

**People v Brown**

2010 NY Slip Op 31155(U)

January 11, 2010

Sup Ct, Kings County

Docket Number: 12378/95

Judge: Abraham G. Gerges

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**MEMORANDUM****SUPREME COURT****KINGS COUNTY****BY ABRAHAM GERGES,J.**

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**The People of the State of New York****Date: January 11, 2010****v.****Edward Brown,****Defendant.****Ind. #12378/95**

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Defendant, *pro se*, moves to vacate the judgment on the grounds that (1) the Court failed to provide adequate jury instructions on the depraved indifference charge; (2) he is not guilty of depraved indifference murder because the evidence shows that he intentionally killed the victim; (3) that the Court gave an improper "mixed" Allen charge; and (4) defense counsel was ineffective in not raising these and other issues.

In deciding this motion, the court has considered defendant's papers, the affirmation in opposition, the trial and sentencing minutes and the court file.

***Background***

On August 24, 1995 at 172 Amboy St. Brooklyn, New York, the defendant shot and killed Michael Floyd (victim).

On October 3, 1995, indictment number 12378/1995 was returned, charging the defendant with two counts of Murder in the Second Degree (P.L. 125.25[1] and [2]), one count of Criminal Possession of a Weapon in the Second Degree (P.L. 265.02[3]), and one count of Criminal Possession of a Weapon in the Third Degree (P.L. 265.02[4]).

On October 12, 1995, the defendant was arraigned and pleaded not guilty.

Trial proceedings began on May 21, 1996. During the trial, the prosecution presented several eyewitnesses who observed a person, a light-skinned black male in a striped shirt, shoot at and subsequently chase after, the victim. The key witness for the prosecution was co-defendant, Lee Aviles, Jr, who identified the defendant as the shooter. Aviles testified that at approximately 7:20 P.M. on August 24, 1995, he was driving his car in the Brownsville region of Brooklyn, with defendant a passenger, when defendant spotted Floyd and Gray. While defendant attempted to duck to avoid being seen, Floyd and Gray saw him and approached the car. Defendant fired one shot at Floyd and Gray from inside the car. Another witness testified that the defendant chased Floyd on foot for approximately two and a half blocks. Several other witnesses testified that Floyd attempted and failed to gain entrance to 164 Amboy, but was able to get into 172 Amboy Street. Other witnesses testified that a light-skinned male in a striped shirt followed Floyd to 172 Amboy and fired his gun into the lobby of the building.

Defendant and Aviles were arrested separately about a month after the shooting, and both told police that Floyd reached in his waistband for what they believed to be a gun. Several officers testified that no gun was recovered from the victim or the crime scene.

The medical examiner testified that Floyd was shot once in the buttocks and once in the abdomen, with the abdominal wound proving fatal.

On May 30, 1996, the defendant was acquitted of intentional murder and convicted of depraved indifference murder. On June 1, 1996, defense counsel made a motion to set aside the verdict pursuant to Criminal Procedure Law 330.30, arguing that the evidence

was insufficient to prove the depraved indifference count; instead counsel argued that the evidence indicated intentional manslaughter.

On June 12, 1996, the court dismissed the defense motion to set aside the verdict. Defendant was sentenced to an indeterminate sentence of 25 years to life.

Defendant appealed the decision on the grounds of (1) prosecutorial misconduct, (2) improper jury instructions with respect to justification, and (3) excessive punishment. On May 18, 1998, the Appellate Division, Second Department affirmed the judgment.<sup>1</sup>

On August 12, 1998, the Appellate Court denied Defendant's application for a writ of *coram nobis*, and leave for appeal to the Court of Appeals was denied.<sup>2</sup>

On December 2, 1998, defendant filed a *pro se* application for a writ of *habeas corpus* in the Eastern District of New York. On September 23, 1999, the District Court dismissed defendant's petition.<sup>3</sup>

On August 28, 2004, defendant filed a *pro se* application for a writ of *coram nobis*, in which defendant claimed ineffective assistance of appellate counsel. Three of the four claims defendant raised in his application were similar to the claims being raised in the instant motion before this court. Defendant claimed that appellate counsel should have raised that (1) the court failed to adequately respond to the jury's inquiry about depraved indifference murder; (2) the court's Allen charge coerced a juror who had requested a private audience with the court; and (3) and that appellate counsel should have raised that trial counsel provided ineffective assistance when he failed to object to (i) the insufficiency of evidence for the depraved indifference count, (ii) the handling of the

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<sup>1</sup> *People v. Brown*, 250 A.D.2d 774 (1998).

<sup>2</sup> *People v. Brown*, 92 N.Y.2d 894 (1998).

<sup>3</sup> *Brown v. Artuz*, CV-99-203 (RJD) (1999).

juror who spoke with the court, (iii) the Allen charge, and (iv) the court's response to the jury's request for an explanation for depraved indifference murder. On October 28, 2008, the Appellate Division denied defendant's petition.<sup>4</sup> The Appellate Division found that defendant failed to establish that appellate counsel was ineffective.<sup>5</sup>

By papers dated December 18, 2008, the Defendant made a motion to vacate judgment.

### *Law*

Under CPL 440.10(2)(c), the court is required to deny a motion to vacate a judgment when sufficient facts appear on the record, but the defendant unjustifiably failed to raise them on direct appeal.<sup>6</sup> All of defendant's present claims were preserved "on the record," for appellate review. Defendant has had adequate opportunity to raise these issues on direct appeal and unjustifiably failed to do so. Therefore, CPL 440.10(2)(c) mandates the court deny defendant's motion to vacate the judgment.

Furthermore, even assuming, *arguendo*, that it is procedurally appropriate to review these issues, defendant's claims are without merit.

In the instant motion, defendant claims that the court failed to provide adequate jury instructions on the charge of depraved indifference murder and the court erred when it failed to give meaningful instructions in response to the jury's requests for clarification. Under CPL 310.30, if the jury makes an inquiry about the law, the court must give further information or instruction as it deems proper. The court has a duty to respond in a

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<sup>4</sup> *People v. Brown* 55 A.D.3d 920 (2008).

<sup>5</sup> *Id.*

<sup>6</sup> *People v. Jossiah*, 2 A.D.3d 877 (2003).

“meaningful” way.<sup>7</sup> However, if the original instruction is adequate and the jury expresses no confusion, there is no error if the judge chooses to respond by rereading the charge.<sup>8</sup> There was no evidence that the jury in this case was confused by the charge. As is detailed in the record, the court reread the same charge on three separate occasions, with no objection by defense counsel.

Defendant’s second claim is that the evidence against him was legally insufficient to satisfy the elements of depraved indifference murder. Defendant asserts that his case was decided under the wrong standard, and instead, he should have been convicted of intentional murder (the jury acquitted him of this count). At the time that defendant’s case was decided, the depraved indifference elements were based on *People v. Register*, 60 N.Y.2d 270. While the standard for depraved indifference murder has changed since defendant’s conviction,<sup>9</sup> the Court of Appeals has held that the change is not retroactive for collateral review.<sup>10</sup> In *People v. Policano*, the court found that non-retroactivity did not pose a great threat to injustice.<sup>11</sup> The *Policano* court cited *People v. Suarez*, in which concurring judges reasoned “defendants who commit vicious crimes but who may have been charged and convicted under the wrong section of the statute are not attractive candidates for collateral relief after their convictions have become final.”

Defendant’s third claim is based on jury coercion and an improper “mixed” *Allen* charge. CPL 440.10(2)(c) mandates that the court deny a motion to vacate when although sufficient facts appear on the record, defendant unjustifiably failed to raise them in direct

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<sup>7</sup> *People v. Malloy*, 55 N.Y.2d 296 (1982); *People v. Santi*, 3 N.Y.3d 234 (2004).

<sup>8</sup> *Id.*

<sup>9</sup> *People v. Feingold*, 7 N.Y.3d 288 (2006).

<sup>10</sup> *Policano v. Herbert*, 7 N.Y.3d 601, 603 (2006); *People v. Thompson*, 748 A.D.3d 883 (2008).

<sup>11</sup> 7 N.Y.3d at 604.

appeal perfected by him.<sup>12</sup> It is clear from the record that juror number seven requested to meet with the court. Both defense counsel and prosecution consented to the juror's questioning by the court and the trial record provides a detailed account of the exchange between the court and the juror, and the court's decision to render a "mixed" Allen charge. There is no indication that the record of this exchange is somehow incomplete or inaccurate.

CPL 440.10(3)(a) permits the court to deny a motion to vacate judgment when a defendant could have, with due diligence, placed all critical facts on the record but unjustifiably failed to do so.<sup>13</sup> Defense counsel did not object to either the court's questioning of juror number seven or the court's "mixed" charge. Therefore, the court has discretion to preclude defendant from raising these claims. Even if defense counsel had raised these claims, they are meritless. The court's charge was not coercive. It is clear from the record that the court did not tell the jurors that they must reach a verdict, or that they should reach a particular one. The court instructed the jurors that they should continue to deliberate if they could do so "without violence to individual judgment." The charge did not shame the jurors into making a decision; it was a balanced and proper charge.<sup>14</sup>

Defendant claims that counsel's failure to preserve these issues for appropriate review was due to the ineffectiveness. Defendant is barred from asserting this claim under CPL 440.10(2)(c). Defendant had the opportunity to raise this ineffective assistance claim on direct appeal from the underlying conviction, but he unjustifiably failed to do so. The Court of Appeals has established that the legislative intent was not

<sup>12</sup> *People v. Cooks*, 67 N.Y.2d 100 (1986).

<sup>13</sup> *People v. Degondea*, 3 A.D.3d 148 (2003).

<sup>14</sup> *People v. McKenzie*, 48 A.D.3d 594 (2008); *People v. Aponte*, 306 A.D.2d 42 (2003); *Allen v. United States*, 164 U.S. 492 (1896).

