

**People v Odenthal**

2010 NY Slip Op 31196(U)

March 8, 2010

Supreme Court, Kings County

Docket Number: 6496/03

Judge: Thomas J. Carroll

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SUPREME COURT OF THE STATE OF NEW YORK  
KINGS COUNTY, CRIMINAL TERM, MISC. MOTIONS

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PEOPLE OF THE STATE OF NEW YORK  
against

Peter Odenthal,  
Defendant

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Indictment No.: 6496 /03

By: Hon. Thomas J. Carroll

Dated: March 5, 2010

Defendant filed a pro se motion pursuant to CPL § 440.20 to set aside his sentence. In deciding this motion, the court has considered the motion papers, the affirmation in opposition, defendant's reply, People's reply, defendant's surreply and the court file. The Court also considered the defendant's letters to the Court, his letter to defense counsel, Michael Odenthal's letters to the Court (one with attachments) and a letter from the Church of Gethsemane.

***Background***

Under Indictment No. 6496/2003, the defendant was indicted for robbery in the second degree (alleging a purse snatching) and grand larceny in the fourth degree (alleging theft of a vehicle).

Under Indictment No. 7068/2003, the defendant was indicted for robbery in the third degree and related charges (predicated on the same purse snatching which was the basis for Ind. No. 6496/2003).

Justice Patricia DiMango, after reargument, set forth the background of these two indictments and reinstated Ind. No. 6496/2003 and dismissed Ind. No. 7068/2003 on procedural grounds. Justice Patricia DiMango, Decision and Order, January 26, 2004.

On October 27, 2004, under Indictment No. 6496/2003, the defendant was found guilty, after a jury trial, of robbery in the third degree.

After the verdict, the defendant brought a pro se motion under CPL § 330.30(1) to set aside his guilty verdict. Defense counsel adopted that motion. Among other things, the defendant argued

that the court should not have submitted robbery in the third degree to the jury because that charge had been dismissed when Justice DiMango dismissed Ind. No. 7068/2003. This court held that the dismissal of one indictment on procedural grounds does not bar the trial of a separate indictment. The court cited CPL § 300.50(1) (permitting submission of any lesser included offense) and held that robbery in the third degree was a lesser included offense of robbery in the second degree. The court denied the defendant's motion in all respects. Justice Thomas J. Carroll, Decision and Order, February 4, 2005.

On March 2, 2005, the defendant was sentenced to a prison term of fifteen years to life as a persistent felony offender ( Carroll, J., at trial and sentence).

On November 27, 2007, the Appellate Division, Second Department, affirmed the defendant's judgment of conviction. *People v. Odenthal*, 45 AD3d 874 (2d Dept 2007).

On February 29, 2008, the New York State Court of Appeals denied the defendant's application for leave to appeal. *People v. Odenthal*, 10 NY3d 769 (2008, Jones, J.)

In this current motion, defendant claims that his sentence was unlawful and unconstitutional based on the following claims:

1. That the defendant was improperly convicted of robbery in the third degree;
2. That New York's discretionary persistent felony offender statute is unconstitutional under *Apprendi v. New Jersey*, 530 US 466 (2000), and thus his sentence should be vacated and he should be resentenced; and
3. That New York's discretionary persistent felony offender statute is unconstitutional because *Almendarez-Torres v. United States*, 523 US 224 (1998) (permitting judicial fact finding regarding prior convictions), was wrongly decided.

In his reply, the defendant also claims:

4. That his trial counsel was ineffective for failing to assert a statutory bar (CPL

§ 210.20(4)) to the submission of the charge of robbery in the third degree to the jury. In a prior letter, defendant asked for the assignment of counsel to represent him on this issue.

### *Discussion*

Defendant's first claim (regarding the conviction for robbery in the third degree) and his fourth claim (alleging trial counsel was ineffective for failure to assert a statutory bar to the submission of that charge) are both claims under CPL § 440.10, motion to vacate judgment, and not claims under CPL § 440.20, motion to set aside sentence. As such, these claims are subject to the bars in CPL § 440.10. The defendant can not avoid these bars by simply labeling his claims as CPL § 440.20 claims.

In a prior motion, a motion brought under CPL § 330.30(1), the defendant claimed the court should not have submitted robbery in the third degree. This court denied that motion on the merits. Accordingly, pursuant to CPL § 440.10(3)(b) this court denies the defendant's first claim in this current motion.

Regarding defendant's fourth claim, the Court finds that it lacks merit. Defendant's assertion that defense counsel was ineffective for not objecting to the submission of the lesser included offense of robbery in the third degree is belied by the record. The record reflects that there was colloquy on this issue and defense counsel objected to the submission of the lesser included offense of robbery in the third degree. Trial Tr., p. 235. Defendant's request for the assignment of counsel on this issue is denied.

Consequently, the defendant's fourth claim is also denied.

Finally, in his second and third claims, defendant attacks the constitutional underpinnings of his sentence as a discretionary persistent felony offender. He argues that his sentence should be set aside under *Apprendi v New Jersey*, 530 US 466 (2000), because his constitutional rights

were abridged when the determination that he would receive an enhanced sentence was made by a judge rather than by a jury. He contends that the sentencing scheme under Penal Law § 70.10 and Criminal Procedure § 400.20 is unconstitutional because its application denied him Due Process and violated the Sixth Amendment. Furthermore, he argues that the effort by the New York State Court of Appeals to distinguish *Apprendi* is flawed by its reliance on *Almendarez-Torres v United States*, 523 US 227 (1998), which he claims has been discredited by the majority of the Supreme Court Justices.

On three occasions the Court of Appeals has upheld the statutory scheme for sentencing a defendant under Penal Law § 70.10 and Criminal Procedure Law § 400.20, finding it to be outside the scope of *Apprendi* (*People v Quinones*, 12 NY3d 116 [2009]; *People v Rivera*, 5 NY3d 61 [2005]; *People v Rosen*, 96 NY2d 329 [2001]). In each instance the Court has recognized that the sentencing scheme in New York does not permit the sentencing judge to find facts or aggravating circumstances in the defendant's case beyond those determined by the jury to enhance his sentence. Rather, "under New York's scheme, a defendant is subject to an enhanced sentence based solely on the existence of two prior felony convictions." (*People v Quinones* at 128). "It is only after a defendant's eligibility for an enhanced sentence is determined that a judge is given the discretion to choose *the appropriate sentence within a sentencing range prescribed by statute.*" (*Id.*, emphasis original). The discretionary persistent felony offender sentencing scheme is therefore not unconstitutional.

Defendant's related argument that the reliance by the New York State Court of Appeals on *Almandarez-Torres v United States* undermines its authority because that case is unpopular with some dissenting Supreme Court Justices is completely unfounded. *Almandarez-Torres* has not been overruled by the Supreme Court. The authoritative force of a decision is not based on

the unanimity or division in the court. Nor is the closeness of a vote in a case determinative of its precedential effect, even where there has been a change of personnel on the court such that a different result would be reached if the decision were rendered today (*see People v Hobson*, 39 NY2d 479 [1976]). Rather, it is the law expressed in the majority opinion that must be followed, regardless of the attractiveness of a dissent. The dissenting opinion is not a binding interpretation of the majority's holding (*People v James*, 75 NY2d 874, 875 [1990]). Accordingly, this arm of defendant's motion is denied.

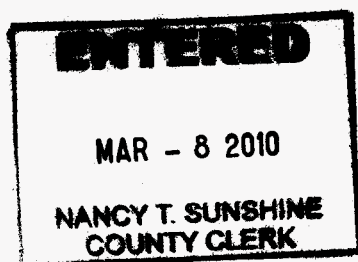
***Decision***


Therefore, based on all of the above, the defendant's motion is denied in its entirety.

***Right to 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.<sup>1</sup>

This constitutes the decision and order of the court.



E N T E R ,  
  
 HON. THOMAS J. CARROLL  
 J. S. C.

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<sup>1</sup> 22 NYCRR § 671.5.