

**People v Spencer**

2008 NY Slip Op 32762(U)

October 2, 2008

Supreme Court, Kings County

Docket Number: 5647/92

Judge: Thomas J. Carroll

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SUPREME COURT OF THE STATE OF NEW YORK  
KINGS COUNTY, CRIMINAL TERM, MISC. PART

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PEOPLE OF THE STATE OF NEW YORK

Ind No.: 5647/92

against

By: Hon. Thomas J. Carroll

Herman Spencer,

Dated: October 2, 2008

Defendant

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Defendant, *pro se*, moves pursuant to CPL § 440.10 to vacate his judgment of conviction.

In deciding the motion, the court has reviewed the moving papers, the People's affirmation in opposition, the defendant's response to the People's opposition and the defendant's amended motion.

The defendant was convicted on June 8, 1993, after a trial jury before Justice Gerald Beldock of one count of criminal possession of a weapon in the second degree. He was sentenced by Justice Beldock on July 12, 1993, as a predicate felon, to a period of incarceration of from seven and one half to fifteen years.

***Procedural Chronology***

With papers dated April 4, 1994, the defendant, *pro se*, moved to vacate judgment pursuant to CPL § 440.10. The defendant raised three claims in that motion:

1. that the court gave an erroneous instruction to the jury;
  2. that the verdict was against the weight of the evidence because his arrest was illegal;
- and
3. that the evidence was insufficient because a key witness had testified falsely.

With papers dated July 18, 1994, the defendant filed a second CPL § 440.10 motion.

The defendant raised the following additional claims in that motion:

1. that the prosecutor knowingly introduced false testimony against the defendant; and
2. that evidence was obtained in violation of the defendant's constitutional rights.

On October 5, 1994, Justice Beldock held that all the defendant's claims were reviewable on appeal and denied defendant's 440 motion citing CPL § 440.10(2)(b) .

In November, 1994, the defendant, with counsel, filed an appeal of his conviction to the Appellate Division.<sup>1</sup> The defendant raised the following three claims in his brief:

1. Because the People failed to present sufficient evidence to prove beyond a reasonable doubt that the defendant possessed a loaded gun, his conviction was against the weight of the evidence and should be reduced to criminal possession of a weapon in the fourth degree.

2. The introduction of speed-loaders and live ammunition recovered the day after the incident was prejudicial and irrelevant.

3. The court's imposition of the term of imprisonment of seven and one-half to fifteen years was unduly harsh and excessive.

On March 3, 1995, the Appellate Division, Second Department, denied the defendant's application for leave to appeal Justice Beldock's October 1994 denial of the defendant's 440 motion.

On August 28, 1995, the Appellate Division affirmed the judgment of conviction. The court held that the evidence was legally sufficient to support the verdict and that upon exercise of the court's factual review power, the verdict was not against the weight of the evidence. The

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<sup>1</sup> People's affirmation in opposition to motion to vacate judgement, dated March 19, 2008.

court also held that the defendant's remaining contentions were without merit. People v. Spencer, 218 AD2d 824 (2d Dept 1995). On December 21, 1995, the Court of Appeals denied defendant's application for leave to appeal. People v. Spencer, 87 NY2d 908.

With papers dated February 13, 1996, the defendant submitted his third 440 motion. (He claimed this was a resubmission of a 440 motion submitted in October 1995. It appears that this February 1996 440 motion was a resubmission of an October 1995 440 motion, based on information in the Prosecutors 2008 affirmation). The defendant raised the following claims in this motion:

1. that the court should have declared one of the People's witnesses, Andre Lee, incompetent and incapable of testifying truthfully because Lee's testimony was allegedly inconsistent with his prior statements;
2. that the court failed to charge the jury that the evidence of prior inconsistent statements is admitted only on the issue of the witnesses credibility and not for the truth of the prior statements; and
3. that the court improperly denied defendant's motion to set aside the verdict on the ground that the evidence was legally insufficient.

With papers dated May 2, 1996, the defendant petitioned the United States District Court for the Eastern District of New York for a writ of habeas corpus claiming:<sup>2</sup>

1. that the verdict was against the weight of the evidence; and
2. that the evidence of the speed-loaders and the live ammunition was admitted erroneously.

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<sup>2</sup> Id.

With papers dated July 16, 1996, the defendant amended his third CPL § 440.10 motion.

He retained the three claims in the original third motion and added the following claims:

1. that the verdict was repugnant; and
2. that the court did not have subject matter jurisdiction over the weapon possession charge.

On October 31, 1996, the defendant moved the Appellate Division for a writ of error coram nobis claiming that he received ineffective assistance from his appellate counsel. On February 24, 1997, the Appellate Division denied the defendant's motion for a writ of error coram nobis. The Appellate Division held that the defendant had not established that he was denied effective assistance of appellate counsel. People v. Spencer, 236 AD2d 640 (2d Dept 1997).

With papers dated April 4, 1997, the defendant amended his federal habeas petition in which he added the following claims:<sup>3</sup>

1. that the trial court did not have geographical jurisdiction for the weapon possession count;
2. that the verdict was repugnant; and
3. that appellate counsel rendered ineffective assistance of counsel.

On September 4, 1997, Justice Rivera denied the defendant's third CPL § 440.10 motion. Justice Rivera held that the defendant's claims were procedurally barred either because they were raised on direct appeal, CPL § 440.10 (2)(a), or the defendant unjustifiably failed to raise them on appeal, CPL § 440.10 (2)( c ). Justice Rivera further noted that the defendant's claims were also

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<sup>3</sup> Id.

procedurally barred, citing CPL § 440.10 (3)( c ), because the defendant could have raised them in either the first or second 440 motions. He noted that none of the defendant's claims were based upon newly discovered evidence.

On January 5, 1998, the United States District Court summarily denied defendant's habeas corpus petition.<sup>4</sup> According to the Prosecutor's affirmation, the U.S. District Court held, among other things, that the evidence was legally sufficient and that appellate counsel rendered effective assistance. The Prosecutor noted that a certificate of appealability was denied. The Prosecutor also noted that on February 10, 1998, the defendant's request for reconsideration of the denial of his petition for a writ of habeas corpus was denied.

On May 20, 1998, the defendant's application to the Appellate Division for leave to appeal the denial of the third 440.10 motion was denied.

On December 31, 1998, according to the Prosecutor's 2008 affirmation, the United States Court of Appeals for the Second Circuit denied defendant's application to that court for a certificate of appealability.

With papers dated on January 8, 2008, the defendant moved<sup>5</sup>, for a second time, for a writ of error coram nobis in the Appellate Division. In his writ, the defendant claims that appellate counsel was ineffective because he/she failed to allege trial counsel was ineffective in two areas because:

1. trial counsel failed to challenge the subject matter jurisdiction of the weapon possession count when the jury acquitted of the other counts; and

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<sup>4</sup> Id.

<sup>5</sup> Id.

2. trial counsel failed to challenge the allegedly false testimony regarding the .357 Magnum recovered from the Bronx apartment.

That second coram nobis motion is still pending.

With papers dated January 30, 2008, the defendant filed this current CPL § 440.10 motion. It is his fourth 440 motion. The defendant raises the following claims in this motion:

1. that he was convicted of possession of a gun for which he had not been indicted;
2. that the trial court lost its geographical jurisdiction to prosecute for criminal possession of a weapon upon the defendant's acquittal for attempted murder and assault;
3. that the judgment was procured by misrepresentations on the part of the prosecutor, when he knowingly misinformed the trial court that the gun recovered in Bronx County was the gun used in Kings County and when he knowingly allowed a witness, Andre Lee, to falsely testify that the defendant fired the .357 Magnum in the Kings County apartment;
4. that material evidence was adduced at the trial resulting in the judgment being false and that prior to the entry of the judgment, known by the prosecutor to be false; and
5. actual/factual innocence.

On September 5, 2008, the defendant filed an amended CPL § 440.10 claiming:

6. that the court did not have jurisdiction of the action or of the person of the defendant and thus the judgment was obtained in violation of a right of the defendant under the constitution of this state and of the United States.

#### ***DECISION***

The first claim is denied because the defendant could have raised this issue on appeal, CPL § 440.10 (2)(c), or the facts could have been made to appear on the record, CPL § 440.10 (3)(a),

or it could have been raised in a prior motion, CPL § 440.10 (3)(a)(c). It is also denied under CPL § 440.30 (1).

The second and sixth claims, regarding jurisdiction, are denied under CPL § 440.10 (2)(c) and (3)(a)(b)(c) and 440.30 (1).

The third and fourth claims are denied under CPL § 440.10 (2)(c) and (3)(a)(b)(c) and 440.30 (1).

The fifth claim, alleged innocence, is denied under CPL § 440.10 (2)(a) and (3)(a) and 440.30 (1).

Therefore, the defendant's motion is denied in all respects.

This constitutes the decision and order of the court.

**RIGHT TO APPLY FOR A CERTIFICATE**

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York, 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.

**ENTERED**  
OCT - 3 2008  
NANCY T. SUNSHINE  
COUNTY CLERK

E N T E R ,

*J. S. C.*  
J. S. C.

7 HON. THOMAS J. CARROLL