

**People v Ortiz**

2009 NY Slip Op 31516(U)

July 3, 2009

Supreme Court, Kings County

Docket Number: 12430/1995

Judge: Cassandra M. Mullen

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM PART 11

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

By: Hon. Cassandra M. Mullen

Date: July 2, 2009

-against-

DECISION & ORDER

PAUL ORTIZ

Indictment No. 12430/1995

-----X  
Defendant moves, *pro se*, for an order vacating his judgment of conviction pursuant to C.P.L. § 440.10.

On September 22, 1995, at approximately 6:15am, the defendant forcibly stole a 1986 Lincoln Town Car from Swerlan Cruz. After struggling with Mr. Cruz for the car keys, the defendant threw Mr. Cruz, put the car in reverse, and drove over Mr. Cruz's right leg. Defendant then put the car in drive, ran over Mr. Cruz's right leg for a second time, and drove away.

For these crimes, defendant was charged, under Indictment Number 12430/95, with Robbery in the Second Degree, Grand Larceny in the Fourth Degree, Robbery in the Third Degree and Assault in the Second Degree.

Defendant was convicted, after a jury trial, of Robbery in the Second Degree and Assault in the Second Degree. On August 1, 1996, defendant was sentenced, as a persistent violent offender, to concurrent prison terms of twelve years to life for each count.

Defendant appealed from his judgment of conviction to the Appellate Division, Second Department. In that appeal, defendant claimed (1) that the lineup procedure was unduly suggestive because the police had informed the witness, prior to his viewing of the line-up, that

he needed to come to the precinct to make an identification and the line-up fillers did not resemble the defendant; (2) the victim's identification of the defendant was unreliable because immediately after the incident, the victim was unable to provide a description of his assailant to the police, and his trial testimony was unbelievable and inconsistent with his previous statements; (3) the prosecutor improperly bolstered the identification evidence by eliciting testimony from a detective, that , after the victim viewed the line-up, defendant was arrested; and (4) defendant's trial counsel provided ineffective assistance because he failed to elicit that defendant spoke only Spanish and he, therefore, could not have spoken with the victim in English.

On January 12, 1998, the Appellate Division affirmed defendant's judgement of conviction. People v. Ortiz, 246 A.D.2d 559 (2<sup>nd</sup> Dept. 1998). The Appellate Division ruled that the defendant's line-up was not impermissibly suggestive, and that the verdict was not against the weight of the evidence. The court further ruled that "defendant's remaining contentions were either unpreserved for appellate review or without merit." Id. At 560.

Defendant applied for and was denied permission to appeal further to the Court Of Appeals. People v. Ortiz, 91 N.Y.2d 944 (1998).

On October 21, 1998, defendant filed in this Court a motion pursuant to C.P.L. § 440.10 to vacate his judgment of conviction. In that motion, the defendant claimed that the People's failure to disclose a tape recording of the 911 call made on the morning of the crime deprived him of his right to a fair trial.

On February 11, 1999 the Court denied defendant's motion in its entirety ruling that defendant's claim was procedurally barred because the claim was based upon fact appearing on

the record, and the defendant unjustifiably failed to raise the claim on his direct appeal. See C.P.L. § 440.10 (2) (c).

Defendant sought leave to appeal to the Appellate Division from the February 11, 1999 decision and order. By order dated June 21, 1999, defendant's request for leave to appeal was denied.

Defendant filed a second motion pursuant to C.P.L. § 440.10 on April 27, 1999, claiming that the prosecution committed misconduct by altering a line-up photo to make the fillers look more like the defendant. The defendant also claimed that the prosecutor improperly vouched for her witnesses' credibility during her summation.

On September 22, 1999, the Court once again denied defendant's motion in its entirety holding that the defendant's claims were procedurally barred because the claims were based upon facts appearing on the record, and defendant unjustifiably failed to raise the claims on his direct appeal. See C.P.L. § 440.10 (2) (c).

Defendant sought leave to appeal to the Appellate Division from the September 22, 1999 decision and order. On January 3, 2000, defendant's request for leave to appeal was denied.

On October 21, 1999, defendant filed a *pro se* motion for a writ of error coram nobis in the Appellate Division, claiming that he was denied effective assistance from his appellate counsel because counsel had failed to raise several claims such as: (1) the People's failure to disclose the 911 tape required the reversal of defendant's conviction; (2) the photo of the line-up had been altered by the prosecutor; (3) the prosecutor improperly vouched for her witnesses during her summation; (4) trial counsel was ineffective for failing to elicit certain information or object to the prosecutor's summation comments; (5) a sworn juror was illegally discharged; and

(6) the assertions regarding defendant's mental health and his willingness to voluntarily go to the police precinct were false.

On October 26, 1999, while his motion for a writ of error coram nobis was pending in the Appellate Division, defendant filed a writ of habeas corpus with the United States District Court for the Eastern District. In his writ, the defendant claimed that he was arrested without probable cause, that the line-up was illegal, and that the prosecution failed to disclose a 911 tape. Defendant also claimed that his trial counsel was ineffective because he allowed an altered photograph of the line-up to be admitted into evidence and he failed to object to constitutional violations. Lastly, defendant claimed that his appellate counsel was ineffective because he failed to adequately challenge his trial counsel's performance.

On December 20, 1999, defendant moved to withdraw his habeas petition pending the outcome of his state court motion for a writ of error coram nobis.

On January 10, 2000, the District Court dismissed the defendant's habeas petition at the defendant's request without prejudice.

On March 6, 2000, the Appellate Division denied defendant's motion for a writ of error coram nobis. People v. Ortiz, 270 A.D.2d 290 (2<sup>nd</sup> Dept 2000). The Appellate Division held that defendant had failed to establish that he was deprived the effective assistance of appellate counsel. Id.

Defendant applied for permission to appeal to the New York Court of Appeals from the Appellate Division's denial of his motion for a writ of error coram nobis. Defendant's application was dismissed on April 14, 2000, because the order sought to be appealed from was not appealable under CPL § 450.90 (1). People v. Ortiz, 94 N.Y.2d 951 (2000).

On August 14, 2000, defendant re-submitted his petition for a writ of habeas corpus. In his petition, defendant raised the same claims that he raised in his October 26, 1999 habeas petition.

On September 30, 2002, the District Court denied defendant's habeas corpus decision.

Defendant now moves, in the instant motion, for the third time, to vacate his judgement of conviction pursuant to C.P.L. § 440.10. Defendant claims now that (1) his trial counsel was ineffective for failing to preserve claims for appellate review, for not objecting to the destruction of the 911 tape, and for failing to argue that the line-up was impermissibly suggestive; (2) the destruction of the 911 tape resulted in Rosario and Brady violations; (3) the line-up evidence should have been suppressed because the fillers didn't resemble the defendant; (4) the complainant's in court identification of defendant should have been suppressed because his description of the assailant to the police did not match defendant's physical characteristics; and (5) his appellate counsel was ineffective.

All of these claims are rejected as they are all procedurally barred from review.

Defendant's claims concerning the alleged suggestivity of the line-up and unreliability of the complainant's identification were raised by the defendant on his direct appeal. The Appellate Division rejected these claims on the merits. Thus, C.P.L. § 440.10 (2) (a) precludes defendant from raising the claims in a motion to vacate. Additionally, defendant's other claims are also procedurally barred because they are based upon facts appearing on the record, and defendant unjustifiably failed to raise them on his direct appeal. See C.P.L. § 440.10 (2)© Lastly, every claim is barred because defendant was in the position to raise all of these claims in his previous two motions to vacate, but he did not do so. See C.P.L. § 440.10 (2) (c).

This decision constitutes the order of the court.

ENTER:



CASSANDRA M. MULLEN, J.S.C.

**ENTERED**  
July 3, 09  
~~JULY 30~~ 2009  
NANCY T. SUNSHINE  
COUNTY CLERK