

People v Ross

2009 NY Slip Op 33010(U)

December 24, 2009

Supreme Court, Kings County

Docket Number: 10377/93

Judge: Thomas J. Carroll

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 24

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THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Thomas J. Carroll

Date: December 24, 2009

-against-

DECISION & ORDER

ANTHONY ROSS

Indictment No. 10377/93

-----X

Defendant moves, *pro se*, to vacate the judgement of conviction pursuant to CPL §440.10 on numerous grounds of trial error as well as a claim of ineffective assistance of counsel. He also moves to set aside his sentence under CPL §440.20 claiming that the imposition of consecutive sentences was illegal. For the following reasons both arms of defendant's motion are denied.

Defendant was convicted by jury verdict on August 29, 1994, for having acted in concert with another individual in the killings of three men in the vestibule of an apartment building in Brooklyn. He was found guilty of three counts of intentional murder, three counts of depraved indifference murder and a count each of criminal possession of a weapon in the second and third degree. On September 12, 1994, defendant was sentenced to consecutive terms of imprisonment of twenty-two years to life for two of the intentional murders and to a concurrent term of twenty-two years to life for the third intentional killing. He was also sentenced to a concurrent term of four to twelve years for criminal possession of a weapon in the second degree.

(Owens, J., at trial and sentence).

On appeal defendant claimed that the trial court (1) improperly submitted a verdict sheet

that included parenthetical phrases that had not been consented to by defense counsel; (2) misled the jury by the its expanded identification charge; and (3) incorrectly curtailed counsel's cross-examination of a key prosecution witness.

The Appellate Division, Second Department, ordered that defendant's appeal be held in abeyance and instructed the trial court to conduct a reconstruction hearing to determine whether defense counsel had consented to the parenthetical phases on the verdict sheet (*People v Ross*, 230 AD2d 924 [2d Dept 1996]).

Upon completing the reconstruction hearing, the court found that counsel's consent to the submission to the verdict sheet had been established (Steinhardt, J.). Defendant's appellate counsel challenged the findings before the Appellate Division as well as the Appellate Division's decision to remit the case for the reconstruction hearing. On August 25, 1997, defendant's conviction was affirmed with the Court holding that "[t]he evidence at the reconstruction hearing supports the...finding that the defense counsel consented to the submission of the annotated verdict sheet (citation omitted)." *People v Ross*, 242 AD2d 392, 392-393 [2d Dept 1997]. Defendant's remaining contentions were found to be either unpreserved or meritless (*Id.* at 393). Leave to appeal to the Court of Appeals was denied (*People v Ross*, 91 NY2d 944 [1998]).

Defendant next moved for a writ of error *coram nobis* claiming that appellate counsel had not acted effectively by failing to raise the of issue of trial counsel's ineffectiveness for not objecting to the submission of both intentional and depraved murder and for not moving to set aside the verdict. Defendant's application was denied (*People v Ross*, 41 AD3d 870 [2007]) and leave to appeal was denied (*People v Ross*, 9 NY3d 881[2007]).

In the instant motion defendant claims that (1) the prosecution failed to prove the element

of intent underlying the intentional murders; (2) the trial court's expanded identification charge misled the jury and hindered defendant's right to present a defense; (3) bolstering hearsay evidence was erroneously admitted; (4) defendant's cross-examination of a key prosecution witness was improperly curtailed; (5) trial counsel was ineffective for failing to object to the identification charge, the submission of the intentional murder counts to the jury, the verdict sheet and for failing to properly advise defendant during plea negotiations; and (6) the imposition of consecutive sentences was illegal.

After considering the papers submitted and the court file, this court finds that all of defendant's claims are procedurally barred.

Pursuant to CPL §440.10(2)(c), a motion to vacate a judgement of conviction must be denied when, although sufficient facts appear on the record to have permitted adequate review, the defendant unjustifiably failed to raise the issue on direct appeal. With regard to the claims that the prosecution failed to prove the element of intent, that hearsay evidence was improperly admitted and that consecutive sentences were illegal, defendant had the opportunity based on the record to raise each issue on appeal but failed to do so.

The propriety of both the identification instruction and the termination of the cross-examination of a prosecution witness was raised on direct appeal. The appellate decision rejected both arguments as meritless or unpreserved. Each is therefore barred from consideration in a post-judgement motion (CPL §§440.10[2][a], [c]).

With regard to the contention that counsel was ineffective for not making certain objections, the same record that indicates that the underlying issues of the identification charge and the intentional murder counts were not preserved, provided defendant with sufficient facts to

have raised the related claim of ineffective assistance of counsel on direct appeal (CPL §440.10[2][c]; *People v Mobley*, 59 AD3d 741 [2d Dept 2009]; *People v Maldonado*, 34 AD3d 497, 498 [2d Dept 2006]; *People v Jossiah*, 2 AD3d 877 [2d Dept 2003]). The fact that counsel failed to object and preserve an issue for appeal is on the record. That failure, framed as a claim of ineffective assistance of counsel, should have been raised on direct appeal and therefore cannot now be introduced in a collateral motion (*see People v Cooks*, 67 NY2d 100, 103 n1 [1986]). The allegation of ineffectiveness arising out of the alleged failure to object to the verdict sheet was resolved at the reconstruction hearing where defense counsel was found to have affirmatively consented to its annotations and to its submission to the jury.

Finally, defendant's claim that counsel was ineffective for not properly advising him to accept a plea offer is rejected because his conclusory allegations are unsubstantiated and under the circumstances cannot be true (CPL §440.30[4][d][i],[ii]). Defendant asserts that a plea offer of twelve and one-half years to twenty-five years was conveyed through counsel that would cover a conviction for manslaughter in the first degree. He states that he told his attorney "that he did not do it, and they got the wrong person" and counsel responded that he should proceed to trial because the prosecutor has a weak case. He also submits an affidavit from an individual who attests to a conversation with defendant about the manslaughter offer.

The People argue that no such unrealistic offer was ever made. Their file reflects that a plea offer of thirty years was transmitted to cover all three homicides as well as two other unrelated pending indictments.

In order to prevail on a claim of ineffective assistance of counsel involving plea negotiations, "defendant has the burden to demonstrate 'that a plea offer was made, that defense

counsel failed to inform him of that offer, and that he would have been willing to accept the offer” (*People v Fernandez*, 5 NY3d 813 [2005], quoting *People v Rogers*, 8 AD3d 888, 890-891 [3d Dept 2004]; *People v Goldberg*, 33 AD3d 1018 [2d Dept 2006]). Self-serving statements alone are insufficient to meet that burden (*see People v Goldberg* at 1019).

In this instance defendant offers no credible support for his bold accusations. Defendant has failed to submit any statement from his attorney and he offers no court generated documentation that would be expected to reflect some court participation in such a drastically reduced offer. That the People would offer one manslaughter conviction to cover the killing of three individuals is, in itself, beyond belief. The affidavit is also incredible on its face because of its generic quality, lack of context and the fact that it comes before this court more than fifteen years after the original conversation was said to have taken place. Moreover, in light of defendant’s alibi defense and considering his claim of innocence, it is unlikely that he would have pleaded guilty to a crime he states that he did not commit. Under the circumstances, defendant’s self-serving allegations fail to convince this court that the purported offer ever existed.

Defendant’s credibility is further weakened by the substantial period of time that passed before submitting this motion. In *People v Nixon*, 21 NY2d 338, 352 [1967], the Court held that a delay of more than a decade was an important factor to be considered in evaluating the seriousness of the defendant’s claim. The Court stated, “revelatory of the seriousness of defendant’s present claims, is that defendant waited over a decade before asserting them. In stale cases, defendants have all to gain by reopening old convictions, retrial being so often an impossibility. These are factors to consider in determining how valid the assertions are....”


Thus, a lengthy delay can be considered in evaluating the validity and legitimacy of a post-judgement claim (*People v Melio*, 304 AD2d 247, 252 [2d Dept 2003]; *People v Hanley*, 255 AD2d 837, 838 [3d Dept 1998]). The weakness of defendant's position is compounded by his failure to offer a reason for the extremely long delay in raising this particular issue. In light of the absence of any explanation and given that the relevant facts should have been long known to defendant, the delay is unjustifiable (*see People v Degondea*, 3 AD3d 148, 160 [1st Dept 2003]).

Accordingly, defendant's motion is denied in its entirety.

This decision constitutes the order of the court.

The 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.

ENTER:


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

ENTERED
 DEC 24 2009
 NANCY T. SUNSHINE
 COUNTY CLERK