

People of the State of New York v Munford
2009 NY Slip Op 31469(U)
March 24, 2009
Supreme Court, Kings County
Docket Number: 1958/03
Judge: Thomas J. Carroll
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs,

Indictment No.: 1958/03

- against-

By: Hon. Thomas J. Carroll

ANTHONY MUNFORD,

Dated: March 20, 2009

Defendant.

The defendant moves, *pro se*, pursuant to CPL § 440.20, to set aside the sentence on the ground that he was illegally sentenced as a persistent violent felony offender in that this court erroneously relied on his plea of guilty under Indictment Number 8406/87 in which he alleges the grand jury proceeding was defective.

In deciding this motion the court has considered the moving papers and its exhibits, the People's affirmation in opposition, the defendant's rebuttal and the court file.

Background

On November 13, 1987, the defendant was indicted under 8406/1987 for attempted murder in the second degree, attempted assault in the first degree, criminal possession of a weapon in the second and third degrees, and an administrative code violation.

On January 26, 1988, the defendant pled guilty to criminal possession of a weapon in the second degree and adjudicated a second felony offender.

On February 16, 1988, the defendant was sentenced, as promised, to a term of imprisonment from four to eight years (Tomei, J., at plea and sentence). The defendant did not appeal this conviction.

On April 9, 2003, the defendant was indicted under 1958/03 for two counts of criminal possession of a weapon in the second degree and related charges. On October 5, 2004, the defendant pled guilty to two counts of criminal possession of a weapon in the third degree. On October 18, 2004, the court sentenced the defendant, as a persistent violent felony offender, to the promised term of twelve years to life (Carroll, J., at plea and sentence).

In the defendant's first CPL § 440.10 motion regarding Ind. No. 1958/03 he alleged that he was denied his constitutional right to effective assistance of counsel, and, also, that Penal Law § 265.02 violates his right to bear arms. On April 12, 2006, this court denied the defendant's first CPL § 440.10 motion.

Also around April 12, 2006, the defendant perfected his direct appeal. The defendant alleged the following grounds on his direct appeal:

1. That his waiver of his right to appeal was invalid; and
2. That the court erred in not granting defendant's suppression motion.

On February 27, 2007, the Appellate Division, Second Department affirmed defendant's conviction, finding that the defendant had knowingly, intelligently and voluntarily waived his right to appeal. The Appellate Division, also held that "The

defendant's valid waiver forecloses appellate review of his challenge to the Supreme Court's suppression determination (citations omitted)." *People v. Munford*, 37 AD3d 855 (2d Dep't 2007). In April, 2007, defendant made a motion to reargue his appeal.

On May 4, 2007, the New York State Court of Appeals denied the defendant's leave application. *People v. Munford*, 8NY3d 988 (2007) (Graffeo,J.)

On June 2, 2007, the Appellate Division denied defendant's reargument motion.

On September 25, 2007, defendant made a *pro se* application for a writ of error coram nobis to the Appellate Division. The defendant argued that his appellate counsel was ineffective for failing to argue that:

1. Even if defendant's waiver of appeal was valid, his suppression claim should have been reviewed in the interest of justice;
2. Defendant's plea was invalid for the same reasons that his waiver was invalid and additionally, it was involuntary;
3. The indictment should have been dismissed for failure to provide a speedy trial; and
4. The second degree weapon counts to which he did not plead guilty were jurisdictionally defective.

On December 26, 2007, the Appellate Division denied the defendant's application, finding he had received effective assistance of counsel. *People v. Munford*, 46 AD3d 922 (2007).

On March 13, 2008, the defendant filed a § 440.10 motion seeking to vacate his 1988 conviction on the grounds that:

1. The grand jury proceeding was invalid; and
2. Defendant was denied effective assistance of counsel, rendering his plea of guilty unknowing and involuntary.

On August 12, 2008, the defendant's § 440.10 motion regarding his 1988 conviction was denied (Tomei, J.)

As to the defendant's latest 440 motion regarding the 2004 conviction, since the Appellate Division previously held in *People v. Munford*, 37 AD3d 855 (2d Dep't 2007), that the defendant's waiver of appeal was valid, this court held on March 20, 2009, that it was precluded from reviewing any claims involving the suppression hearing or plea.

Decision

Defendant's motion must be denied.

The defendant did not appeal his 1988 conviction.

CPL §440.10 (2)(c) states that a motion to vacate judgment must be denied when sufficient facts appear on the record to allow a claim to have been raised on direct appeal but the defendant inexplicably failed to do so. This applies to the defendant's claim that the grand jury proceeding was defective as well as the ineffective assistance of counsel claim. Both claims could have been raised on direct appeal.

Justice Tomei decided both of these claims in his August, 2008, decision. In the

current motion before this Court, the defendant has attempted to use different verbiage in an attempt to make his claims appear new and different, but to no avail. CPL § 440.20 (3).

Equally unpersuasive is defendant's interpretation of the Second and Eighth Amendments as justification for his illegal possession of a handgun. The Supreme Court's decision in District of Columbia v. Heller, 128 S.Ct. 2783 (2008), addresses the issue of a ban on gun possession inside the home, which has nothing do with New York State's regulatory scheme for gun possession outside of one's home or place of business.

Finally, P. L. § 265.02 (4), Criminal Possession of a Weapon in the Third Degree, became designated as P. L. § 265.03 (3), raising it from a "D" violent felony to a "C" violent felony. 2006 McKinney's Session Laws of New York, Chp. 742.. Thus, the defendant is not "entitled" to a sentence reduction.

Therefore, for all of the foregoing reasons, the defendant's motion is denied in all respects.

This shall constitute the decision and order of the court.

ENTERED
MAR 24 2009
NANCY T. SUNSHINE
CLERK

ENTER,
J. Carroll
J S C
HON. THOMAS J. CARROLL