

<b>People v Fox</b>
2010 NY Slip Op 31134(U)
January 11, 2010
Supreme Court, Kings County
Docket Number: 1134/02
Judge: Raymond Guzman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS – PART 9

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

DECISION AND ORDER

Indictment # 1134/02

-against-

ANTHONY FOX,

Defendant,

----- X  
RAYMOND GUZMAN, J.S.C.

**INTRODUCTION**

On February 20, 2002, at approximately 5:30 A.M., defendant forced his way into the home of Elyce Burns located at 294 Osborn Street, Apartment 5A, in Kings County as she was opening the door for her friend Cherie Hunter. Once inside the apartment defendant brandished a knife and demanded money from Ms. Burns and Ms. Hunter. Ms. Burns called out for her brother, Arthur Griggs, who was asleep in another room of the apartment. Mr. Griggs awoke and ran to the living room to find defendant threatening the two women. As he brandished the knife, defendant also removed a phone from the wall which he placed in his pocket. The three occupants of the apartment retreated from the living room toward the bedroom. As they did so, defendant chased them and stabbed Ms. Hunter twice in the abdomen.

Inside the bedroom multiple calls were made to 911 to report an assault in progress. At approximately 5:50 A.M., Police Officers Peter Rodriguez and Michael Thomas responded to a radio transmission of the 911 call. When the officers arrived they were unable to gain access to 294 Osborn Street and waited outside. While outside, Officer Rodriguez noticed defendant running

down the interior steps of the building. Defendant then exited the building right next to where the police officers were standing. Officer Rodriguez confronted defendant and asked him two questions. Defendant disclosed that he did not live in the building and was coming from apartment 5A. Upon learning this information, Rodriguez asked defendant to accompany him to apartment 5A, and defendant agreed. At the apartment defendant was identified as the attacker and it was determined that when he was stopped by the police exiting the building he was in possession of the telephone he pulled from the wall as well as Ms. Hunter's coat.

Defendant was charged under King County Indictment Number 1134/02 with two counts of Robbery in the First Degree (Penal Law § 160.15[3]); two counts of Robbery in the Third Degree (Penal Law § 160.05); Burglary in the Second Degree (Penal Law § 140.25[2]); Burglary in the Third Degree (Penal Law § 140.20); Assault in the Second Degree (Penal Law § 120.05[2]); Assault in the Third Degree (Penal Law § 120.00[1]); and Criminal Possession of a Weapon in the Fourth Degree (Penal Law § 265.01[2]).

Following a jury trial, defendant was convicted of two counts of Robbery in the First Degree (Penal Law § 160.15[3]) and one count of Burglary in the Second Degree (Penal law § 140.25[2]). On March 27, 2003, defendant was adjudicated a second felony offender and was sentenced to concurrent prison terms of twelve years for each robbery conviction and ten years for the burglary conviction.

Following his sentence, defendant appealed his conviction to the Second Department. Defendant's conviction was affirmed by slip opinion dated on October 25, 2004. People v Fox, 11AD3d 709 (2d Dept 2004) *lv denied*, 4 NY3d 743 (2004).

On January 8, 2005, defendant filed a motion to vacate the judgment of conviction pursuant

to CPL § 440.10 before the Supreme Court, Kings County (Chamber, J.).<sup>1</sup> By Decision and Order dated October 11, 2005, Justice Chambers denied defendant's motion in its entirety.

By papers dated August 11, 2009, defendant moves this Court, *pro se*, for an order vacating his judgment of conviction pursuant to Criminal Procedure Law § 440.10, on the grounds that: (1) the People knowingly adduced false testimony at the hearing and trial of the instant matter; (2) the People withheld exculpatory evidence, specifically, reports from crime scene investigators; and (3) the People withheld impeachment evidence concerning two of their witnesses' convictions. Further, defendant moved for an Order to set aside his sentence pursuant to Criminal Procedure Law § 440.20 on the grounds that the sentencing court impermissibly considered conduct for which defendant was acquitted when sentencing him.<sup>2</sup>

The People filed opposition to defendant's motion on August 24, 2009, arguing that defendant was procedurally barred from raising these claims based on his failure to do so either on direct appeal or in his first post-conviction motion. Defendant subsequently filed an affidavit in further support of his motion dated September 9, 2009, wherein he raised a new claim that the People's August 24, 2009 opposition papers contained material misstatements of the facts. This Court, while sitting in the Miscellaneous Motions Part received the original motion, opposition papers, and supplemental filing by defendant on September 28, 2009. The People filed a second

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<sup>1</sup> Defendant's 2005 Motion to Vacate alleged three grounds, two of which are identical to the grounds alleged in the instant motion, as will be further discussed in the Legal Analysis section of this Decision and Order.

<sup>2</sup> Defendant states that he is moving the Court pursuant to CPL § 440.30 to vacate his judgment of conviction and to set aside his sentence. As CPL § 440.30 does not offer any relief, but rather spells out the procedure for motion made pursuant to CPL §§ 440.10 and 440.20, the Court will review defendant's applications under the rubric of those two CPL sections.

set of opposition papers on October 21, 2009, to address the new claims raised by defendant's second filing, arguing they did not misstate the facts.

Finally, defendant filed another supplemental reply to the People on November 11, 2009, reiterating that the People adduced false evidence at trial and failed to turn over Brady material. The People did not reply to defendant's final submission to the Court.

For the following reasons defendant's motion is denied.

## **LEGAL ANALYSIS**

### **I. Defendant's Motion To Vacate Pursuant to CPL § 440.10**

Defendant seeks to vacate his judgment of conviction of three grounds: (1) the People knowing adduced false testimony at the hearing and trial of the instant matter; (2) the People withheld exculpatory evidence, specifically, reports from crime scene investigators; and (3) the People withheld impeachment evidence concerning two of their witnesses, namely prior convictions.

Following his conviction, defendant filed an appeal with the Second Department alleging that he was denied a fair trial based on errors made at the pre-trial Huntley/Wade/Mapp/Dunaway hearing. Defendant did not allege any of the issues that he has now brought forth in the instant motion. See, People v Fox, 11 AD3d 709 (2d Dept 2004). However, defendant filed a CPL § 440.10 motion on March 11, 2005, alleging Brady violations identical to grounds two and three detailed above. By decision and order dated October 11, 2005, Justice Cheryl E. Chambers denied defendant's motion pursuant to CPL § 440.30(4)(d), holding that defendant failed to allege any facts "substantiating or tending to substantiate" that Brady material was withheld.

Additionally, defendant has raised a new allegation, that the prosecutors intentionally elicited false testimony based on differences between Officer Rodriguez's testimony at the pre-trial hearing

and at trial. It is clear that the different testimony was an issue that appeared on the record at the time defendant took his appeal in this case. Defendant failed to raise this claim during that appeal.

Defendant faces two procedural hurdles in bringing the instant action. Criminal Procedure Law, § 440.10(2) provides in pertinent part:

Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment when:

(c) Although sufficient facts appear on the record of the proceedings 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 take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him.

Criminal Procedure Law, § 440.10(3) provides in pertinent part:

Notwithstanding the provisions of subdivision one, the court may deny a motion to vacate a judgment when:

(b) 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; or

(c) Upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.

Because defendant's two Brady violation allegations have already been considered by a court of concurrent jurisdiction and decided on the merits, this Court will not review them pursuant to CPL

§440.10(3)(b). *See also*, People v Cochrane, 27 AD3d 659 (2d Dept 2006); People v Dover, 294 AD2d 594 (2d Dept 2002).

Defendant's remaining contention must also be denied. Defendant avers that the discrepancy between Officer Rodriguez's pre-trial hearing testimony and trial testimony is evidence of the People eliciting false testimony. Apart from being highly speculative, sufficient facts appeared on the record for defendant to have raised this issue on his direct appeal or in his initial post-conviction motion. There is no evidence to suggest that defendant was justified in failing to raise the issue before the Second Department, or before Justice Chambers. Therefore, pursuant to CPL § 440.10(2)(c), and CPL § 440.10(3)(c), defendant's motion based on this ground is denied. *See also*, People v Hall, 28 AD3d 678 (2d Dept 2006); People v Williams, 5 AD3d 407 (2d Dept 2004)

Accordingly, defendant's motion to vacate his judgment of conviction is denied.

## **II. Defendant's Motion To Set Aside His Sentence Pursuant to CPL § 440.20**

Defendant also contends that he was illegally sentenced as an "armed felon" and that his sentence was illegally enhanced based on a crime for which he was acquitted. Defendant's contention regarding his sentence is meritless.

Defendant was properly sentenced as a Second Felony Offender to two counts of Robbery in the First Degree (Penal Law § 160.15[3]) and one count of Burglary in the Second Degree (Penal Law § 140.25[2]). The trial court imposed two twelve year determinate sentences for the robbery convictions to run concurrently, and a ten year sentence for the burglary, also to run concurrently. These sentences are permissible under Penal Law §70.02(3)(a),(b) and Penal Law § 70.45. There is absolutely no indication that the court used the crime for which defendant was acquitted in

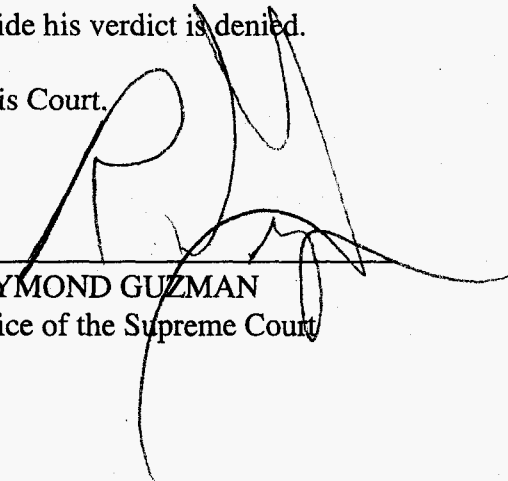
determining this sentence. Because defendant has failed to provide any substantiation whatsoever for his allegations, and there is no reasonable possibility that they are true, his motion to set aside his verdict is denied in its entirety. Additionally, pursuant to CPL § 440.30(4)(d), defendant's motion for a hearing on this matter is denied.

**CONCLUSION**

For the foregoing reasons, defendant's motion pursuant to CPL § 440.10 to vacate the judgment of conviction, and pursuant to CPL § 440.20 to set aside his verdict is denied.

This opinion shall constitute the decision and order of this Court.

Dated: January 11, 2010  
Brooklyn, New York

  
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RAYMOND GUZMAN  
Justice of the Supreme Court

**ENTERED**  
JAN 13 2010  
NANCY T. SUNSHINE  
COUNTY CLERK