

People v Harrison

2009 NY Slip Op 31477(U)

April 21, 2009

Supreme Court, Kings County

Docket Number: 12017/1995

Judge: James P. Sullivan

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 CITY OF NEW YORK
COUNTY OF KINGS: PART 3

-----X
 THE PEOPLE OF THE STATE OF NEW YORK :
 :
 -against- :
 :
 :
 TONY HARRISON, :
 :
 :
 Defendant. : Indictment No. 12017/1995
 :
 -----X
 JAMES P. SULLIVAN, J.

DECISION AND ORDER

The defendant has moved, *pro se*, for an order pursuant to CPLR § 2221, for reconsideration of the order of the Supreme Court, Kings County, dated May 17, 2006, denying defendant's motion to vacate his judgment of conviction pursuant to section 440.10 of the Criminal Procedure Law. Further, defendant moves pursuant to section 440.20 of the Criminal Procedure law setting aside his sentence. In a motion dated, June 10, 2008, the defendant claims, as he did in his 2003 motion, that the trial court improperly ordered his sentences to run consecutively. Thus, as to this issue, defendant's motion can also be considered as a motion for reconsideration pursuant to CPLR § 2221. The defendant now adds further claims that he was improperly sentenced as a mandatory persistent violent felony offender. On November 20, 2008, the People filed an answer in opposition. Defendant filed a further response on January 2, 2009. On March 4, 2009, the People filed an additional answer in opposition. For the reasons stated below, the motion is denied.

Background and Procedural History

For the acts of June 23, 1995, involving Shirley Carel, the defendant was charged, under Indictment Number 12017/95, with rape in the first degree; sodomy in the first degree; three counts of sexual abuse in the first degree; menacing in the second degree; and unlawful imprisonment in the second degree. The indictment also charged harassment in the first degree; and resisting arrest arising out of the aborted incident on September 16, with Sonia Rodriguez. For the acts of March 4, 1995, involving Sonia Allin, the defendant was charged, under Indictment number 7629/96 with rape in the first degree; two counts of sodomy in the first degree; three counts of sexual abuse in the first degree; burglary in the first degree; and menacing in the second degree. The above two indictments were consolidated under Indictment Number 1201/95 by order of the trial court, dated July 23, 1996.

On January 27, 1997, the defendant was convicted, after a jury trial, of two counts of rape in the first degree, two counts of sodomy in the first degree, and harassment in the first degree. On February 7, 1997, the defendant was adjudicated a mandatory persistent violent felony offender. A predicate statement was filed pursuant to C.P.L. § 400.16 and is part of the Supreme Court record. On that date, the defendant was sentenced, as a mandatory persistent violent offender, to four consecutive terms of twenty-five years to life imprisonment for the rape and sodomy counts, and one

year on the harassment count (Feldman, J. at hearings, trial and sentence).

The defendant appealed from his judgment of conviction to the New York State Supreme Court, Appellate Division, Second Department, claiming, in addition to his other claims, that his sentence was excessive. The Appellate Division unanimously affirmed defendant's conviction on November 2, 1998. *People v. Harrison*, 255 A.D.2d 335 (2d Dep't 1998). Leave to appeal to the Court of Appeals was denied on February 17, 1999. *People v. Harrison*, 93 N.Y.2d 853 (1999) (Wesley, J.).

On January 8, 2001, the defendant filed a motion pursuant to C.P.L. § 440.10 to vacate the judgment of conviction, alleging that it was obtained by misrepresentation, introduction of false evidence, and prosecutorial misconduct. The defendant further claimed that his trial counsel was ineffective. On March 13, 2000, the defendant's motion was denied. The defendant's motion for ineffective assistance of counsel was denied on the merits, with the court finding that "counsel exhibited ingenuity, a high level of competence and the appropriate degree of zealotry." (Feldman, J.). On or about August 23, 2000, leave to appeal from the denial of defendant's C.P.L. § 440.10 motion was denied (McGinity, J.S.C.).

On October 30, 2000, the defendant filed a *pro se* petition for a writ of *habeas corpus* before the United States District Court, Eastern District of New York. Defendant raised all claims raised in his direct appeal as well as ineffective assistance of trial counsel. On May 10, 2001, the District Court denied defendant petition and denied a certificate of appealability. On January 28, 2003, the United States Court of Appeals for the Second Circuit denied defendant's *pro se* motion for a certificate of appealability. The Circuit Court, on November 15, 2006, denied defendant's application to file successive *habeas* petitions based on purported newly-discovered DNA evidence. Defendant's further motion of June 29, 2007, was denied by the District Court, on January 22, 2008, as meritless (Weinstein, J.). On November 9, 2007, the DNA report, People's Exhibit 8 at defendant's trial, was forwarded to defense counsel during federal post-conviction proceedings (Weinstein, J.) To the extent that the defendant's claim of factual innocence was deemed to be yet another successive *habeas* petition, the District Court found that it did not have jurisdiction, and that the case was transferred to the Second Circuit. On February 18, 2009, the defendant's papers were dismissed because defendant failed to file an application requesting the Second Circuit to authorize a second or successive petition within the time limits required.

On May 16, 2003, defendant filed a motion to set aside his sentence pursuant to C.P.L. § 440.20 alleging among other claims, that defendant's consecutive sentences were improperly imposed. On July 17, 2003, the defendant's motion was denied (Feldman, J.).

Defendant next filed an application for *coram nobis*, alleging that his appellate counsel was ineffective for failing to raise the ineffectiveness of his trial counsel, and various other claims. This application was denied on April 9, 2004. Leave to appeal the denial of defendant's *coram nobis* application was denied by the Court of Appeals on July 14, 2004 (Smith, J.).

In defendant's second motion pursuant to C.P.L. § 440.10, dated March 7, 2006, the defendant again claimed that the forensic evidence was flawed and that the prosecutor had misrepresented who had analyzed the rape kit during his trial. On May 17, 2006, the defendant's motion was denied (Feldman, J.S.C.). In a decision and order dated August 9, 2006, the Appellate Division denied defendant's application for a certificate for leave to appeal further (Prudenti, J., Presiding Justice).

The Current Motion to Vacate the Judgment of Conviction

Defendant now moves to renew and reargue his prior motions to vacate the judgment of conviction on grounds that 1) his trial attorney rendered ineffective assistance of counsel; and 2) his conviction was procured by prosecutorial misconduct and by the introduction of evidence known to the prosecutor and trial counsel to be false. The defendant further moves to vacate his sentence pursuant to C.P.L. § 440.20 on the grounds that 1) the court sentenced him to an excessive term of imprisonment; and 2) that he was improperly sentenced as a mandatory persistent violent felony offender.

To the extent that defendant's current motions are deemed a motion to renew, they should be denied. First, defendant's claims are not based upon new facts that would change the prior motion. *See*, CPLR § 221 (3) (e) (2). Additionally, the defendant provides new legal claims that cannot be raised in a motion to renew. A motion to renew should be utilized only to alert the court to facts which were not known by the moving party at the time of the original motion, but which support the grounds raised in the original motion. *Brooklyn Welding Corp. V. Chin*, 236 A.D.2d 392 (2d Dep't 1997); *Foley v. Roche*, 68 A.D.2d 558, 568 (1st Dep't 1979). Renewal is not available where the facts upon which the motion is based were known to the moving party at the time of the original motion. *LaRosa v. Trapani*, 271 A.D.2d 506 (2d Dep't 2000); *Palmer v. Toledo*, 266 A.D.2d 268, 269 (2d Dep't 1999); *Chin*, 236 A.D.2d at 392; *Roche*, 68 A.D.2d at 568. Moreover, defendant has not offered additional material facts in his present motion, nor has he provided any reasonable justification for his failure to present such facts in his prior motion. *See*, CPLR § 221 (3) (e) (3); *Roche*, 68 A.D.2d at 568.

The defendant's motions should also be denied as a motion to reargue. CPLR § 2221 (d) (3) provides that a motion for leave to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry." The order denying defendant's second motion pursuant to C.P.L. § 440.10 was dated May 17, 2006, and entered by the court clerk on May 26, 2006. To the extent that defendant argues that the court improperly imposed consecutive sentences in his motion to set aside his sentence, his motion must be considered as a motion to reargue his previous motion. In this case, the order denying defendant's motion pursuant to C.P.L. § 440.20 was denied on July 17, 2003, and was stamped entered on July 23, 2003. Thus the filings of these motions to reargue are untimely.

Additionally, "motions for re-argument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or

misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision.” *Loland v. City of New York*, 212 A.D.2d 674 (2d Dep’t 1995); accord, *Perez v. Linshar Realty Corp.*, 259 A.D.2d 532 (2d Dep’t 1995). Re-argument is not designed to afford the unsuccessful party an opportunity to present arguments different from those originally asserted. See, *People v. Lopez*, 235 A.D.2d 496, 497 (2d Dep’t 1997). Further, the defendant has made no valid showing that the order of Justice Feldman, denying defendant’s motion to vacate judgment and set aside his sentence, overlooked or misapprehended the case law governing ineffective assistance of counsel or any claim. Thus, this claim is without merit.

Furthermore, to the extent that defendant’s motion is considered a third motion to vacate the judgment pursuant to C.P.L. § 440.10, it must also be denied. The defendant presents several claims that were decided in his previous motions to vacate the judgment. He claims that the prosecutor knowingly used false evidence and testimony to convict him, and that his judgment of conviction was procured by prosecutorial misrepresentation and fraud. The defendant further claims that his trial counsel provided ineffective assistance of counsel by failing to call the complainant’s roommate to whom she made the initial outcry; by failing to request a missing witness charge as to that witness; by failing to investigate forensic evidence; and by failing to file a demand for discovery regarding the forensic evidence. C.P.L. § 440.10 (3) (b) provides that a court *may* deny a motion to vacate judgment when “the 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, or upon a motion or proceeding in federal court.” In fact, “[d]efendant’s claim of ineffective assistance of counsel appears to be fabricated out of whole cloth”, the court previously determined, finding that “counsel exhibited ingenuity, a high level of competence and the appropriate degree of zealousness” (Feldman, J.). Therefore, since these claims were previously determined on the merits in both state and various federal proceedings, this portion of his motion to vacate judgment is denied pursuant to C.P.L. § 440.10 (3) (b).

Defendant now claims that his trial counsel was ineffective by failing to contact or subpoena other potential witnesses; and by failing to investigate. This court may deny the motion because these issues could have been raised in defendant’s two prior motions to set aside judgment. These claims are denied as defendant was in a position to raise those claims in his original motion but failed to do so. C.P.L. § 440.10 (3) ©; *People v. Cochrane*, 27 A.D.3d 659, 660 (2d Dep’t 2006); *People v. Dover*, 294 A.D.2d 594, 596 (2d Dep’t 2002). Specifically, defendant asserted a claim of ineffective assistance of trial counsel in his first motion, but did not mention any of these grounds that he now asserts. Additionally, the defendant has provided no sufficient explanation for his failure to assert these grounds until his third motion to vacate judgment. Thus, these claims are denied.

Even if this court were to review defendant’s ineffective assistance of counsel claims on the merits, his motion must be denied. To be successful on a claim of ineffective assistance of counsel, a defendant must overcome the legal presumption that counsel’s performance falls within the wide range of reasonable professional competence. See, *Strickland v. Washington*, 466 U.S. 668; *People v. Rivera*, 71 N.Y.2d 705.

Accordingly, the question to be resolved is not whether the defendant demonstrated that his

counsel provided “less than meaningful representation”, but “whether the attorney’s conduct constituted ‘egregious and prejudicial’ such that the defendant did not receive a ‘fair trial’”. See, *People v. Benevento*, 91 N.Y.2d 708, 714, quoting *People v. Flores*, 84 N.Y.2d 184, 188. In the present case, the record shows that his attorney delivered cogent and coherent opening and closing statements, raised proper and relevant objections, and extensively and effectively cross-examined the people’s witnesses, all actions appellate courts have held to constitute “meaningful representation”. *People v. Hewlett*, 71 N.Y.2d 841, 842. The defendant has failed to meet his burden of proving that trial counsel failed to provide meaningful representation and/or committed such egregious and prejudicial errors that deprived him of a fair trial. Thus, to the extent that defendant raises “new” claims regarding the effectiveness of his trial counsel they are without merit.

Additionally, the defendant’s claim that the prosecutor knowingly used false evidence is denied as it was previously determined on the merits upon a prior motion in this state, as well as in federal court. C.P.L. § 440.10 (3) (b). The defendant’s claim of new evidence based on the theory that the laboratory report prepared by the police chemist, Sonia Basiles, was not genuine, and constituted fraud by the prosecution, was determined not to “lead to the far-fetched conspiracy imagined by him.” (Feldman, J.). Moreover, this claim is contradicted by documentary evidence and court records, as is defendant’s claim that his attorney was aware of this alleged fraud. A review of the Police Laboratory Analysis Report, dated June 13, 1995, signed by chemist Samia Basilious, and identified phonetically in the trial transcript as “Sonia Basiles”, clearly indicates that defendant’s claim is “refuted by unquestionable documentary proof”, and “under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true”. C.P.L. § 440.30 (4) ©, (d).

Further, the defendant’s motion to set aside his sentence is denied. The defendant’s claim that the trial court improperly ordered that his sentences run consecutively, rather than concurrently, is denied as this issue was previously determined on the merits upon a prior motion or proceeding in this state. C.P.L. § 440.20 (3). To the extent that the defendant is claiming that his sentence was excessive, this claim *must* be denied because the issue was previously determined on the merits upon an appeal from the judgment or sentence. C.P.L. § 440.20 (2). On November 2, 1998, the Appellate Division unanimously affirmed the judgment of conviction and sentence holding that the defendant’s sentence was not excessive. *People v. Harrison*, 255 A.D.2d 335 (2d Dep’t 1998). Moreover, a motion to set aside the sentence is solely based upon the “ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law”. C.P.L. § 440.20 (1). Additionally, the defendant’s claim that the court and the prosecutor did not follow the dictates of the Criminal Procedure Law in adjudicating the defendant a persistent violent felony offender and failed to file the mandatory statement advising defendant of his previous violent felony convictions is contradicted by the court record. A statement pursuant to C.P.L. § 400 is part of the Supreme Court file and is referred to in the sentencing proceedings of February 7, 1997.

Moreover, the defendant’s claim that his sentence as a mandatory persistent violent felony offender violates the dictates of the United States Court’s decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) is incorrect. In *Apprendi*, the Supreme Court held that “other than the fact of a prior

conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt". *Apprendi*, 530 U.S. at 490. The Court clearly held that a court may consider a defendant's recidivism at sentencing even though that recidivism was not proven to a jury beyond a reasonable doubt. *See also, Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *Blakely v. Washington*, 542 U.S. 296 (2004).

Additionally, the New York's appellate courts have specifically upheld the constitutionality of New York's mandatory persistent violent felony offender sentencing scheme under Penal Law § 70.08 against Sixth Amendment challenges. *See, People v. Boyer*, 6 N.Y.3d 427 (2006); *People v. Leon*, 10 N.Y.3d 122 (2008); *People v. Licea*, 44 A.D.3d 690 (2d Dep't 2007). *See also, People v. Quinones*, 2009 N.Y. Slip op. 1318, 2009 N.Y. Lexis 29 (2009) (upholding the constitutionality of New York's discretionary persistent felony offender sentencing scheme). Finally, the defendant's reliance on several federal cases which have questioned the constitutionality of New York State's adjudication of discretionary persistent felony offenders is inapplicable to this case. Thus, this claim is denied.

Accordingly, defendant's motion to vacate the judgment of conviction is denied. The defendant's motion to set aside his sentence is denied. This constitutes the decision and order of the Court.

Dated: April 21, 2009.

JPS
James P. Sullivan, J.S.C.
HON. JAMES P. SULLIVAN
J.S.C.

ENTERED
APR 22 2009
NANCY T. SUNSHINE
COUNTY CLERK