

People v James

2010 NY Slip Op 31172(U)

February 8, 2010

Supreme Court, Kings County

Docket Number: 12129/1998

Judge: Michael A. Gary

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procedurally and on the merits. In the interim, defendant perfected an appeal from his judgment of conviction in which he argued that the prosecutor's improper comments during summation had deprived him of his right to a fair trial. The Appellate Division Second Department affirmed defendant's judgment of conviction on May 28, 2002 (*People v James*, 294 AD2d 600 [2d Dept 2002]). Leave to appeal to the Court of Appeals was denied (*People v James*, 98 NY2d 768 [2002]).

According to the People, defendant submitted approximately nine letters to the District Attorney's office between September 2003 and March 2006, seeking documents and records pursuant to the Freedom of Information Law (FOIL). In June, 2004, defendant was provided with copies of several police reports, including defendant's original On Line Booking System (OLBS) worksheet.

In papers dated January 5, 2007, defendant brought a second motion pursuant to CPL § 440.10 for an order vacating his judgment of conviction on the grounds of ineffective assistance of counsel. This court denied the motion on August 28, 2007, finding defendant's claims either procedurally barred or without merit.

In papers dated February 15, 2009 the defendant filed a writ of error coram nobis in the Appellate Division, relating to the failure of appellate counsel to raise the claim of ineffective assistance of counsel inasmuch as trial counsel failed to challenge the court's refusal to give an adverse inference charge about the missing *Rosario* material, i.e. the "stop and frisk report". On July 14, 2009, the Appellate Division denied defendant's application for a writ of error coram nobis. *See People v. James* 64 AD3d 667(2d Dept.).

In the third decision denying defendant's motion to vacate, dated March 5, 2009 the court found that the defendant fabricated the paperwork alleged to have been the basis for

yet another ineffective assistance of counsel claim. Specifically, the defendant complained that defense counsel (1) failed to cross-examine the complainant and three police officers about several police reports; (2) failed to introduce those reports into evidence at trial; and (3) failed to point out the allegedly inconsistent description contained in those reports to the jury.

In the present motion, again, defendant complains of the failure of his attorney to object on the record to the court's alleged off-the-record indication that it would not sanction the People for failing to turn over a "stop and frisk report" in the way of an adverse inference. Defendant contends that he was severely prejudiced by both the failure of the court to give an adverse inference charge, and the failure of counsel to object when the court declined to do so. Had this objection been on the record, defendant claims an appellate court would have granted a new trial.

As a preliminary matter, defendant's claims are procedurally barred to the extent that they rely on facts appearing on the record. In the nature of ineffective assistance of counsel, the failure to object is a matter that is considered to be on the record. Where such claims could have been reviewed on appeal but defendant has failed to raise them in an appeal already perfected by him, the court must deny a motion to vacate judgment (CPL § 440.10[2][c]). Furthermore, as has been discussed previously, counsel was free to cross examine Officer Vasquez about the "stop and frisk report" and could have commented on it in his summation. The proper method of sanctioning the People, if any, was in the discretion of the court.

Even if the claim were not barred, the failure of the People to turn over *Rosario* material prior to trial does not constitute grounds to vacate a judgment of conviction unless

“there is a reasonable possibility that the failure to disclose the *Rosario* material contributed to the verdict” (*People v Jackson*, 78 NY2d 638, 649 [1991]). Here, defendant has not established how the information contained in the “stop and frisk report”, which is virtually identical to that contained in other police reports and testified to at trial, would have resulted in a different verdict had it not been lost.

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, . . .

(b) the judgment is at the time of the motion appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal; 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;

3. Notwithstanding the provision of subdivision one the court may deny a motion to vacate a judgment when:

(a) Although facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the ground or issue in question was not subsequently determined on appeal; or

(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 . . .

(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.

A court is mandated to deny a motion to vacate a judgment of conviction when the issues raised therein could have been or were already raised in previously filed post-verdict/post-conviction proceedings. The issue raised herein concerns trial based activity

which was clearly part of the court record and properly raised on direct appeal. However, motions alleging ineffective assistance of counsel encompass both record- based allegations and those not found on the record, and thus, properly considered under CPL § 440. Thus, the People also oppose the defendant's motion claiming that the defendant is procedurally barred from raising this claim as it is an issue that should have been raised in any of his three previously filed 440 motions, and in fact, was raised as the basis for the writ of error coram nobis, which application was denied only 7 months ago.

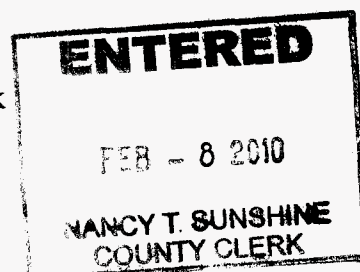
This court, as well as the Appellate Division, has already found that the defendant received effective assistance of his counsel, as discussed in its decision of March 2009. Accordingly, for the fourth time, the court finds that the defendant has failed to support his motion to vacate the conviction, and accordingly the motion is hereby denied.

This decision constitutes the order of the court.

The defendant is hereby advised pursuant to 22 NYCRR § 671.5 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 his 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 certification granting leave to appeal is granted.

Dated: Brooklyn, New York
February 8, 2010

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MICHAEL A. GARY, J.S.C.