

People v Gardner

2010 NY Slip Op 31250(U)

April 7, 2010

Supreme Court, Kings County

Docket Number: 1489-99

Judge: Michael A. Gary

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 12

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

-against- : DECISION AND ORDER
440 Motion
PHILIP GARDNER :
: IND. NO. 1489-99
Defendant :
-----X
MICHAEL A. GARY, J.

Defendant moves *pro se*, pursuant to CPL § 440.10, to vacate his judgment of conviction. The People have filed a response opposing the defendant's motion, and defendant has filed a set of reply papers. Defendant argues, pursuant to CPL §440.10 subdivisions (1) (a), (b), (d) (e) and (h) that the judgment was obtained in violation of his rights under the state and federal constitutions respectively, because of fraud, lack of jurisdiction, because of the ineffective assistance of counsel, and trial court error. In the alternative, he moves for a hearing on the issues.

In a previous decision this court recounted the details of the crime committed by the defendant, as well as the progression of the case against him. Defendant was charged in Indictment 1488-99, with the crimes of Murder in the second degree (Penal Law § 125.25[1] and [2]), and one count of Criminal possession of a weapon in the fourth degree (Penal Law §265.01). This was followed by a combined *Wade/Dunaway/Huntley* hearing, where the court found that the statements were voluntarily given post-Miranda, and that the identification was free of any suggestivity by the police and thus, admissible as evidence at trial. After a jury trial, at which defendant testified, Mr. Gardner was convicted on October

12, 1999, of Murder in the second degree, depraved indifference murder (and acquitted of intentional murder). On December 7, 1999 the court ordered a psychiatric examination in aid of sentencing pursuant to CPL § 390 and in January, 2000, defendant was found fit to proceed with a recommendation that he continue psychotherapy. Before sentencing on the next date, however, the defendant requested that a new lawyer be assigned to represent him and one was assigned for that purpose. The new lawyer filed a motion to set aside the verdict, which was denied on March 26, 2000. On that day, the defendant was sentenced to the maximum term of imprisonment of a minimum of 25 years and a maximum of Life.

Defendant appealed his case to the Appellate Division Second Department, arguing that the evidence was not legally sufficient to sustain the conviction for depraved indifference murder, as there was only one stab wound. His arguments were rejected by the Appellate Division which specifically found that all of the circumstances surrounding the stabbing showed a wanton disregard for human life, and sustained the conviction for depraved indifference murder and his conviction was unanimously affirmed at 291 AD2d 456 (2002). Leave to appeal was denied by the Court of Appeals, at 98 NY2d 710 (Table).¹

Defendant now once again seeks to vacate his conviction alleging various constitutional challenges to his conviction. He argues: 1. that the court had no jurisdiction because his name is not in the caption of the indictment; 2. the indictment was fraudulently obtained because the grand jury was not informed of the defendant's mental illness or charged to consider lesser included offenses; 3. that he was not given his Miranda warnings

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See appended list of further post judgment activity.

and the statement given was given under duress; 4. that he had suffered from mental disease and could not understand the proceedings; and 5. he received ineffective assistance of counsel as his attorney failed to interview witnesses and among other shortcomings failed to mount either a defense of extreme emotional disturbance or insanity.

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, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue; 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;

As noted above and recounted in the People's response, the defendant appealed his case to the Appellate Division, thus, the issues raised by the defendant in this motion regarding objections to trial related issues appeared on the record. If an issue has been or should have been raised before the appellate court, and is a matter of the record, it is fatal to the consideration by the court entertaining the 440 motion. *See People v. Cooks*, 67 NY2d 100 (1986) and CPL § 440.10 (2)(a). The court notes that the issues raised herein have been dealt with in the previous 440 motion, though they have been slightly re-framed to invoke an alleged constitutional violation.

The issue of the caption of the indictment is a matter of the record before the court and thus should have been raised if at all on appeal. Even if it were to be considered on the

merits, on that basis alone, there was no alleged deficiency in the indictment. See for example, *People v. Fitzgerald*, 45 NY2d 574. Similarly, the claim that the defendant was never administered Miranda warnings is belied by the record before the court. There was a Huntley hearing done by the court which determined that the defendant's statement was admissible at the trial. Inasmuch as that was part of the record, again the defendant could have raised it on appeal.

Once again the defendant raises the issue of his mental illness. This issue has been addressed previously by this court in its decision dated January 3, 2007, and thus it will not re-visit the issue.

The last argument of defendant's motion to vacate the conviction concerns a claim of ineffective assistance of counsel. The record here reveals that the defendant's attorney effectively made motions, conducted plea negotiations and preliminary hearings and cross-examined witnesses at trial. The defendant's attorney asked for and was granted the services of an investigator. His current and then- psychiatric status was well known to all parties; defendant was found fit after an examination ordered by the court. Other than his assertions in this motion, he has not substantiated in any manner his contention that he failed to understand the proceedings. He testified at the trial, and clearly assisted in his defense.

Finally, the court must reiterate its prior conclusion that "This court finds that under the totality of the circumstances, Mr. Gardner was afforded more than meaningful representation". Therefore, the motion to vacate the conviction on this ground is denied. And though Mr. Gardner has offered to take "5-15 years", and has filed many papers indicating that he has initiated a civil lawsuit against the police department for false arrest among other claims, the appellate court has already found that the sentence imposed was

fair and legally justified.

As the defendant has not proffered a cognizable ground under CPL § 440.10 to convince the court that any violation of his rights under the constitution occurred, the court hereby once again denies this motion to vacate the judgment.

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York
April 7, 2010



MICHAEL A. GARY, J. S. C.

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Post-Judgment Activity

February 6, 2004 Writ of habeas corpus denied, *Gardner v. Phillips, Superintendent* 03-

CV-4099 (EDNY, Block, J.)

November 18, 2004 Leave to appeal to US court of appeals denied with prejudice

February 27, 2006 CPL 440 motion filed in Kings County Supreme Court

January 3, 2007 Decision denying 440 motion filed

August 11, 2009 CPL 440 motion filed in Kings County Supreme Court

ENTERED

APR - 9 2010

NANCY T. SUNSHINE
COUNTY CLERK