

People v Cruz

2010 NY Slip Op 31184(U)

March 3, 2010

Supreme Court, Kings County

Docket Number: 8978/2003

Judge: Carolyn E. Demarest

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART CV19

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THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Carolyn E. Demarest

Date: January 29, 2010

-against-

DECISION & ORDER

CARLOS CRUZ

Indictment No. 8978/2003

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Defendant moves, *pro se*, for an order vacating his judgment of conviction pursuant to CPL § 440.10(1)(c) and (h). Defendant makes five claims, all of which are procedurally barred or without merit. He also seeks an order pursuant to CPL § 420.30 remitting the mandatory surcharge imposed upon him. For the following reasons, the motion is denied.

Defendant's conviction arises from his participation in a shooting outside a Brooklyn nightclub on December 22, 2003. Defendant, acting in concert with an accomplice, fired into a crowd of people who had just left a party. Two victims were shot, one of whom died from her wounds. Police apprehended defendant and his accomplice near the scene, recovering the two guns along defendant's escape route. One gun was the murder weapon and the second gun matched shells that police had found at the crime scene.

For their acts, defendant and co-defendant Antonio Flores were both charged under a single indictment with two counts of murder in the second degree (PL § 125.25[1], [2]), one count of attempted murder in the second degree (PL § 110/125.25[1]), one count of assault in the first degree (PL § 120.10[1]), two counts of assault in the second degree (PL § 120.05[2]), one count of reckless endangerment in the first degree (PL § 120.25), one count of reckless

endangerment in the second degree (PL § 120.20), two counts of criminal possession of a weapon in the third degree (PL § 265.02[4]), two counts of criminal possession of a weapon in the fourth degree (PL § 265.01[2]), one count of attempted burglary in the second degree (PL § 110/140.25[2]), one count of criminal mischief in the fourth degree (PL § 145.00[1]), and one count of criminal trespass in the second degree (PL § 140.15).

The jury convicted defendant of intentional murder in the second degree, attempted murder in the second degree, assault in the second degree, reckless endangerment in the first degree, and criminal mischief in the fourth degree. On November 22, 2004, defendant was sentenced to prison terms of twenty-three and one-half years to life for the murder, consecutive prison terms of twenty years for the attempted murder and seven years for the reckless endangerment, and one year for the criminal mischief.

Defendant subsequently appealed from his judgment of conviction, claiming that the trial court's admission of gang expert testimony was an abuse of discretion, that the prosecutor's summation was improper, and that the court's imposition of consecutive sentences was erroneous and excessive. The Appellate Division, Second Department, affirmed defendant's judgment of conviction on December 4, 2007 (*People v Cruz*, 46 AD3d 567 [2d Dept 2007]). The court rejected defendant's claims, finding them either unpreserved or meritless.

In the instant motion, defendant makes five new claims. He argues that (1) the indictment is jurisdictionally defective because his name is not specifically repeated in the body of the indictment, and other details about the grand jury proceedings were omitted from the indictment; (2) none of the People's witnesses at trial had "personal knowledge" of defendant; (3) defendant's inculpatory statement was inadmissible at trial because it was involuntary; (4) the

felony complaint was defective; and (5) defendant was improperly indicted for both intentional and depraved indifference murder.

The court must deny a motion to vacate judgment when sufficient facts appear on the record to permit review on appeal, but no such review has occurred owing to the defendant's unjustifiable failure to raise the issue on appeal (CPL § 440.10[2][c]). In this instance, all of the claims raised are based on matters appearing on the record. Defendant had a full opportunity to raise these claims on appeal, and his failure to do so is unjustified. A motion to vacate the judgment of conviction is not a substitute for an appeal (*People v Cooks*, 67 NY2d 100, 500 [1986]). Thus, all of defendant's claims are procedurally barred from collateral review.

Furthermore, defendant's claims are utterly without merit. Contrary to defendant's belief, there is no requirement that a defendant, properly named in the caption of the indictment, be named in each single count within. CPL § 200.50, which lists the required elements of an indictment, does not contain any requirement that each count must repeat the defendant's name. "An indictment is jurisdictionally defective only if it does not effectively charge the defendant with the commission of a particular crime--for instance, if it fails to allege that the defendant committed acts constituting every material element of the crime charged" (*People v D'Angelo*, 98 NY2d 733, 734 [2002]). Here, both defendant and co-defendant were named in the caption and are thereafter referred to as defendants in the subsequent charges listed. There is no reason to disturb this indictment, which is facially sufficient and substantially conforms to the requirements of CPL § 200.50 (CPL §210.25 [a court may dismiss a defective indictment only if it does not "substantially conform" to the requirements of CPL § 200.50]).

Defendant's second claim, that the prosecution witnesses lacked personal knowledge of

the crime, is vague, unsubstantiated and entirely conclusory. It fails to present a “ground constituting [a] legal basis for the motion” (CPL § 440.10[4][a]). The trial testimony from two key prosecution witnesses also renders the claim incredible. For example, witness Javier Garcia identified defendant at trial, testifying that he saw defendant holding a gun. A second witness, Michael Eddi, identified defendant in court as one of the perpetrators who fired shots towards the victims. By its verdict, the jury accepted this testimony as accurate. Defendant’s allegation that the People’s witnesses lacked personal knowledge is simply beyond belief.

As discussed above, defendant’s claim with respect to his allegedly involuntary statement should have been raised on appeal (CPL § 440.10[2][c]). Moreover, defendant has failed to elaborate upon or substantiate this claim with any additional facts and there is no reasonable possibility that it is true (CPL § 440.30[4][d]). Accordingly, it is summarily rejected.

Fourth, defendant claims that the felony complaint was defective. In vague terms, defendant alleges that the complaint did not meet the statutory requirements and that it was unsworn. This claim, which is made solely by defendant, is wholly unsupported by any other affidavit or evidence and under all the circumstances attending the case, there is no reasonable possibility that it is true (CPL § 440.30[4][d]). “In any event, even if the felony complaint was defective, it was superseded by a valid indictment, rendering any claim regarding a purported defect in the felony complaint academic” (*People v Smith*, 304 AD2d 677 [2d Dept. 2003]) *see also People v Wilkens*, 176 AD2d 978 [2d Dept. 1991]).

The contention that defendant was improperly indicted for both intentional and depraved indifference murder is without merit. The claim is also irrelevant because the depraved indifference count was dismissed and was never presented to the jury for consideration.

Although the law of depraved indifference murder has changed in recent years, the law at the time of defendant's indictment did not preclude indictments that charged the defendant with murder under both intentional and depraved indifference theories (*see People v Feingold*, 7 NY3d 288, 294 [2006]). Indeed, the use of such twin-count indictments was common because the Court of Appeals considered the question of the defendant's state of mind a matter for the jury (*Policano v Herbert* (7 NY3d 588, 599, [2006])). Although *People v Payne*, 3 NY3d 266 (2004), began to alter the landscape of depraved indifference murder in 2004, this shift in the law was addressed primarily to juries considering depraved indifference and intentional murder counts in the alternative. Twin-count indictments, now rarely used, present no concern of unfairness when one count is dismissed before ever reaching the jury room. Here, where the jury considered only the intentional murder count and defendant takes no issue with the legal sufficiency of his intentional murder conviction, there is no violation of defendant's constitutional rights. His claim is therefore rejected.

CPL § 420.30(3) specifically precludes remission of mandatory surcharges. Nor has defendant raised any question of hardship that would otherwise entitle him to deferral pursuant to CPL § 420.40. Therefore, as no legal remedy is available to defendant, his request for remission of the imposed mandatory surcharge is denied.

Accordingly, the motion is denied in its entirety.

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.

ENTER:



CAROLYN E. DEMAREST, J.S.C.



ENTERED
FEB - 3 2010
NANCY T. SUNSHINE
COUNTY CLERK