

**People v Frazier**

2010 NY Slip Op 31252(U)

April 8, 2010

Supreme Court, Kings County

Docket Number: 10815/04

Judge: Raymond Guzman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS – PART 9

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

DECISION AND ORDER  
Indictment # 10815/04

-against-

BRENT FRAZIER,  
Defendant,  
----- X  
RAYMOND GUZMAN, J.S.C.

**INTRODUCTION**

On May 3, 1995, defendant was convicted, following a jury trial, of two counts of Robbery in the First Degree (Penal Law § 160.15[3]), six counts of Robbery in the Second Degree (Penal Law § 160.10), one count of Assault in the Second Degree (Penal Law 120.05), one count of Criminal Possession of Stolen Property in the Fifth Degree (Penal Law § 165.40), and two counts of Criminal Possession of a Weapon in the Fourth Degree (Penal Law § 265.01).

Defendant was sentenced on May 15, 1995, (George, J.) as a second violent felony offender, to an indeterminate term of imprisonment of ten to twenty years for each Robbery in the First Degree conviction, an indeterminate term of imprisonment of seven and one-half to fifteen years on five of the six counts of Robbery in the Second Degree, an indeterminate term of imprisonment of three and one-half to seven years on the Assault in the Second Degree conviction, one year determinate on the Criminal Possession of Stolen Property in the Fifth Degree conviction, and one year determinate for both Criminal Possession of a Weapon in the Fourth Degree counts. The sentencing Court ran the two Robbery in the First Degree sentences, and two of the Robbery in the Second Degree sentences consecutive to one another, for a total indeterminate sentence of thirty-five (35) to seventy (70)

years. The remaining counts were to run concurrently to the four counts that the Court ran consecutively to one another.

Following his sentence, defendant filed an appeal with the Second Department, which finding that the sentencing Court had mistakenly failed to sentence defendant on one of the six Robbery in the Second Degree counts, remitted the case back to Supreme Court for defendant to be resentenced on all six of the Robbery in the Second Degree counts. People v Frazier, 237 AD2d 618 (2d Dept 1997).

On April 8, 1998, defendant appeared in Supreme Court for resentencing on the Robbery in the Second Degree counts. The Court sentenced defendant on those counts only and maintained its earlier sentence with the exception that defendant was sentenced on the previously missing count of Robbery in the Second Degree to an indeterminate term of imprisonment of seven and one-half to fifteen years to run consecutively to the four counts that were previously run consecutively to one another. Defendant's new sentence was an indeterminate term of imprisonment of forty-two and one-half (42 ½) to eighty-five (85) years.

Defendant filed an appeal following his resentence arguing that it was excessive. By unreported Memorandum Decision, the Second Department denied defendant's appeal and affirmed the resentence. People v Frazier, 269 AD2d 885 (2d Dept 2000). On April 13, 2000, the Court of Appeals denied leave to appeal that decision. People v Frazier, 94 NY2d 947 (2000)(Levine, J.).

By motion papers dated June 20, 2006, defendant moved *pro se*, to set aside his sentence pursuant to CPL 440.20 on the grounds that: (1) he was unlawfully adjudicated a second violent felony offender because his predicate offense was not a violent felony; and (2) he was denied a hearing after informing the Court that he wished to challenge the constitutionality of his predicate

felony offense. By decision and order dated November 3, 2006, the Court denied defendant's first assertion that his predicate felony was not a violent felony, but did grant defendant a hearing to challenge the constitutionality of his predicate felony conviction. By Decision and Order dated April 27, 2007, following the hearing and subsequent argument by assigned counsel on defendant's behalf, the motion to vacate defendant's sentence was denied.<sup>1</sup>

Defendant now moves this Court, *pro se*, for an order setting aside his sentence pursuant to CPL § 440.20. Defendant contends that: (1) the resentencing Court exceeded the mandate of the Second Department by resentencing defendant on the Robbery in the First Degree counts by running the previously omitted Robbery in the Second Degree count consecutive to those counts; (2) the resentencing Court acted vindictively, and impermissibly, by increasing the aggregate sentence from thirty-five (35) to seventy (70) years to forty-two and one-half (42 ½) to eighty-five (85) years by running the previously omitted count consecutive to the other counts; and (3) the resentencing Court did not allow defendant to speak and failed to inquire of defendant if he wished to speak at his resentencing.

The People filed opposition papers to defendant's motion on October 20, 2009, arguing that defendant is procedurally barred from raising these issues and that even were he not procedurally barred, each contention lacks merit. Defendant filed reply papers to the People's opposition papers on November 16, 2009.

For the following reasons, defendant's motion is denied.

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<sup>1</sup> Defendant has filed numerous post-conviction applications, including three writs of error *coram nobis* with the Second Department, and a writ of *habeas corpus* with the United States District Court for the Eastern District of New York (Amon, J.). None of these applications have proven successful, and none have any bearing on the instant matter.

## LEGAL ANALYSIS

In the instant motion, defendant makes three claims for the first time which he failed to raise in either of his previous two appeals or his previously filed CPL § 440.20 motion. The People urge the Court not consider the merits of these claims because CPL § 440.30(1) states that, “a defendant who is in a position adequately to raise more than one ground should raise every such ground upon which he intends to challenge the judgment or sentence.” The People interpret this language of CPL § 440.30 as a procedural bar akin to CPL § 440.10(2). The Court does not agree with that reading of the statute.

Criminal Procedure Law §§ 440.20(2) and (3) provide the grounds for which the Court “must” and “may” deny a motion to set aside a sentence on procedural grounds. Neither of those subdivisions provides for a procedural bar like that expressed in CPL § 440.10(2). Rather, a motion to set aside pursuant to CPL § 440.20 is procedurally barred where the grounds have previously been decided. Despite his numerous filing in association with this case, defendant has not raised these issues in his previous appeals or his previous motion to set aside, and therefore, this Court will consider each ground for relief submitted by defendant on the merits.

Defendant’s first contention that the resentencing Court exceeded the mandate of the Second Department’s decision in People v Frazier, 237 AD2d 618 (2d Dept 1997) is entirely without merit. The sentencing minutes are clear that defendant was not being resentenced on any counts other than the Robbery in the Second Degree counts. “The defendant was convicted of six counts of Robbery in the Second Degree, but was only sentenced on five counts of Robbery in the Second Degree. The

sentences imposed on the defendant for the remaining counts he was convicted of still stand.”<sup>2</sup> Furthermore, defendant’s contention that the resentencing Court somehow resentenced defendant the Robbery in the First Degree counts by running the previously omitted count of the Robbery in the Second Degree consecutive to those counts is not supported by any legal authority, the court file, or the resentencing minutes.

Next, defendant contends that the resentencing Court acted vindictively when it ran the sentence of the previously omitted Robbery in the Second Degree count consecutive to the other counts and increased his aggregate sentence from thirty-five (35) to seventy (70) years to forty-two (42 ½) to eighty-five (85) years.

The Court acknowledges the “well settled principle that criminal defendants should not be penalized for exercising their right to appeal.” People v Young, 94 NY2d 171, 176 (1999). Explaining further, the Court of Appeals in Young held, “In order to insure that trial courts do not impose longer sentences to punish defendant for taking an appeal, a presumption of vindictiveness generally arises when defendants who have won appellate reversals are given greater sentences after their retrials than were imposed after their initial convictions.” Id. (citing, People v Van Pelt, 76 NY2d 156 [1990]; North Carolina v Pearce, 395 US 711 [1969]).

In support of this contention, defendant cites to People v Young, *supra*; People v Van Pelt, *supra*; and People v Hilliard, 49 AD3d 910 (3d Dept 2008). Defendant’s reliance on these authorities in the context of the instant action is misplaced. The holdings in Young, Van Pelt, and Hilliard, all arise from cases where the defendants were tried, convicted and sentenced, and were successful in overturning their convictions on appeal. The greater sentences involved in the three cases cited by

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<sup>2</sup> April 8, 1998, Resentencing Minutes, Page 6, Lines 6-11.

defendant came about following retrial on the same actions after being remanded on reversal by a reviewing authority. The facts, and the law relating to those facts are easily distinguishable from the instant motion.

Unlike in the cases relied upon by defendant, here the reviewing authority did not reverse the convictions on any counts, and thus no retrial was held. In the instant matter, the Second Department vacated the five Robbery in the Second Degree sentences because the sentencing Court mistakenly failed to sentence defendant on all six Robbery in the Second Degree convictions. The Court did not increase the defendant's sentence after retrial on the same charges, which would carry the presumption of vindictiveness, but rather entered a legal sentence on all of the convictions for the first time. "Inasmuch as the prior sentences imposed were vacated as illegal, no presumption of vindictiveness attaches to resentencing." People v Sommerville, 33 AD3d 733, 734 (2d Dept 2006) (citing, People v Rogner, 285 AD2d 749 [3d Dept 2001]; People v Swan, 158 AD2d 158 [4th Dept 1990]; People v Taylor, 145 AD2d 446 [2d Dept 1988]; People v Fuller, 134 AD2d 278 [2d Dept 1987]). Accordingly, defendant has failed to establish that the resentencing was vindictive.

Finally, defendant argues that he was not afforded the right to speak at his resentencing in violation of CPL § 380.50(1). The Court of Appeals has clearly held that it is not error for the sentencing court not to follow the literal dictates of CPL § 380.50(1), if it substantially complies with the mandates therein. See, People v McClain, 35 NY2d 483 (1974); People v Green, 54 NY2d 878 (1981).

In the instant matter, defendant's counsel made a statement on his behalf at the sentence and never alerted the Court that defendant had anything to say. Defendant does not now allege that he had a statement to make to the Court at the resentencing. The resentencing Court therefore

substantially complied with the mandates of CPL § 380.50, in accord with the Court of Appeals precedent in McClain and Green, and defendant's claim is without merit.

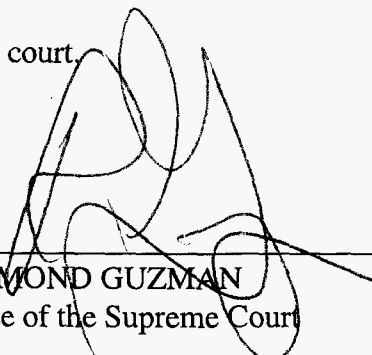
Insofar as defendant's motion raised issues that this Court was able to address by reviewing the submissions of the parties and the court file, including the records of defendant's two appeals in this matter, there is no need for the Court to conduct a hearing on this matter. *See*, CPL § 440.30(1); People v Satterfield, 66 NY2d 796 (1985).

**CONCLUSION**

For the foregoing reasons, defendant's motion to set aside his sentence pursuant to CPL § 440.20 is denied.

This opinion shall constitute the decision and order of this court.

Dated: April 8, 2010  
Brooklyn, New York

  
RAYMOND GUZMAN  
Justice of the Supreme Court

**ENTERED**  
APR 12 2010  
NANCY T. SUNSHINE  
CLERK