

People v Murray

2009 NY Slip Op 33006(U)

September 21, 2009

Supreme Court, Kings County

Docket Number: 911/85

Judge: Michael L. Pesce

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART CV76

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THE PEOPLE OF THE STATE OF NEW YORK,

By: Hon. Michael L. Pesce

Date: September 17, 2009

-against-

DECISION & ORDER

Indictment Nos. 911/85 & 3557/83

K. DEXTER MURRAY a/k/a DEXTER ROBINSON

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Defendant's *pro se* motions for post-judgment relief under two separate indictments have been consolidated for the purposes of this decision. Under indictment no. 911/85, defendant moves to vacate the judgment of conviction pursuant to CPL § 440.10 on the ground that his illegal sentence should have led to the suppression of his statements, the lineup identifications and certain physical evidence. He also seeks to set aside his sentence under indictment no. 3557/83 claiming that his plea was induced by a promise of youthful offender status that was never kept. Defendant asserts that the illegality of this sentence undermines the propriety of his adjudication as a second violent felony offender for his conviction under indictment no. 911/85. For the reasons stated below, the motion is denied in its entirety.

On February 7, 1984, defendant was convicted, upon his plea of guilty, of attempted robbery in the second degree (PL § 110/160.10) (indictment number 3557/83). In his allocution, defendant admitted to attempting to take property from another person under the threat of using a revolver. At that time, defendant was offered youthful offender status on the condition that he successfully complete a probation employment program or enter the United States Army. On April 12, 1984, defendant was sentenced, as a violent felony offender, to five years probation (Pesce, J., at plea and sentence).

Approximately two years later, defendant was convicted, after a jury trial, of two counts of robbery in the first degree (PL § 160.15) (indictment number 911/85). At sentencing, defense counsel controverted defendant's 1984 predicate on the ground that the 1984 plea was induced by a promise of youthful offender treatment. The court rejected that argument, and on January 3, 1986, sentenced defendant, as a second violent felony offender, to consecutive terms of imprisonment of nine to eighteen years on each robbery count (Goldman, J., at trial and sentence).

On appeal, defendant made several claims, among them that the court improperly denied suppression of the physical evidence recovered and, the statements and lineup identifications made after defendant had been arrested in his home in violation of *Payton v New York*, 445 US 573 (1980), and that he was improperly found to be a second violent felony offender. Although the Appellate Division agreed that defendant had standing to assert the *Payton* violation (*see Minnesota v Olson*, 495 US 91 [1990]), it held that any *Payton* violation would not lead to suppression of the statements or the identifications (*citing New York v Harris*, 495 US 14 [1990]; *People v Ayala*, 165 AD2d 878 [2d Dept 1990]; *People v Thomas*, 164 AD2d 874 [2d Dept 1990]). With respect to the physical evidence recovered, the Appellate Division determined that even if the admission of the property was error, the error was harmless based on the overwhelming evidence of guilt against defendant. As for the sentencing issue, which was raised in defendant's *pro se* supplemental brief, the Appellate Division dismissed defendant's remaining claims as unpreserved for appellate review or lacking merit. On January 28, 1991, the Appellate Division affirmed the judgments of conviction (*People v Murray*, 169 AD2d 843 [2d Dept 1991]).

Subsequent to the affirmance of defendant's convictions by the Appellate Division, the Court of Appeals in *People v Harris*, 77 NY2d 434 (1991) held that statements obtained from an accused following an arrest made in violation of *Payton* are inadmissible unless the taint resulting from the violation has been attenuated. As a result, on March 1, 1991, defendant moved to reargue his appeal in light of the decision in *Harris*. The Appellate Division denied defendant's motion to reargue and also denied his motion for reconsideration. The Court of Appeals subsequently denied defendant leave to appeal (*People v Murray*, 78 NY2d 1013 [1991], *reconsideration denied* 82 NY2d 757 [1993]).

Defendant next petitioned the United States District Court for the Eastern District of New York for *habeas corpus* relief on both grounds he raised before the Appellate Division and Court of Appeals. That petition was denied after both issues were addressed by the court (*Murray v McClellan*, No. 91-CV-4609, 1992 US Dist LEXIS 21277 [EDNY Aug 19, 1992]), and the United States Court of Appeals, Second Circuit, affirmed the denial (*Murray v McClellan*, 57 F3d 1063 [1995]).

Defendant also made numerous post-judgment motions in Kings County Supreme Court. In 1987, his motion to set aside his sentence was denied. On four other occasions, his motions to vacate the judgment of conviction based on the alleged *Payton* violation were also denied.

Defendant moves once again to vacate the judgment of conviction and to set aside sentence. This been repeatedly raised and denied in state and federal court. A court must deny a motion to vacate a judgment or set aside the sentence when "the ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law

controlling such issue” (CPL § 440.10[2][a]; CPL § 440.20[2]). Since the Appellate Division has already rejected both of defendant’s claims in his direct appeal, and there has been no retroactive change in the law controlling these issues, the claims are now procedurally barred from this court’s review. A court may deny a motion to vacate a judgment or set aside the sentence 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, other than an appeal from the judgment, or upon a motion or proceeding in a federal court; unless since the time of such determination there has been a retroactively effective change in the law controlling such issue” (CPL § 440.10[3][b]; CPL § 440.20[3]).

On the merits, defendant’s illegal sentence claim is “contradicted by a court record ..., and under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true” (CPL § 440.30[4][d]). The record reveals that during the plea proceeding of indictment 3557/1984, the court throughly explained that it would sentence defendant to five years probation and would consider youthful offender treatment on condition that he successfully complete a court employment program or join the armed forces. Defendant was also advised that another felony conviction would subject him to different or additional punishment. Defendant expressly stated that he understood the promised sentence, as well as each and every right explained to him by the court. At sentencing, defendant was again reminded that youthful offender status would not be granted unless he provided sufficient proof to the court that he completed the program or joined the armed forces. A review of the record reflects that defendant never met his end of the bargain and in fact was arrested within two years under indictment no. 911/85.. Accordingly, defendant’s adjudication as a second violent felony

offender on the subsequent felony conviction is appropriate and there is no basis to disturb the sentencing court's initial finding.

For the above stated reasons, defendant's motion is denied.

This decision constitutes the order of the court.

Defendant is hereby advised pursuant to 22 NYCRR § 671.5 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 his 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 certification granting leave to appeal is granted.



Michael L. Pesce, J.S.C.

