

People v Joseph

2009 NY Slip Op 33018(U)

November 5, 2009

Supreme Court, Kings County

Docket Number: 4682/95

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

Roger Joseph,
Defendant

Indictment No.: 4682/95

By: Hon. Thomas J. Carroll

Dated: November 5, 2009

Defendant filed a pro se motion pursuant to CPL 440.10 to vacate judgment. In deciding this motion, the court has considered the motion papers, the People's Affirmation in Opposition, the defendant's Reply and the court file.

Background

In January 1995, the defendant and two others were indicted under indictment number 377/1995 and charged with murder in the second degree and other crimes.

In March 1995, the defendant's counsel filed a notice of motion and an affirmation seeking, among other things, an order permitting him to inspect the grand jury minutes for purpose of moving to dismiss the indictment. On March 14, 1995, Judge Albert Koch granted the defendant's motion to dismiss. He also granted the People's leave to re-present. Defendant's Motion, Exhibit A.

On April 25, 1995, the People filed indictment number 4682/95 which charged the defendant and two others with murder in the second degree and other crimes.

On May 5, 1995, the defendant's counsel again filed a notice of motion and an affirmation seeking, among other things, an order permitting him to inspect the grand jury minutes for purpose of moving to dismiss the indictment. Defense counsel used the same

language in his second affirmation as he used in his first affirmation. On June 16, 1995, Judge Koch ruled that the evidence before the grand jury was legally sufficient and that the assistant district attorney correctly charged the grand jury. Judge Koch denied the defendant's motion to dismiss the indictment. People's Opposition, Exh. B.

On September 14, 1995, the defendant was found guilty of second degree murder and one count each of criminal possession of a weapon in the second and third degrees.

On November 29, 1995, the defendant was sentenced to twenty-five years to life on the murder count, seven and one-half to fifteen years on the second degree weapon count and three and one-half to seven years on the third degree weapon count. The sentences for weapons charges were to run concurrently with each other but consecutively to the sentence for murder count (Koch, J., at trial and sentence).

In May 1999, appellate counsel for the defendant filed a brief containing the following issues:

1. The defendant was denied his due process right to a fair trial by the court's failure to charge that two prosecution witnesses were accomplices as a matter of law whose testimony had to be corroborated;
2. The defendant was denied his constitutional right to effective assistance of counsel by trial counsel's failure to request the accomplice corroboration charge; and
3. The trial court improperly sentenced the defendant to consecutive sentences for defendant's murder and second degree gun possession convictions where the weapon was a material element of the murder and the possession was a continuing crime.

In February 2000, the Appellate Division modified the defendant's sentence to provide

that the second degree murder charge and the second degree weapon possession charge run concurrently because the murder and that weapon possession arose from the same act. As modified, the judgment was affirmed. They also found defendant was not deprived of effective assistance of counsel and that his other contentions were without merit or not requiring reversal. People v. Joseph, 269 AD2d 407 (2d Dep't 2000).

In May 2000, the defendant's application to appeal to the Court of Appeals was denied. People v. Joseph, 95 NY2d 799 (Levine, J., 2000).

In April 2001, according to the People's Opposition, the defendant sought a writ of habeas corpus in the United States District Court for the Eastern District of New York, raising the same ineffective assistance of counsel claim as he had in his appeal. After the People responded, the case was referred to a United States Magistrate Judge for a Report and Recommendation. In May 2002, United States District Court Judge David G. Trager adopted the recommendation which was to deny defendant's petition for failure to demonstrate that trial counsel's failure to request the accomplice corroboration instruction could not be considered sound strategy. A Certificate of Appealability to the United States Court of Appeals for the Second Circuit was denied.

In September 2004, the defendant submitted a pro se motion to compel the Kings County District Attorney's Office to provide him with a complete copy of the grand jury minutes under Indictment Number 4682/95 claiming that he needed them to determine if the prosecutor's instructions violated his constitutional rights. In his supporting affidavit, para. 10, the defendant stated that defense counsel had submitted a motion to inspect the grand jury minutes and dismiss the indictment. In November 2004, the People filed an answer opposing the defendant's motion.

In November 2004, defendant's motion was denied (Mangano, Jr., J.).

In June 2006, according to the People's Opposition, the defendant moved in Supreme Court, Westchester County, for a writ of habeas corpus, claiming that his detention was illegal because the state was allowed to resubmit the same charges to a second grand jury after a finding that the first grand jury had insufficient evidence to indict defendant on those charges. The Attorney General's Office opposed the defendant's state court habeas corpus petition. In October 2006, the Westchester County Supreme Court denied the defendant's petition for a writ of habeas corpus. The court held that a writ of habeas corpus did not lie and that the defendant could have raised these claims in his direct appeal or in a CPL § 440 motion. The court also held that the first indictment had been dismissed for a defective presentation and that the Kings County District Attorney's Office had been given leave to represent (People's Opposition).

Discussion

In the defendant's current pro se motion to vacate judgment, the defendant makes the following claims:

1. The trial court lacked jurisdiction because the prosecutor's presentation to the second grand jury was also defective as a matter of law; and
2. That the defendant was deprived of effective assistance of counsel in that defense counsel failed to move to dismiss the second indictment after having successfully moved to dismiss the first indictment

The defendant claims the second grand jury presentation was defective and thus the trial court lacked jurisdiction. However, Judge Koch reviewed these grand jury minutes and found that the evidence was legally sufficient and that the Assistant District Attorney correctly charged

the grand jury. Judge Koch ruled that, “[a]ccordingly, the defendant’s motion to dismiss the indictment is denied.” People’s Opposition, Exh. B. Since “sufficient facts appear on the record” to have permitted appellate review, the court must deny the claim. CPL § 440.10 (2)(c). Furthermore, this claim was previously determined by Judge Koch upon a prior motion. Thus, this claim is also denied under CPL § 440.10 (3)(b).

The defendant also claims he was denied his constitutional right to the effective assistance of counsel because he did not resubmit a motion to dismiss the indictment based on the same facts as his first motion. However, defense counsel did make a motion regarding the second grand jury presentation. In fact, the defendant, in his supporting affidavit for his pro se motion seeking all the grand jury minutes, acknowledged that defense counsel had made such a motion. Indeed, defense counsel used the same language in his second affirmation as he did in his first affirmation. Since these motions are a matter of record, this claim must be denied. CPL § 440.10 (2)(c). Furthermore, the defendant’s allegation is refuted by the fact that defense counsel’s second motion is in the court record. Thus, this claim is also denied under CPL § 440.30 (4)(c).

Decision and Order

Based on the above, the defendant’s motion to vacate judgment is denied in its entirety.

This constitutes the decision and order of the court.

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.¹

E N T E R ,



J. S. C.

HON. THOMAS J. CARROLL

ENTERED
NOV - 9 2009
NANCY T. SUNSHINE
COUNTY CLERK

¹ 22 NYCRR § 671.5.