

People v Foust

2008 NY Slip Op 33259(U)

October 14, 2008

Supreme Court, Kings County

Docket Number: 2876/87

Judge: John G. Ingram

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

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THE PEOPLE OF THE STATE OF NEW YORK, DECISION AND ORDER

-against-

Indictment No. 2876/87

RICHARD FOUST
a/k/a INJAH TAFARI,

Defendant,

-----X

INGRAM, J.

Defendant stands convicted, following a jury trial in Supreme Court, Kings County on April 13, 1989, of two counts of Robbery in the First Degree. On May 4, 1989, Defendant was sentenced as a persistent violent felony offender to two concurrent terms of twenty years to life. (Beldock, J., at trial and sentence). Since his conviction, Defendant has pursued a myriad of post conviction remedies. For nearly the past twenty years, Defendant has inundated both the state and federal courts with his motions challenging his conviction, including three motions to vacate his judgment, a direct appeal, a petition for federal *habeas corpus* relief and two *coram nobis* applications. All of these challenges have been rejected.

Defendant first appealed to the Appellate Division, claiming the trial court made numerous errors throughout the trial, including violating his right to counsel. On April 26, 1993, the Appellate Division unanimously affirmed Defendant's judgment of conviction. People v. Foust, 192 A.D.2d 718 (2d Dept. 1993). Among other findings, the Appellate Division held that Defendant received effective assistance of counsel. Leave to appeal to the Court of Appeals was denied on August 11, 1993. People v. Foust, 82 N.Y.2d 717 (1993) (Smith, J.)

On April 25, 1997, Defendant moved for a writ of error *coram nobis*, claiming his appellate attorney was ineffective for failing to raise certain claims on direct appeal. On September 15, 1997, the Appellate Division denied Defendant's motion on the ground that Defendant had failed to establish that he had been denied the effective assistance of appellate counsel. People v. Foust, 242 A.D.2d 582 (2d Dept. 1997). Permission to appeal this decision was denied on February 2, 1998. People v. Foust, 91 N.Y.2d 925 (1998). (Smith, J.)

On May 30, 2001, Defendant filed his first motion to vacate his judgment of conviction pursuant to C.P.L. § 440.10 in Supreme Court, Kings County. Defendant claimed that the trial court violated this constitutional right to counsel by refusing to assign his former privately retained counsel to represent him at the retrial. On December 18, 2001, the Supreme Court denied Defendant's motion on the ground that Defendant's claims were meritless and procedurally barred. (Gary, J.). On July 30, 2002, the Appellate Division denied Defendant's application for leave to appeal from the Supreme Court's denial of his motion to vacate judgment. People v. Foust, 100N.Y.2d 581(2003)(Florio, J.).

On December 30, 2002, Defendant moved, *pro se*, for a second time, for a writ of error *coram nobis*, claiming that his appellate attorney was ineffective. On March 31, 2003, the Appellate Division denied Defendant's second motion for *coram nobis* relief on the ground that Defendant had failed to establish that he had been denied the effective assistance of appellate attorney. People v. Foust, 303 A.D.2d 763 (2d Dept. 2003). On July 10, 2003, the Court of Appeals denied Defendant's application for leave to appeal. (Smith, J.).

On June 26, 2003, Defendant filed a *pro se* application for a writ of *habeas corpus* in the United States District Court for the Eastern District of New York . Tafari a/k/a Foust v. Unger, 03-

CV-3242[FB][LB]. On February 4, 2004, the District Court dismissed Defendant's application as untimely and denied a certificate of appealability to the Second Circuit Court of Appeals. (Block, J.). On November 4, 2004, the Second Circuit Court of Appeals denied Defendant's motion for a certificate of appealability and dismissed his appeal.

On January 25, 2005, Defendant filed his second *pro se* motion in the Supreme Court, Kings County to vacate his judgment of conviction pursuant to C.P.L. § 440.10, again claiming that his counsel was ineffective and also arguing that his adjudication as a persistent violent felony offender violated his due process. On June 27, 2005, the Supreme Court summarily denied Defendant's motion, holding that Defendant's sentence was proper and that Defendant's ineffective assistance of counsel claim was procedurally barred and meritless. (Firetog, J.). On June 7, 2006, the Appellate Division denied Defendant's application for leave to appeal from the Supreme Court's denial. (Florio, J.).

On December 9, 2006, Defendant filed his third *pro se* motion in the Supreme Court, Kings County, to vacate his judgment of conviction pursuant to C.P.L. § 440.10, claiming that he was deprived of the right to counsel of his choice at his retrial. On June 5, 2007, the Supreme Court summarily denied Defendant's motion holding that this issue had been considered previously on the merits and it was rejected, and the claim was procedurally barred. (Sullivan, J.) On December 7, 2007, the Appellate Division denied Defendant's application for leave to appeal from the Supreme Court's denial of his motion to vacate judgment.

The Motion Before the Court

In a *pro se* motion dated May 20, 2008, Defendant now moves to vacate his judgment of conviction on the grounds that Kenneth Bruce, Esq., Defendant's retained counsel at his original 1988 trial, nor Joseph Miller, Esq., Defendant's assigned counsel at his 1989 retrial, properly advised him about the advantages and disadvantages of accepting the People's plea offer of eight years to life imprisonment. Defendant claims he received ineffective assistance of counsel. The People argue that Defendant's present claim is barred procedurally from this Court's review and is entirely meritless. In deciding the instant motion, this Court considered Defendant's moving papers, the People's papers in opposition, Defendant's reply papers, the court file and applicable law.

The Court's Decision

Criminal Procedure Law § 440.10(3)(c) authorizes the Court to deny a 440.10 motion when "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." See People v. Cochrane, 27 A.D.3d 659 (2d Dept. 2006); People v. Jossiah, 2 A.D.3d 877 (2d Dept. 2003), lv denied, 2 N.Y.3d 742 (2004). Since Defendant's conviction nineteen years ago, Defendant has filed three previous C.P.L. § 440 motions before the Supreme Court, Kings County. All three of his prior motions addressed ineffective assistance of counsel, yet none of them included his present claim of ineffective assistance of counsel. Defendant's present claim of ineffective assistance of counsel should have been asserted in the three previous C.P.L. § 440 motions. According to his own motion, Defendant was aware of the People's offer prior to trial and was present during each trial. Therefore, he was in an adequate position to raise the issue underlying the present motion in this three prior §440

motions, but failed to do so. Therefore, this Court denies Defendant's motion in its entirety. C.P.L. § 440.10(3)(c).

This Court also denies Defendant's motion because Defendant has not shown a reason for his lengthy delay in raising this "new" branch of ineffective assistance of counsel. Defendant's delay in raising this issue for the last nineteen years has complicated this matter because Defendant's attorney in his original 1988 trial, Kenneth Bruce, Esq., is deceased.¹ Even though the affirmation from Defendant's ex-wife, Catherine Bush, is dated May 14, 2008, she acknowledges in the affirmation that the alleged conversations she had with both of Defendant's attorneys occurred nearly twenty years ago. No where in Defendant's motion does he address the nineteen year delay in making this motion. Therefore, this Court may deny the motion because this issue could have been raised in Defendant's previous 440.10 motion and it was not made with "due diligence" as required under C.P.L. § 440.10(1)(g). People v. Wong, 256 A.D.2d 724 (3rd Dept. 1998).

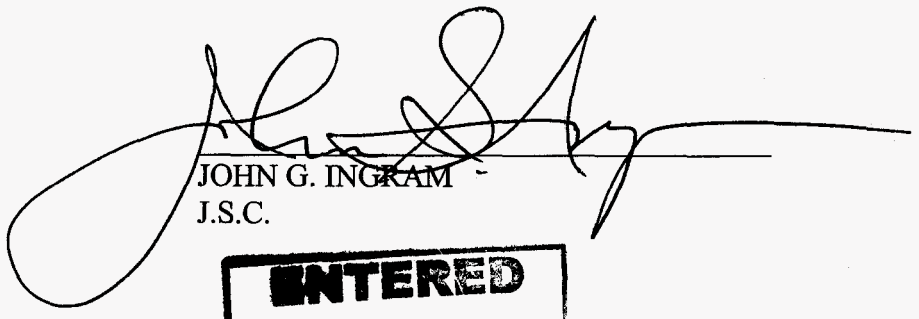
In any event, were this Court to address Defendant's allegation, it would find it without merit. To prevail on a claim of ineffective assistance of counsel based upon the defense counsel's failure to advise the defendant with respect to an offer of a plea agreement, a defendant must demonstrate "that a plea offer was made, that defense counsel failed to inform him [or her] of that offer, and that he [or she] would have been willing to accept the offer." People v. Fernandez, 5 N.Y.3d 813, 814 (2005). A defendant's steadfast insistence that he is innocent is a factor to consider in assessing the defendant's claim that he would have accepted a plea offer. People v. Garcia, 19 A.D.3d 17 (1st Dept. 2005). In the case at hand, Defendant took the stand in his own behalf at both trials, and each time he asserted his innocence. In fact, even during Defendant's

¹The Appellate Division, First Department had been notified that as of mid-June 2002, Kenneth Bruce, Esq., was deceased.

sentencing, defense counsel stated that Defendant had steadfastly proclaimed his innocence throughout the pendency of this case. In addition, Mr. Miller signed an affidavit refuting Ms. Butler and Defendant's allegations and clearly remembers that he explained to Defendant the advantages and disadvantages of accepting the People's offer. These factors undermine Defendant's claim that he would have plead guilty if defense counsel had "counseled" him better on the advantages and disadvantages of taking the plea.

Accordingly, Defendant's motion is denied. This opinion constitutes the Decision and Order of this Court.

Dated: October 14, 2008
Brooklyn, New York


JOHN G. INGRAM
J.S.C.

ENTERED
OCT 15 2008
NANCY T. SUNSHINE
COUNTY CLERK