

People v Wright

2009 NY Slip Op 31472(U)

April 9, 2009

Supreme Court, Kings County

Docket Number: 7334/01

Judge: Thomas J. Carroll

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[* 1]
SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY, CRIMINAL TERM, MISC. MOTIONS

PEOPLE OF THE STATE OF NEW YORK

Indictment No.: 7334/01

against

By: Hon. Thomas J. Carroll

Dated: April 9, 2009

Gerald Wright,

Defendant

Defendant filed a pro se motion pursuant to CPL 440.10 to vacate judgment. In deciding this motion, the court has considered the motion papers, the People's affirmation in opposition, the court file and the defendant's opposition to the People's opposition.

This is the defendant's third pro se CPL §440.10 motion. In it, the defendant questions the swearing of the jurors.

Background

On November 13, 2002 the defendant was found guilty, after a jury trial, of three counts of burglary in the second degree.

On December 3, 2002, the defendant was sentenced to three concurrent prison terms of twenty-five years to life as a persistent violent felony offender (Feldman, J., at trial and sentence).

On November 8, 2004, the Appellate Division, Second Department, affirmed the defendant's judgment of conviction. People v. Wright, 12 AD3d 468 (2d Dept 2004).

On February 3, 2005, the New York Court of Appeals denied the defendant's leave

to appeal. People v. Wright, 4 NY3d 804 (2005) (R.S. Smith, J.).

On or about August 24, 2005, the defendant filed his first pro se CPL § 440.10 motion to vacate judgment on many grounds. In this 440.10 motion, he also claimed he was sentenced as a persistent felony offender, but that he was not. On March 30, 2006, in a Decision and Order, the court denied defendant's motion. People v. Wright, 12 Misc.3d 1164[A] (Sup.Ct., Kings County, 2006, Feldman, J.) The court found all but the ineffective assistance of counsel claim were procedurally barred. The court then found the defendant's ineffective assistance of counsel claim without merit. The court also found no legal basis upon which to set aside the defendant's sentence. On June 14, 2006, the Appellate Division, Second Department, denied the defendant's application for a certificate granting leave to appeal from the March 30, 2006, Supreme Court order which denied the defendant's motion to vacate judgment (Lifson, J.).

On September 12, 2006, the defendant filed his second pro se motion to vacate judgment pursuant to CPL § 440.10. On December 1, 2006, in a Decision and Order, the court denied defendant's motion, finding that the defendant's claims were barred (Collini, J.). On February 16, 2007, the Appellate Division, Second Department, denied the defendant's application for a certificate granting leave to appeal from the December 1, 2006, Supreme Court order which denied the defendant's motion (Lifson, J.).

On October 4, 2007, the defendant filed a writ of error coram nobis.¹ On January

¹ People's affirmation in opposition, para. 21

15, 2008, the Appellate Division, Second Department, denied the defendant's application for a writ of error coram nobis, finding that he had failed to establish his claim of ineffective assistance of appellate counsel. People v. Wright, 47 AD3d 736 (2d Dept 2008). On April 11, 2008, the Court of Appeals denied defendant leave to appeal from the decision denying defendant's petition for a writ of error coram nobis. People v. Wright, 10 NY3d 846 (2008) (Pigott, J.).

On May 23, 2008, the defendant filed another writ of error coram nobis.² On September 16, 2008, the Appellate Division, Second Department, denied the defendant's writ of error coram nobis, finding that he had failed to establish his claim of ineffective assistance of appellate counsel. People v. Wright, 54 AD3d 887 (2d Dept 2008). On December 12, 2008, the Court of Appeals denied the defendant leave to appeal from the decision denying the defendant's writ of coram nobis. People v. Wright, 11 NY3d 901 (2008) (Pigott, J.).

In this, his third CPL § 440.10 motion, defendant claims that prospective jurors were not sworn in accordance with CPL § 270.15(a).

Mandatory/Permissive Statutory Bar

Under CPL § 440.10 (2)(c) a court must deny a motion to vacate a judgment when “[a]lthough sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the

² Id., para. 24

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;" As there is a record of the voir dire, the defendant should have raised his claim that the prospective jurors were not sworn on his direct appeal (Peo.'s Response, Tr. of voir dire, Nov. 4 and 6, 2002). Therefore, the defendant's claim is barred on this ground.

CPL § 440.10 (3)(c) states that a court may deny a motion to vacate judgment 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. As there is a record of the voir dire, the defendant could have raised this issue in either of his two previous CPL § 440.10 motions but failed to do so. Therefore, the defendant's claim is denied based on this ground.

CPL § 440.30 (1) requires a defendant who is in a position to adequately raise more than one ground or issue raise each ground or issue in his initial motion to vacate judgment. As the defendant could have raised his claim on direct appeal and in his initial CPL § 440.10 motion, his claim is denied based on this ground.

Furthermore, CPL § 440.30(4)(d) permits a court to deny a motion to vacate judgment when an allegation of fact "is contradicted by court record or other official document," Here the voir dire transcript indicates that the first panel was "sworn" before any questioning was commenced (Peo.'s Response, Tr. of voir dire, p. 19). When

a second panel was called, they, too, were sworn (Peo.'s Response, Tr. of voir dire, p. 122). The jurors were also sworn after they were selected (Peo.'s Response, Tr. of voir dire, pp. 66, 99, 119-20, 170-71). After all the jurors were selected they were sworn as a trial jury by the court clerk (Peo.'s Response, Tr. of voir dire, p. 171). As it appears that the voir dire transcript contradicts the defendant's allegation that the jurors were not sworn as required by CPL § 270.15(a), his claim is denied based on this ground.

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

Decision


This shall constitute the Decision and Order of the court.

Right to Apply to Appeal

The defendant is hereby advised 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 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 certificate granting leave to appeal is granted.³

E N T E R,


HON. THOMAS J. CARROLL
J. S. C.

ENTERED
APR 10 2009
NANCY T. SUNSHINE
COUNTY CLERK

³ 22 NYCRR § 671.5.