

People v Berry

2008 NY Slip Op 31090(U)

March 6, 2008

Supreme Court, Kings County

Docket Number: 0005253/1990

Judge: Abraham G. Gerges

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MEMORANDUM

SUPREME COURT

KINGS COUNTY

BY ABRAHAM GERGES, J.

The People of the State of New York

Date: March 6, 2008

v.

Kahill Berry,

Defendant.

Ind. #5253/1990

Defendant moves to set aside the sentence imposed on the above-referenced indictment.

The court has considered defendant's motion papers with attachments dated January 27, 2007 and reply dated December 3, 2007, the People's answer with attachments dated October 29, 2007, various plea and sentence minutes, and the court file including the predicate statement.

Facts

Defendant was charged under indictment number 5253/1990 with Attempted Murder in the First Degree, Attempted Murder in the Second Degree, Assault in the Second Degree, four counts of Criminal Possession of a Weapon in the Second Degree, two counts of Criminal Possession of a Weapon in the Third Degree and Reckless Endangerment in the First Degree.

On February 16, 1993 defendant pleaded guilty to one count of Attempted Criminal Possession of a Weapon in the Third Degree. On March 8, 1993, pursuant to the negotiated plea, defendant was sentenced to a term of imprisonment of a minimum of two years to a maximum of life. The predicate statement filed with the court on the sentence date details two prior violent felony offenses. The first enumerated felony was Assault in the Second Degree, with a sentence date of March 10, 1983. The second felony listed was Criminal Possession of a Weapon in the Second Degree, with a sentence date of April 22, 1985.

A late notice of appeal was filed for ind. 5253/90, which was dismissed by the court on

July 2, 2002.

Defendant now moves to set aside the sentence pursuant to CPL §440.20(1) and (3), contending that he was erroneously sentenced as a predicate felon and that counsel was ineffective.

Law

CPL 430.10 prohibits a court from altering a commenced incarceration sentence, except where specifically authorized by law (*People v Richardson*, 100 NY2d 847, 850-851(2003); *Matter of Pirro v Angiolillo*, 89 NY2d 351, 356(1996); *People v Vasquez*, 88 NY2d 561, 580-581(1996). Even when a term of imprisonment has not begun, a lower court is without authority to modify a sentence if the term of the court in which the sentence was imposed has passed *People v Chunn*, 186 AD2d 262, 263 (1992); *People v White*, 121 AD2d 762, 763-764 (1986); cf. *Hennessy v Cunningham*, 57 AD2d 298, 300 (1977).

CPL 440.20 is an exception to CPL 430.10 (*People v Turner*, 47 AD2d 564, 565 (1975)). The former provision provides for the vacatur of sentence, even after the commencement of an incarceration sentence, where the original sentence is illegal. If the sentence is legal, the court is not authorized to change the sentence (*People v Corso*, 40 NY2d 578, 580 (1976); *People v Romain*, 288 AD2d 242, 243 (2001); *People v Gurlakis*, 160 Misc 2d 345; see also *Vasquez*, 88 NY2d 561).

Defendant contends that the court improperly relied on a youthful offender conviction in determining his predicate status. The transcript of the prior proceedings on January 24, 1983 details that defendant pleaded guilty to several offenses under three separate indictments. In sentencing defendant on March 10, 1983 the court specifically noted that youthful offender status was granted on only one indictment. The court further stated that each indictment represented separate and distinct actions and were not consolidated. In addition to the youthful offender adjudication, sentence was also imposed for Assault in the Second Degree and Criminal Possession of a Weapon in the Second Degree and various other counts. Defendant received a sentence of a minimum of one and one-third years to a maximum of four years on the youthful offender matter, and a minimum of one and one-half years to a maximum of four and one-half

years on the other counts, all to run concurrently.

On March 8, 1993 defendant was sentenced on the instant case. The predicate statement lists prior violent felony convictions of Assault in the Second Degree (sentence date March 10, 1983) and Criminal Possession of a Weapon in the Second Degree (sentence date April 22, 1985). On the record, defendant admitted to the prior convictions, although he indicated he was appealing the 1985 Criminal Possession of a Weapon conviction because of one alleged

constitutional violation. The court explained if that conviction was overturned defendant would not meet the statutory criteria for a mandatory persistent violent felony offender and the sentence under indictment 5253/90 would have to be modified by law. The court further went on to state that if the Criminal Possession of a Weapon conviction was affirmed on appeal, the sentence on 5253/90 would be valid. After a lengthy colloquy with the court, defendant admitted to the prior felonies. There is no indication that defendant's 1985 conviction was overturned on appeal; it was thus a qualifying prior violent felony offense under Penal Law § 70.02 and §70.04. Based on the qualifying felonies, defendant was properly adjudicated a persistent violent felony offender.

Other than defendant's unsubstantiated allegations in the moving papers, there is no support in the record for his contentions, and indeed the record contradicts his claims. Since the sentence imposed under indictment was lawful, the court is without authority to vacate the sentence.

Defendant's remaining claims are meritless (*People v. Benevento*, 91 NY2d 705; *Strickland v. Washington*, 466 US 668).

The motion to vacate the sentence is hereby denied.

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 30 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).

E N T E R,

John J.
J. S. C.

HON. ABRAHAM G. GERGES
J.S.C.

ENTERED
MAR - 7 2008
NANCY T. SUNSHINE
COUNTY CLERK