

**People v Graddick**

2008 NY Slip Op 33552(U)

November 24, 2008

Supreme Court, Kings County

Docket Number: 8434/2001

Judge: Carolyn E. Demarest

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM PART CV19

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

By: Hon. Carolyn E. Demarest

Date: November 24, 2008

-against-

DECISION & ORDER

SHOMARI GRADDICK

Indictment No. 8434/2001

-----X

Defendant moves, *pro se*, for an order setting aside his sentence pursuant to CPL § 440.20 on the grounds that the verdict of guilty was repugnant. The motion is denied.

On October 31, 2001, defendant took part in a mugging in the Windsor Terrace section of Brooklyn. An accomplice took the victim's wallet, and defendant struck the victim multiple times with a hammer and then drove the getaway car. For these acts, defendant was ultimately charged with one count of robbery in the first degree (PL § 160.15[3]), two counts of robbery in the second degree (PL § 160.10[1]), and one count of criminal possession of a weapon in the fourth degree (PL § 265.01[2]).

On October 9, 2002, defendant was convicted by jury trial of one count of robbery in the first degree. He was sentenced to a term of imprisonment of ten years.

Defendant has since made multiple applications to reverse or vacate his judgment of conviction. Defendant raised an appeal before the Appellate Division, Second Department, arguing (1) that the trial court improperly precluded defense counsel from introducing evidence of the co-defendant's bench warrant as proof of defendant's innocence, (2) that defendant's

sentence was unduly harsh, and (3) that trial counsel was ineffective. On May 24, 2004, the Appellate Division affirmed defendant's judgment of conviction (*People v Graddick*, 7AD3d 811 (2d Dept 2004)). The Court of Appeals denied defendant's request for leave to appeal (*People v Graddick*, 3 NY3d 674 [2004]).

By papers dated December 9, 2004, defendant moved to vacate his judgment of conviction pursuant to CPL § 440.10. He claimed that he possessed newly discovered evidence in the form of an exculpatory affidavit from defendant's co-defendant. On February 2, 2005, this court denied defendant's motion on the ground that the affidavit did not constitute new evidence. Defendant's request to appeal from this court's denial of his CPL § 440.10 motion was denied on May 9, 2005.

In a second CPL § 440.10 motion, defendant argued that trial counsel was ineffective for failing to inform him that his sentence could be greater than the statutory minimum and to advise him as to whether the People's plea offer was desirable. On March 29, 2006, this court denied defendant's motion summarily because defendant failed to raise this new claim in his previous CPL § 440.10 motion. The court also found defendant's claim meritless. On August 7, 2006, the Appellate Division again denied defendant's application for permission to appeal.

On September 6, 2006, defendant filed two separate motions before the Appellate Division and the Court of Appeals seeking (1) dismissal of the Appellate Division's denial of his application for permission to appeal from this court's denial of his second CPL § 440.10 motion, and (2) an order directing the Appellate Division to reconsider its denial of defendant's application. The Court of Appeals dismissed defendant's application on October 19, 2006 and the Appellate Division denied defendant's application for reargument on November 1, 2006.

On November 24, 2006, defendant applied to the Appellate Division to again reconsider its August 7, 2006 decision denying permission to appeal from this court's denial of his motion to vacate his judgment of conviction. Defendant also sought reconsideration of the Appellate Division's November 1, 2006 decision denying defendant's application to reargue. The Appellate Division denied defendant's motion for reconsideration on January 9, 2007.

In the instant motion, defendant contends that his sentence should be set aside pursuant to CPL § 440.20. In particular, he alleges that the verdict of guilt for first degree robbery was repugnant because "the jury failed to find a verdict of guilt" on the weapons charge. Defendant has also filed an affidavit in rebuttal to the People's opposition papers in which he claims to have documentary evidence—a rap sheet—showing that the weapons charge was dismissed. For the following reasons, the instant motion is denied procedurally and on the merits.

Pursuant to CPL § 440.20, the court may set aside a sentence that is "unauthorized, illegally imposed or otherwise invalid as a matter of law." In this case, defendant's sentence does not fall into any of these categories because it is based on a valid verdict. Furthermore, the court has not ruled on defendant's instant claim of repugnancy and thus CPL § 440.20 is not the appropriate remedy for the relief defendant seeks.

Even if this court were to review defendant's claim as a motion to vacate the judgement of conviction pursuant to CPL § 440.10, this avenue is foreclosed to defendant as well based on defendant's failure to raise his repugnancy claim either on appeal or in one of his previous CPL § 440.10 motions. The court must deny a motion to vacate a judgment when "sufficient facts appear on the record" to permit adequate review on appeal, but the defendant unjustifiably fails to raise the ground or issue upon appeal. Defendant's claim of a repugnant verdict is such a

record-based claim. A CPL § 440.10 motion is not a substitute for an appeal and defendant already had an opportunity to raise the instant claims before the appellate court (*People v Cooks*, 67 NY2d 100, 500 [1986]). Defendant also had ample opportunity to raise the claim in either of his two previous CPL § 440.10 motions but neglected to do so (CPL § 440.10[3][c]).

Defendant's claim is without merit as well. Defendant is mistaken as to why the weapons charge was dismissed. At trial, criminal possession of a weapon in the fourth degree was never submitted to the jury, on request of the People. The jury was also properly instructed to cease deliberations and not to address any of the lesser charges upon finding defendant guilty of any charge. Accordingly, as the jury never considered the weapons charge defendant was not acquitted of it, as defendant claims. The rap sheet simply indicates that the charge was dismissed without ever being submitted to the jury. The verdict of guilty for robbery in the first degree is therefore not repugnant or inconsistent (*see* CPL § 300.30[5] ["two counts are 'inconsistent' when guilt of the offense charged in one necessarily negates guilt of the offense charged in the other"]).

Accordingly, the motion is denied.

This decision constitutes the order of the court.

The defendant is hereby advised pursuant to 22 NYCRR § 671.5 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 his 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 certification granting leave to appeal is granted.

ENTER:



CAROLYN E. DEMAREST, J.S.C.

**ENTERED**  
DEC 17 2008  
NANCY T. SUNSHINE  
COUNTY CLERK