

People v Lampon

2009 NY Slip Op 33011(U)

October 9, 2009

Supreme Court, Kings County

Docket Number: 6349/2001

Judge: Michael A. Gary

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 31

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

-against-

DECISION & ORDER
440 Motion

MIGUEL LAMPON,

Ind. No. 6349/2001

Defendant

-----X
By: Hon. Michael A. Gary

Defendant moves to vacate his judgment of conviction pursuant to CPL § 440.10(1)(h) on the grounds that he was denied his right to a fair trial when the court denied his request for the submission of a lesser included offense in its charge to the jury. For the following reasons, the motion is denied.

During the late night hours of July 18, 2001 and into the early morning, defendant drank alcohol and argued with David Garcia at defendant's apartment in Brooklyn. Garcia was verbally abusive toward defendant and refused to leave when asked. When Garcia finally went to sleep, defendant, who states he was "unusually" intoxicated and consumed with the idea that Garcia would harm him, shot Garcia twice in the head through a pillow, killing him. Defendant straightened up his apartment and shot himself twice in the chest several hours later, after which he called 911.

For his act, defendant was charged with two counts of Murder in the second degree (PL § 125.25[1], [2]) and one count of Criminal possession of a weapon in the fourth degree

(PL § 265.01[2]). The jury considered the intentional and depraved indifference murder counts in the alternative, as well as a charge of first-degree manslaughter pursuant to the affirmative defense of extreme emotional disturbance. The court gave an intoxication charge with respect to the intentional homicide counts. The defense objected to the submission of depraved indifference murder on the grounds that there was no reasonable view of the evidence that defendant's conduct was reckless, and the court also denied defense counsel's request that the court submit second-degree manslaughter as a lesser included offense of depraved indifference murder. Defendant was convicted of depraved indifference murder, for which he was sentenced on September 5, 2002 to a prison term of 15 years to life.

Defendant filed an appeal with the Appellate Division, Second Department, on January 18, 2006. In his brief, defendant argued that the evidence was legally insufficient to prove his guilt of depraved indifference murder because the evidence showed that he acted intentionally rather than recklessly. At oral argument on September 29, 2006, counsel also argued that the evidence was legally insufficient to prove the element of having acted under circumstances evincing a depraved indifference to human life.

After briefs had been submitted but before a decision was rendered, the Court of Appeals overruled the controlling case on depraved indifference murder, *People v Register*, 60 NY2d 270 (1983). On July 5, 2006, the Court held in *People v Feingold*, 7 NY3d 288, 294 (2006) that "depraved indifference to human life" was a mens rea element that must be established through subjective factors. The Appellate Division affirmed defendant's judgment of conviction on March 13, 2007, finding that "defendant's motions to dismiss,

which were limited to recklessness without addressing depraved indifference, failed to preserve with sufficient specificity the issue now raised on appeal” (*People v Lampon*, 38 AD3d 682, 682-683 [2d Dept 2007], *lv denied* 9 NY3d 991 [2007]).

In the instant motion to vacate judgment, defendant contends that the trial court improperly denied his request to submit the lesser included offense of manslaughter in the second degree to the jury. Specifically, defendant argues that while *Register* precluded the argument that defendant’s intoxication and heightened emotional state negated the depraved indifference element of the murder charge, the new *Feingold* standard for depraved indifference murder now permits such a claim and requires that second-degree manslaughter be submitted to the jury as a lesser-included offense. Defendant claims that *Feingold*, which was decided before his conviction was made final, should apply to his case retroactively pursuant to the Court of Appeals’ recent decision in *People v Jean-Baptiste*, 11 NY3d 539 (2008).

Under *Register*, which was still in effect at the time of defendant’s trial, depraved indifference murder was based solely on an objective assessment of the circumstances surrounding the acts and the factual setting in which the risk-creating conduct occurred (*Register* at 276). The assessment of the objective circumstances was a qualitative judgment by the trier of fact (*People v Roe*, 74 NY2d 20, 24 [1989]). Whereas manslaughter in the second degree under this standard required reckless disregard of a substantial risk of death, depraved indifference murder required reckless disregard of a very substantial risk (*Register* at 277). Nevertheless, the dissent in *Register* and in subsequent depraved indifference cases warned that this narrow distinction would confuse juries and result in depraved indifference

murder becoming a substitute for both manslaughter and intentional murder in cases where both intentional and depraved counts are submitted to the jury (*Register* at 284-285, *Roe* at 35-36).

At defendant's trial and in his appellate brief, objective circumstances were not a mens rea element and were thus not subject to negation by evidence of intoxication. Nor could intoxication be considered to negate the element of recklessness (*Register* at 276, 278-279; PL § 15.05[3]). As a result, defendant argues that he could not make a viable argument on appeal that his intoxication negated depraved indifference under the *Register* standard.

After defendant's trial, a line of cases were decided that significantly changed the law of depraved indifference and culminated in the overruling of *Register* with *People v Feingold*. While the Court of Appeals reaffirmed *Register* in *People v Sanchez*, 98 NY2d 373 (2002), shortly thereafter it reversed a series of depraved indifference murder convictions in which one-on-one shootings or stabbings constituted only intentional conduct, the circumstances of which could not support a finding of depraved indifference (*see People v Payne*, 3 NY3d 266 [2004]; *People v Gonzalez*, 1 NY3d 464 [2004]; *People v Hafeez*, 100 NY2d 253 [2003]). These cases chipped away at *Register* by sharpening the distinction between intent and depraved indifference to human life until the Court observed in *Payne* that "depraved indifference murder may not be properly charged in the overwhelming majority of homicides that are prosecuted in New York" (*Payne* at 269).

In *People v Suarez*, 6 NY3d 202 (2005), the Court departed more explicitly from *Register*, explaining that the element of depraved indifference to human life was a component of the crime, consisting of both depravity and indifference (*Suarez* at 214). Of

particular significance was the Court's statement that depraved indifference could only be charged in a few rare circumstances involving "wanton cruelty, brutality or callousness directed against a particularly vulnerable victim, combined with utter indifference to the life or safety of the helpless target of the perpetrator's inexcusable acts" (*Suarez* at 213). If such facts could not be shown with respect to a one-on-one killing, the jury should not consider depraved indifference murder (*id.*).

Finally, the Court stated outright in *Feingold* that depraved indifference was a distinct mens rea element (*Feingold* at 295). This holding cemented the narrow application of depraved indifference murder to one-on-one killings as developed in the Court's previous jurisprudence. Furthermore, under *Feingold*, it became clear that evidence of intoxication could be used to negate the mens rea element of depraved indifference (*see People v Coon*, 34 AD3d 869 [3d Dept 2006] [intoxication that would negate intent also negates mens rea of depraved indifference]).

The Court of Appeals has noted that its "quartet of cases", *Hafeez, Gonzalez, Payne* and *Suarez*, "represented a perceptible, evolving departure from the underpinnings of depraved indifference murder as expressed in *Register* and *Sanchez*" (*Policano v Herbert*, 7 NY3d 588 at 595 [2006]). Moreover, at the time defendant appealed on January 18, 2006, the Appellate Division had recently issued its direct appeal decision on *Feingold* on October 6, 2005 (*People v Feingold*, 22 AD3d 242 (2005), and leave to appeal to the Court of Appeals had already been filed in that case. The Court issued its final decision in *Feingold* on July 5, 2006, several months before oral argument was held on defendant's own appeal.

CPL § 440.10 governs the court's decision making capacity in regards to the motion

to vacate the judgment of conviction. Upon examination of the record and all the previously filed motion papers, the court MUST deny the motion to vacate if : . . .

2.(a) 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; or . . .

(c) although sufficient facts appear on the record of the proceeding underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion , . . . no such appellate review or determination occurred owing to the defendant's unjustifiable failure to . . . raise such ground or issue upon an appeal actually perfected by him;

In light of the timeline of the deprived indifference cases culminating in *Feingold*, defendant's claim is procedurally barred. When sufficient facts appear on the record to permit review of a claim on direct appeal but the defendant unjustifiably fails to raise it before the appellate court, CPL § 440.10(2)(c) bars the court from reviewing that claim in a motion to vacate judgment (*see People v Cooks*, 67 NY2d 100, 103-104 [1986] [CPL § 440.10 may not be used as a substitute for direct appeal]). With respect to the claim that *Register* foreclosed defendant's argument that intoxication may negate deprived indifference, defendant neglects the fact that he had available alternative means of raising a new claim during the interim period between when *Feingold* was decided on July 5, 2006 and when his conviction was affirmed on appeal on March 13, 2007. Pursuant to 22 NYCRR § 670.20(I), parties may seek permission from the Appellate Division to provide additional submissions after argument. Here, because the new *Feingold* standard was in effect several months before oral argument, defense counsel should have been aware of this important new development in the law. Defendant, however, failed to raise the instant claim

before the appellate court either at oral argument or in a post-argument letter or brief. As a result, the issue was never addressed on appeal. Moreover, defendant did in fact raise the instant claim only months after his appeal was decided in his application for leave to appeal to the Court of Appeals. That defendant raised a *Feingold* claim in this context further demonstrates that his claim could have been raised on appeal.

With the specific finding that the defendant had an opportunity and failed to preserve his claim for the appellate court to review, this court is constrained to abide by the ruling in *Policano v. Herbert*, 7 NY3d 588 (2006), as interpreted by *People v. Jean Baptiste*, 11 NY3d 539. In *Policano*, the court specifically discussed the applicability of *Feingold* on cases challenged by collateral attack. “ Existing law should not be applied on collateral review to defendant whose convictions became final prior to our new interpretation of the law of depraved indifference murder”. In *Jean Baptiste*, the court further elucidated that *Feingold* should apply, however, to “cases on direct appeal in which the defendant has adequately challenged the sufficiency of the proof to his depraved indifference murder conviction” (at 542). In reconciling these two standards as it relates to this case, this court is constrained to find that since the Appellate Division in this case specifically determined that “defendant [Lampon] failed to preserve with sufficient specificity his challenge to the depraved indifference murder” (*Lampon* at 683), so, too, the current challenge on the refusal to charge the jury with the lesser included crime of Manslaughter in the second degree fails. Because the issue was not raised, as discussed above, when it could have been, this court finds that the defendant is barred from review under CPL 440.10 (2)(c).¹

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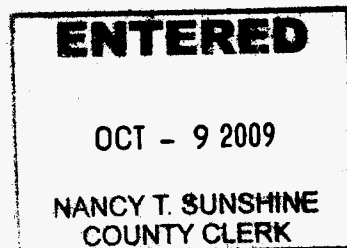
In any event, even if *Feingold* properly applied to this case retroactively, defendant’s present claim is without merit. Were *Feingold* to be applied to the facts of defendant’s case, defendant’s theory that second-degree manslaughter should have been charged as a lesser

Accordingly, it is ordered that defendant's motion to vacate his judgment is denied.

This decision constitutes the order of the court.

Dated: Brooklyn, New York
October 9, 2009


MICHAEL A. GARY, J.S.C.



included offense of depraved indifference murder would not be viable. Under *Feingold*, there is no evidence to suggest that defendant's conduct should fall within the narrow exception for one-on-one killings delineated for depraved indifference murder because the evidence is consistent solely with an intentional homicide. The act of shooting the sleeping victim twice in the head at short range was nearly certain to cause death (*People v Solano*, 52 AD3d 848, 849 [2d Dept 2008] [shooting victim in the head from 6 to 16 inches away demonstrated a manifest intent to kill]). The killing at issue also failed to exhibit the uncommon brutality or callousness characteristic of depraved indifference. Therefore, had *Feingold* been in effect at trial, depraved indifference murder would never have been charged to the jury under such circumstances and defendant would have had no grounds to seek submission of second-degree manslaughter as a lesser included offense. That is to say, the error complained of by the defendant - the failure to charge a lesser-included offense of depraved indifference murder is a non-sequitur. If *Feingold* applied, then the lesser-included offense of Manslaughter in the second degree with a mens-rea requirement of recklessness would never have been charged, and defendant would have had no grounds to seek submission of the Manslaughter in the second degree charge.