

**People v Cummings**

2008 NY Slip Op 32763(U)

September 10, 2008

Supreme Court, Kings County

Docket Number: 5819/99

Judge: Michael A. Gary

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM PART 31

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

-against- : DECISION AND ORDER

JAMIE CUMMINGS :  
: IND. NO. 5819-99  
Defendant :

-----X  
MICHAEL A. GARY, J.

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

The People have filed a response in papers opposing the motion. Defendant argues, pursuant to subdivision (1)(h) that the judgment was obtained in violation of his rights under the state and federal constitutions, inasmuch as the court allegedly lacked subject matter jurisdiction over the case and therefor the conviction must be overturned. In the alternative, he moves for a hearing on the issues presented herein.

The defendant's convictions arose from the following incident. As found by the jury, on December 18, 1998, the defendant and an accomplice posed as deliverymen and rang the doorbell of Apartment 6A at 191 Willoughby Street in Brooklyn. Once buzzed in, the defendant and his partner tied up the victims and proceeded to ransack the apartment. A short time later a police officer attempted to pull over what turned out to be defendants' car, which had been speeding. Instead of stopping for the police, the car sped off. Other police officers found the same car abandoned a short while later with extensive front end damage and some identification left by Mr. Cummings. Once he was arrested several months later, the defendant was identified in a police lineup.

The defendant was charged in Kings County Indictment 5819-99 with the crimes of Burglary in the first degree (Penal Law § 140.30[4]), Robbery in the first degree (Penal law § 160.15) and Criminal use of a firearm (Penal Law § 265.08) and several other counts relating to the theft of the items and to tying up the victims.

After a jury trial defendant was convicted on May 16, 2000, of Burglary in the first degree and Robbery in the first degree. On June 8, 2000, he was sentenced as a persistent felony offender, to concurrent sentences of indeterminate terms of imprisonment of a minimum of 25 years and a maximum of life imprisonment.

The defendant appealed his case and the Appellate Division affirmed his conviction at 288 AD2d 234 (2d Dept., 2001). His only argument on appeal was that the lineup procedure was improper in that it excluded his attorney, and that the trial court erred in denying suppression. Leave to appeal to the Court of Appeals was denied at 98 NY2d 636. In addition to the instant motion to vacate the judgment, the defendant filed a petition for a writ of habeas corpus *pro se* with the Eastern District, making the same argument relating to the identification procedure, which was denied along with a certificate of appealability.

In this motion, the defendant applies again for a writ of habeas corpus. He claims that the indictment was defective as he is not named in any of the charges, rather he is named only in the caption and otherwise referred to as “defendant”. He alleges that the failure to list his name in each count, renders the indictment jurisdictionally deficient. Inasmuch as there was a defective indictment, he argues, the court had no jurisdiction to try the matter

and his conviction must be overturned.

The People oppose this motion arguing that it is procedurally barred, as the defendant should have previously raised the issues he does now. Further, even if it were to be considered by the court, there is no merit to his claims.

As an initial matter, the People argue that he defendant erred in bringing this motion as a habeas writ. Though they are correct as a matter of procedure, because claims that are reviewable on direct appeal should not be the subject of habeas review, (see *People ex rel. Curry v. Girdich*, 219 AD2d 912 [2d Dept]; lv. denied 98 NY2d 602 [ 2002]), the court will consider the instant motion in the nature of a "440" motion to vacate the judgment.

CPL § 440.10 governs the court's decision making capacity in regards to the motion to vacate the judgment of conviction. Upon examination of the record and all the previously filed motion papers, the court MUST deny the motion to vacate if : . . .

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

(b) the judgment is at the time of the motion appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal; or

(c) although sufficient facts appear on the record of the proceeding 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;

A court is mandated to deny a motion to vacate a judgment of conviction when the issues raised therein could have been raised in previously filed post- verdict/post-conviction proceedings, as matters that appear on the record. The People in their response have delineated the issues already raised in the direct appeal, wherein the defendant outlined the

alleged error of the trial court in not suppressing evidence of the identification procedure. He now raises for the first time the matter of the jurisdictional insufficiency of the indictment. The People argue that as a matter of the record, this is not a proper subject for a motion to vacate pursuant to CPL § 440.

The very purpose of an appeal is to argue to the appellate tribunal that the matters before it on the record constitute a legal basis for reversal. The defendant, in previously availing himself of an appeal failed to take advantage of that opportunity before the Appellate Division. The indictment clearly is part of the written record and accordingly, this court cannot consider the issue on this motion. CPL § 440.10 (2).

Were it to consider the matter, however, the court notes, the defendant would not prevail. The People have outlined their arguments for the denial of the defendant's motion, and in each instance the court notes that the People's argument is persuasive. These arguments include: the fact that the defendant has waived the alleged defect in the form of the indictment by not raising it before the trial; the use of the defendant's name in only the caption is legally sufficient (especially so when there is only one defendant charged; *See People v. Fitzgerald*, 45 NY2d 574); the issue of a defective indictment is not appropriately raised under CPL § 440, as none of the subdivisions are impacted by the alleged failure to include the defendant's name in each count; and last, the alleged defect does not render the indictment defective in that the requirements of CPL § 200.50 were satisfied and served to inform the defendant of the charges pending against him.

As Mr. Cummings has not proffered a cognizable ground under CPL § 440.10 (1) (h) to convince the court that any violation of his rights under the constitution occurred, the

court hereby denies this motion to vacate the judgment in its entirety.

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York  
September 10, 2008

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MICHAEL A. GARY, I.S.C.  
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