People v Dorsette

2009 NY Slip Op 33017(U)

October 6, 2009

Supreme Court, Kings County

Docket Number: 4179/04

Judge: Thomas J. Carroll

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SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY, CRIMINAL TERM, MISC. MOTIONS

PEOPLE OF THE STATE OF NEW YORK
against

Alfred Dorsette,

Defendant

Indictment No.: 4179 /04

By: Hon. Thomas J. Carroll

Dated: October 6, 2009

Defendant filed a pro se motion pursuant to CPL 440.10 to vacate judgment and, in the alternative, CPL 440.20 to set aside his sentence. In deciding this motion, the court has considered the motion papers, the affirmation in opposition, defendant's reply and the court file.

Background

On May 13, 2005, the defendant was found guilty, after a jury trial, of one count of criminal possession of a weapon in the second degree. On June 28, 2005, the defendant was sentenced to a prison term of twenty years to life as a persistent violent felony offender (Collini, J., at trial and sentence).

On January 15, 2008, the Appellate Division, Second Department, affirmed the defendant's judgment of conviction. People v. Dorsette, 47 AD3d 728 (2d Dep't 2008).

On May 12, 2008, the New York Court of Appeals denied the defendant's leave to appeal. People v. Dorsette, 10 NY3d 862 (2008) (Jones, J.).

In this CPL 440.10 motion, the defendant makes the following claims:

1. That the prosecutor knew, before entry of judgment, that a prosecution witness, Saasha White, testified falsely; and that the court should not have allowed her to testify because she did not understand what an oath was;

2. That the prosecutor failed to inform the defendant until after verdict that he was subject to persistent violent felony offender treatment and defense counsel

did not advise the defendant of this potential sentencing treatment;

3. That defense counsel's representation was ineffective in several aspects; and

4. That the court improperly adjudicated defendant a persistent violent felony offender.

Discussion

Regarding the defendant's claim pursuant to CPL § 440.10 (1) (c), that the prosecutor knew, before entry of judgment, that Saasha White committed perjury at trial, the defendant has failed to provide any sworn allegations of fact to support his claim. Defendant's allegation is based solely on a letter he wrote to his trial counsel, dated September 4, 2008, which claims that in an August 29, 2008, telephone conversation with his son he said that Ms. White had told the defendant's son that she had lied at trial and was willing to go back to court because she realized that it was wrong to lie under oath (Defendant's 440 Motion, Exhibit E).

This unsworn, out-of-court, hearsay statement attributed by the defendant to Saasha White is insufficient proof of defendant's claim. People v. Brown, 56 NY2d 242 (1982); People v. Portalatin, 132 AD2d 581 (2d Dep't 1987). Additionally, recantation evidence has been held to be inherently unreliable. People v. Shillitano, 218 NY 161 (1916). Thus, this aspect of this claim is denied.

Defendant's claim concerning Saasha White's understanding of the oath appears on the record and, thus, could have been raised on the defendant's direct appeal (People's Exhibit IV, p. 113-116). Therefore, this claim cannot be asserted now in a motion to vacate judgment. CPL 440.10 (2)(c); People v. Cuadrado, 9 NY3d 362, 364-365 (2007). This aspect of the defendant's first claim is also barred and thus denied.

Based on the foregoing, defendant's motion based on his claims regarding Saasha White are denied.

The defendant claims that the prosecutor is guilty of misconduct for not informing the

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defendant of his possible mandatory persistent felony offender status prior to trial. He alleges that the consequence of this failure was to deprive him of vital information that he was entitled to consider in evaluating the People's plea offer.

The minutes of the sentencing and the CPL Article 400 predicate felony statement are both matters of record (People's Exhibit II). Defense counsel raised this issue at the time of the defendant's sentencing (Id., p. 2-6). Since this claim raises a matter that was on the record, it could have been raised in the defendant's direct appeal. This claim is also barred and thus denied. CPL § 440.10 (2) (c); Cuadrado, 9 NY 3d at 364-365.

The defendant also claims that defense counsel was ineffective for not advising him about his exposure to a sentence as a persistent violent felony offender. He argues that had he been aware that he was facing a sentence of up to 25 years to life he would have accepted either of the People's plea offers of eight or ten years. This claim is also apparent from the record and could therefore have been raised on appeal. CPL § 4401.0 (2)(c).

At sentence defendant was served with a predicate felony statement that documented his record of two prior violent felony convictions for criminal possession of a weapon in the third degree from 1987 and 1991 respectively. Along with his present conviction for criminal possession of a weapon in the second degree, defendant was now facing an enhanced sentence as a mandatory persistent violent felony offender. The record, however, reflects that counsel was surprised by this development explaining that only one violent felony offense had been the subject of the *Sandoval* hearing and that the trial court had advised counsel and the prosecution to prepare for a sentence as a second violent felony offender.[1] Counsel also stated, "I just point out, Judge, that that conviction

[1] It is also likely that the People were unaware of defendant's correct predicate status until the predicate felony statement was prepared. In addition to the People's silence on the issue until the time of sentence, the plea offers of eight and ten years for attempted murder in the second degree were illegal for a persistent violent felony offender.

the prosecutor is referring to from 1987 does not appear on the rap sheet. It talks about what charges were presented to the Grand Jury but does not have a criminal possession of a weapon in the third degree. It's not there." Counsel further contended that he would have adjusted his trial strategy were he aware of another violent felony conviction.

According to the record, defendant was also unprepared to receive the severe sentence that he was facing. In response to the court's invitation to speak before the imposition of sentence, defendant stated, "I feel it was a fair trial. My record is pretty bad but that's not all I consist of is bad acts. I've done a lot of good things in my life. I do have a family. I didn't know that this point was going to come up where I would be facing 25 years to life." People's Exhibit II, p. 12.

It is, thus, clear from the exchanges at the sentencing proceeding that counsel had not advised defendant of the potential sentence that he was facing. Counsel's comments coupled with defendant's recognition of his unexpected impending fate indicate further that they did not engage in any private discussion regarding this matter. Defendant could therefore have raised this particular allegation of ineffective assistance of a counsel on appeal. His failure to do so bars him from raising the issue in a post-judgement motion. CPL § 440.10 (2)(c).

Furthermore, the defendant claims that if properly counseled by defense counsel, he would have taken a plea as an Alford plea. Defendant, however, has not demonstrated that the People offered an Alford plea. Peo v. Fernandez, 5 NY 3d 813. Accordingly, there is no basis for this claim and it is denied.

Moreover, the alleged offer on February 2005 was not 10 years but rather "Att. Murder 2 & 10 years & F.O.O.P." Defendant's Motion, Exh. A. Similarly, the April 2005 offer was not 8 years but rather "Att. Murder 2 and 8 years jail." Id. The defendant has not demonstrated that he would have pleaded guilty to Attempt Murder in the Second Degree. Thus, again, this claim is denied.

Based on the foregoing, defendant's motion based on the prosecutor's alleged late notification about possible sentencing exposure and defense counsel's failure to advise about such is denied.

The defendant claims that defense counsel was ineffective in several other aspects.

The defendant contends defense counsel failed to request a Dawson hearing. On appeal, defendant's appellate counsel raised the Dawson issue. People's Exhibit III, S. Ct., App. Div., 2d Dep't, Brief for Defendant - Appellant, Point 1 (A). Thus, this aspect of the defendant's claim is denied.

Another allegation is that defense counsel prohibited the defendant from testifying. However, the defendant has not presented an affidavit from either of his two trial counsels, Eric Meggett or Marisa Benton, stating that either trial counsel prohibited him from testifying. In fact, the defendant wrote in a letter dated September 4, 2008, to Mr. Meggett that, "First, I want to thank you and Ms. Benton for all your work on my case at trial." Defendant's Motion, Exhibit E. Furthermore, as noted above, at sentencing the defendant stated on record, "I feel it was a fair trial." People's Exhibit II, supra. In light of the above, this court concludes that the defendant has not demonstrated that either defense counsel prohibited him from testifying.

In his ineffective of assistance counsel claim, the defendant also contends that defense counsel failed: 1) to make a timely motion for a mistrial during summations and to preserve his contentions; 2) to move to suppress physical evidence; 3) to argue that three 911 recordings must be introduced in evidence; 4) to introduce testimony to show that Mickey White was not honest when he testified about his employment; 5) conducted himself in an unprofessional manner; and 6) to ask to the court to dismiss criminal possession of a weapon in the second degree. The grounds for these allegations are on the record. Moreover, the defendant has not submitted an affidavit from

either defense counsel to substantiate these claims. Furthermore, the defendant stated he felt he received a "fair trial." People's Exhibit, supra. These claims of ineffective assistance of counsel are denied. CPL § 440.10 (2)(c).

Defendant also contends that defense counsel failed: to timely investigate a defense witness; to investigate the prosecutor's main witness, Mickey White, regarding his testimony; and to employ an expert investigator "to talk to witness" or to investigate the bullet hole at the crime scene. The defendant has not produced an affidavit from either of his defense attorneys to support these claims. These claims of ineffective assistance of counsel are also denied. CPL 440.10 (2)(c); *See* People v Ozuna, 7 NY 3d 913.

Pursuant to CPL § 440.20 (1), defendant challenges his adjudication as a persistent violent felony offender based on Apprendi v. New Jersey, 530 US 466 (2000), requiring that his sentence be set aside.

Defendant previously raised this issue in his direct appeal. People's Exhibit III, S. Ct., App. Div., 2d Dep't, Brief For Defendant-Appellant, p.31-38. The Appellate Division, Second Department, did not accept this claim. People v. Dorsette, 47 Ad3d 728 (2d Dep't 2008). In fact, in his reply, defendant states that he is raising " substantially the same Apprendi claim that was raised on appeal . . . ." Defendant's Reply, p. 8. Therefore, the defendant's claim seeking to set aside his sentence is denied. CPL § 440.20 (2), (a).

Decision

Defendant's motion to vacate judgment and/or set the verdict aside is denied in all respects. This shall constitute the Decision and Order of the court.

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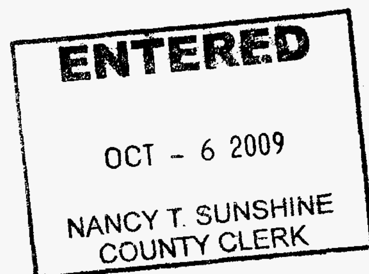
Certificate of Appeal

The defendant is hereby advised 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 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 certificate granting leave to appeal is granted.[2]

E N T E R,

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



[2] 22 NYCRR § 671.5.