated: Brooklyn, New York  
April 7, 2008

HON. J. KONVISER  
J.S.C.

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**ENTERED**

APR - 7 2008

NANCY T. SUNSHINE  
COUNTY CLERK