

People v Brown

2008 NY Slip Op 32765(U)

October 2, 2008

Supreme Court, Kings County

Docket Number: 8807/2001

Judge: Michael A. Gary

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

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THE PEOPLE OF THE STATE OF NEW YORK :

-against- : DECISION AND ORDER

DAVID BROWN

Defendant

: IND. NO. 8807-2001

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MICHAEL A. GARY, J.

Defendant moves by way of a written motion, filed on May 21, 2008, to vacate his conviction and sentence pursuant to CPL § 440.10. The People oppose this motion in a written response dated August 15, 2008. The defendant filed a reply dated September 15, 2008.

The defense brings this motion pursuant to subdivision 1(h) alleging ineffective assistance of counsel. He asserts that defense counsel's failure to investigate the legal issue of whether the premises constituted a dwelling, violated his constitutional rights. The People counter defendant's argument in saying that the defendant's claims are procedurally barred and without merit.

This case arose, as the jury found, from an incident on November 16, 2001 when defendant broke into complainant Anthony Sexton's room, where he was found rummaging through Mr. Sexton's things. Complainant called 911 and when the police arrived they found the door to Mr. Sexton's room broken and the dresser drawers displaced and the defendant standing in the middle of the room.

The defendant was indicted and charged in IND. No. # 8807-2001 with Burglary in

the second degree and related charges. On June 24, 2002 ,the defendant was convicted of Burglary in the second degree (Penal Law § 140.25 [2]), after a jury trial. The jury found that the defendant had entered the complainants' apartment with the intention of stealing the money, pretending to be collecting the rent for the apartment on behalf of the landlord.

Prior to sentencing, the defendant by way of his attorney (though not the same attorney who tried the case) filed a motion pursuant to CPL § 330.30 to set aside the verdict. In that motion, defendant contended that the proof at trial failed to establish that the complainant's apartment was a dwelling, arguing that the place was abandoned and no one but squatters were living in the building, which had allegedly fallen into disrepair. In the motion defense counsel included two affidavits from people allegedly affiliated with the building and attached several photos. This court denied the motion to set aside the verdict in a decision dated November 4, 2002.

On November 7, 2002, defendant was adjudicated a persistent violent felony offender and sentenced to an indeterminate term of a minimum of 16 years and a maximum of Life imprisonment.

The defendant appealed and the Appellate Division Second Department affirmed his conviction in *People v. Brown*, 36 AD3d 930 (2nd Dept., 2007). Leave to appeal to the Court of Appeals was denied at 8 NY3d 982 (2007, Table). He now moves to vacate the conviction based on an allegation of ineffective assistance of counsel at trial.

Now in a motion to set aside the verdict the defendant once again argues that his attorney at trial was ineffective for failure to ascertain that the building was abandoned and could not have been a dwelling, for purposes of the burglary statute. He claims that he told

his attorney that the building was abandoned and the attorney never investigated the issue. He further complains that his attorney never replied to his requests for an affidavit attesting to this fact and attached a return receipt showing that he mailed defenses attorney a letter. The court need not reach this issue in light of its subsequent findings herein.

The People oppose the defendant's motion claiming both that the defendant is procedurally barred from raising this claim as it is an issue that already appears on the record and in any event defendant's claim must fail on the merits.

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;

3. Notwithstanding the provision of subdivision one the court may deny a motion to vacate a judgment when:

(a) Although facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the ground or issue in question was not subsequently determined on appeal; or

(b) the ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state other than an appeal from the judgment, or upon a motion or proceeding in a federal court . . .

(c) upon a previous motion made pursuant to this section , the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.

A court is mandated to deny a motion to vacate a judgment of conviction when the

issues raised therein could have been or were already raised in previously filed post-verdict/post-conviction proceedings. The issue raised herein concerns trial based activity which was clearly part of the court record and properly raised on direct appeal. However, motions alleging ineffective assistance of counsel encompass both record- based allegations and those not found on the record, and thus, properly considered under CPL § 440. Insofar as an allegation of the effectiveness of counsel is concerned the court is mandated to view the representation defendant received in the totality of the circumstances and whether the defendant received meaningful representation *People v. Baldi*, 54 NY2d 137.

Defendant's argument centers on the alleged failure of the trial attorney to challenge the nature of the building where the complainant lived.¹ He complains that his attorney failed to investigate the witnesses he says establish that the building was abandoned at the time and that the complainant was lying. He points to the very same witnesses that were proffered at the time of the filing of the CPL §330.30 motion. However, it would have been illogical to call these two witnesses at trial, especially if the defendant was arguing that he was there to collect rent for the landlord. It would have made no sense for the defense to have argued that the building had a landlord, for whom the defendant was allegedly collecting rent, but was also abandoned. Further, as found by this court in its previous

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However, curiously, the defendant on his appeal did not argue that the conviction before the jury should have been overturned on that ground. Instead, appellate counsel argued that the defendant went to collect rent on behalf of the landlord for the apartment dwelling thereby rebutting that he had any larcenous intent upon his entry into the apartment. The argument that he was present to collect rent from a tenant implicitly acknowledges that the apartment was a place that was rented out for purposes of habitation. In over 16 pages, the defendant by way of appellate counsel argues this point. It is disingenuous to now argue that the trial attorney was ineffective for failing to investigate whether the establishment was a "dwelling", when the defendant concedes that point in the brief to the Appellate Division.

decision on the defendant's CPL § 330.30 motion, there was ample factual basis in the trial record to establish that even if the building were an SRO, the complainant's residence constituted a dwelling. The police officer who testified at trial corroborated the complainant's testimony about the status of his living space and therefore the trial strategy defendant now proposes would have been for nought.


The court notes that the jury was completely charged on the law by 11:45 AM and a verdict was rendered at 2:27 PM, the same day. The court notes, too, that the jury was fed their lunch during that period.

In totality, the defendant was afforded "meaningful representation" under the standard set by *People v. Baldi, supra*, and *People v. Henry*, 95 NY2d 563 (2000). Faced with testimony of the 911 tape, and a police officer witness who found the defendant in the location, Mr. Brown was afforded sound representation. The Appellate Division, in review of the evidence, also found that there was legally sufficient evidence to support the jury's finding that the defendant entered the complainant's dwelling, with the intent of committing a crime. Mr. Brown's attorney, under the totality of the circumstances, represented his client diligently.

Accordingly, the defendant's motion to set aside the judgment of conviction is denied in all respects.

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York
October 2, 2008



MICHAEL A. GARY, I.S.C.

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