

People v Muhammad
2009 NY Slip Op 31474(U)
March 26, 2009
Supreme Court, Kings County
Docket Number: 9332/96
Judge: Jill Konviser
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 26**

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

-against- :

Ind. No. 9332/96

MALIK MUHAMMAD, :

Defendant. :

----- X

JILL KONVISER, JUSTICE:

On May 28, 1997, the defendant was convicted, after a jury trial, of two counts of murder in the second degree and one count of robbery in the first degree. On June 24, 1997, he was sentenced to an indeterminate prison term of eight years to life.¹ On direct appeal, the defendant's conviction was unanimously affirmed. People v. Muhammad, 282 A.D.2d 761 (2d Dept.), lv. denied, 96 N.Y.2d 922 (2001).

The defendant has filed a pro se motion to vacate the judgment of conviction under Criminal Procedure Law §440.10 on two grounds: (1) the verdict convicting him of both felony murder and depraved indifference murder is inconsistent as “the crimes of felony murder and depraved indifference murder are mutually exclusive crimes;” and, (2) the indictment is jurisdictionally defective in that each count included therein referred to him as “defendant” rather than by his actual name. The People oppose the defendant's motion. For the reasons that follow, the motion to vacate the judgment of conviction is denied without a hearing.²

¹The defendant received an indeterminate prison term of three to nine years for the robbery conviction and that sentence initially ran consecutively to the sentences imposed for the murder convictions. On October 17, 2005, the sentencing court granted the defendant's C.P.L. §440.20 and re-sentenced the defendant to concurrent terms of imprisonment.

²The defendant's request for the assignment of counsel in connection with this collateral motion is denied. See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); People v. Leonard Ramsey, 2001 N.Y. Slip. Op. 50142(U), 2001 WL 1875965 (Sup. Ct. Bronx Co. Feb. 9, 2001)

Procedural History

The Direct Appeal.

The defendant, through appellate counsel, filed a direct appeal of his conviction with the Appellate Division, Second Department, in which he alleged that: (1) his Sixth Amendment right to confrontation had been violated; and, (2) trial counsel provided him with ineffective assistance. On April 30, 2001, the Appellate Division, Second Department, rejected the defendant's claims and unanimously affirmed his conviction. People v. Muhammad, 282 A.D.2d 761 (2d Dept. 2001). Leave to appeal to the New York Court of Appeals was denied on August 20, 2001. People v. Muhammad, 96 N.Y.2d 922 (2001)(Wesley, J.).

The Defendant's First Pro Se Motion Under C.P.L. §440.10.

The defendant's first pro se motion to vacate the judgment of conviction under C.P.L. §440.10, on the ground that his trial counsel provided him with ineffective representation, was denied on October 30, 2003. See People v. Malik Muhammad, Slip Op No. 9332/96 (Sup. Ct. Kings Co. October 30, 2003) (Jones, J.).

The Defendant's Pro Se Petition for a Federal Writ of Habeas Corpus.

The Defendant's pro se petition for a federal writ of habeas corpus, in which he alleged that his Sixth Amendment right to confrontation was denied and that trial counsel provided him with ineffective representation, was denied on September 7, 2004. See Muhammad v. Zon, ___ F.Supp.2d ___, 2004 WL 1962095 (E.D.N.Y. Sept. 7, 2004) (Gleeson, J.). On January 6, 2006, the defendant's request for a Certificate of Appealability from the United States Court of Appeals for the Second Circuit was denied.

(Hunter, J.); People v. Richardson, 159 Misc.2d 167, 168 (Sup. Ct. Kings Co. 1993).

The Defendant's Second Pro Se Motion Under C.P.L. §440.10.

The defendant's second pro se motion to vacate the judgment of conviction under C.P.L. §440.10, on the ground that the verdict convicting him of both felony murder and depraved indifference murder is inconsistent and that the felony murder and depraved indifference murder statutes are unconstitutionally vague, was denied on July 25, 2006. See People v. Malik Muhammad, Slip Op No. 9332/96 (Sup. Ct. Kings Co. July 25, 2006) (Sullivan, J.).

The Defendant's Pro Se Application for a Writ of Error Coram Nobis.

The defendant's pro se application for a writ of error coram nobis, in which he alleged that his appellate counsel provided him with ineffective representation, was denied by the Appellate Division, Second Department, on June 19, 2007. People v. Muhammad, 41 A.D.3d 738 (2d Dept. 2007). Leave to appeal this decision to the New York Court of Appeals was denied on March 7, 2008. People v. Muhammad, 10 N.Y.3d 814 (2008) (Kaye, J.).

The Defendant's Third Pro Se Motion Under C.P.L. §440.10.

The defendant's third pro se motion to vacate the judgment of conviction under C.P.L. §440.10, in which he requested that the court inspect and dismiss the grand jury minutes, was denied on April 4, 2008. See People v. Malik Muhammad, Slip Op No. 9332/96 (Sup. Ct. Kings Co. July 25, 2006) (Del Giudice, J.).

The Defendant's Fourth Pro Se Motion Under C.P.L. §440.10.

The defendant's fourth pro se motion to vacate the judgment of conviction pursuant to C.P.L. §440.10, on the ground that a certificate of conviction was not on file at his place of incarceration in contravention of C.P.L. §380.60, was denied by this Court on November 13, 2008. See People v. Malik Muhammad, Slip Op No. 9332/96 (Sup. Ct. Kings Co. November 13, 2008)

(Konviser, J.).

The Current Motion Before the Court

The defendant, in his fifth pro se motion to vacate the judgment of conviction pursuant to C.P.L. §440.10, claims: (1) the verdict convicting him of both felony murder and depraved indifference murder is inconsistent as “the crimes of felony murder and depraved indifference murder are mutually exclusive crimes;” and, (2) the indictment was jurisdictionally defective in that each count included therein referred to him as “defendant” rather than by his actual name.

The Defendant’s Claim that the Verdict is Inconsistent

The defendant, in support of his motion to vacate the judgment under C.P.L. §440.10, claims that the verdict convicting him of both felony murder and depraved indifference murder is inconsistent as “the crimes of felony murder and depraved indifference murder are mutually exclusive crimes.” See Defendant’s Affidavit at 2. The defendant’s claim is barred from this Court’s consideration by C.P.L. §440.10(2)(c). C.P.L. §440.10(2)(c) provides that a court must deny a defendant’s motion to vacate the judgment of conviction when sufficient facts appear on the record to permit appellate review of the issue raised, but the defendant has unjustifiably failed to raise the issue on direct appeal to the Appellate Division. People v. Cochrane, 27 A.D.3d 659 (2d Dept.), lv. denied, 7 N.Y.3d 787, cert. denied, 127 S. Ct. 436 (2006); People v. Jossiah, 2 A.D.3d 877 (2d Dept. 2003), lv. denied, 2 N.Y.3d 742 (2004); see People v. Cooks, 67 N.Y.2d 100, 103 (1986) (a motion to vacate a judgment of conviction cannot be “employed as a substitute for direct appeal when defendant. . . could readily have raised it on appeal but failed to do so (C.P.L. §440.10[2][c]).”).

In this case, the jury’s verdict was obviously part of the trial record, and thus, any claim

regarding an alleged inconsistency in the verdict could have been raised by the defendant on direct appeal. People v. Jossiah, 2 A.D.3d at 877; People v. Lopez, 14 Misc.3d 1223(A), 2006 WL 3962056 (Sup. Ct. Bronx Co. Dec. 21, 2006) (Massaro, J.); People v. Jean, 14 Misc.3d 1208(A), 2006 WL 3758198 (Sup. Ct. Rock. Co. Oct. 25, 2006) (Kelly, J.). The defendant, however, unjustifiably failed to raise this claim on direct appeal. As such, the motion to vacate the judgment on the ground that the verdict was inconsistent is barred by C.P.L. §440.10(2)(c). People v. Byrdsong, 234 A.D.2d 468 (2d Dept. 1996), lv. denied, 89 N.Y.2d 1033 (1997).

The defendant's claim is also barred by C.P.L. §440.10(3)(b). C.P.L. §440.10(3)(b) provides that a court may deny a motion to vacate a judgment when "[t]he 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 . . . unless since the time of such determination there has been a retroactively effective change in the law controlling such issue[.]" In this case, the precise issue the defendant has now raised -- that the verdict convicting him of both felony murder and depraved indifference murder is inconsistent -- was specifically considered and rejected by the Court in connection with the denial of the defendant's second motion to vacate the judgment. See People v. Malik Muhammad, Slip Op No. 9332/96 (Sup. Ct. Kings Co. July 25, 2006) (Sullivan, J.). Moreover, there has been no retroactively effective change in the law with respect to the issue that the defendant has raised. As such, the defendant's claim is barred from this Court's consideration by C.P.L. §440.10(3)(b). People v. Glinton, 74 N.Y.2d 779, 780 (1989).

The Defendant's Claim that the Indictment was Jurisdictionally Defective

Equally without merit is the defendant's claim that the indictment was jurisdictionally defective as each count included therein referred to him as "defendant" rather than by his actual

name. As a threshold matter, the defendant's claim is barred from this Court's consideration by C.P.L. §440.10(2)(c) as sufficient facts appeared on the record to have permitted the defendant to raise this claim on his direct appeal to the Appellate Division, but the defendant unjustifiably failed to do so. People v. Jossiah, 2 A.D.3d 877 (2d Dept. 2003), lv. denied, 2 N.Y.3d 742 (2004); People v. Nunez, 264 A.D.2d 487 (2d Dept. 1999); see People v. Maldonado, 34 A.D.3d 497, 498 (2d Dept. 2006), lv. denied, 8 N.Y.3d 847 (2007); People v. Medina, 273 A.D.2d 119 (1st Dept. 2000), lv. denied, 96 N.Y.2d 736 (2001); People v. Ramsey, 2001 N.Y. Slip. Op. 50142(U), 2001 WL 1875965 at *2 (Sup Ct. Bronx Co. Feb. 9, 2001) (Hunter, J.). As such, the motion to vacate the judgment on the ground that the indictment was defective because the defendant's actual name was not set forth in each count of the indictment is barred by C.P.L. §440.10(2)(c). People v. Byrdsong, 234 A.D.2d 468 (2d Dept. 1996), lv. denied, 89 N.Y.2d 1033 (1997).

The defendant's claim is also barred from this Court's consideration by C.P.L. §440.10(3)(c). C.P.L. §440.10(3)(c) provides that a court may deny a motion to vacate the judgment when the defendant has filed a previous motion to vacate the judgment pursuant to C.P.L. §440.10 and "was in a position adequately to raise the ground or issue underlying the present motion but did not do so." In this case, the defendant could have raised his current claim that the indictment was jurisdictionally defective in any one of his four previous motions to vacate the judgment of conviction under C.P.L. §440.10. The defendant, however, failed to do so. As such, the defendant's current claim is barred by C.P.L. §440.10(3)(c) as he was in a position adequately to raise it in his prior motions to vacate the judgment of conviction. See People v. Dover, 294 A.D.2d 594, 596 (2d Dept.), lv. denied, 98 N.Y.2d 767 (2002); People v. Thomas, 147 A.D.2d 510 (2d Dept.), lv. denied, 74 N.Y.2d 669 (1989) People v. Mario Perez, 11 Misc.3d 1093(A), 2006 WL 1295858 at *2 (Sup. Ct. Kings Co. Mar. 24,

2006) (Carroll, J.).

In any event, the defendant's claim is without merit. The Criminal Procedure Law does not specifically require the defendant's actual name to be set forth in each count of the indictment. See C.P.L. §200.50. Moreover, where, as here, a defendant's name is included in the caption of the indictment, such indictment passes muster even if the defendant's name is not set forth in the body of that indictment. See People ex rel. Lewis v. Graham, 57 A.D.3d 1508 (4th Dept. 2008); People v. Brothers, 66 A.D.2d 954 (3d Dept. 1978); People v. Toro, 147 Misc.2d 991, 993 (Sup. Ct. Bronx Co. 1990); Downey v. Hale, 67 F.2d 208 (1st Cir. 1933), cert. denied, 291 U.S. 662 (1934); Franco v. Walsh, No. 00 Civ. 8930AGSJCF, 2002 WL 596355 (S.D.N.Y. April 17, 2002) (Schwartz, D.J.), aff'd 73 Fed. Appx. 517, 2003 WL 22056234 (2d Cir. September 4, 2003); see also People v. Iannone, 45 N.Y.2d 589, 592 (1978).

Conclusion

The motion to vacate the judgment of conviction pursuant to C.P.L. §440.10 is denied in its entirety without a hearing.

This constitutes the Decision and Order of the Court. The Clerk of the Court is directed to mail copies of this Decision and Order to the defendant at his place of incarceration and to the Kings County District Attorney.

Dated: Brooklyn, New York
March 26, 2009



J.S.C.

