

People v Blackman

2010 NY Slip Op 31321(U)

May 25, 2010

Supreme Court, Kings County

Docket Number: 4238/2002

Judge: Abraham G. Gerges

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MEMORANDUM**SUPREME COURT****KINGS COUNTY****BY ABRAHAM GERGES, J.**

The People of the State of New York**Date: May 25, 2010****v.****Damon Blackman,****Defendant.****Ind. # 4238/2002**

Defendant moves to vacate the judgment of conviction.

In determining this motion, the court has considered defendant's motion and reply papers, the district attorney's affirmation in opposition, the court file and the transcripts of hearing, trial and sentence.

Facts & Procedural History

On June 17, 2002 the complainant Maurice David was accosted by defendant at the home of Sharon Forde. Defendant, Ms. Forde's former boyfriend, asked complainant why he was at the home. Mr. David, who did not know defendant, did not respond and proceeded to enter his vehicle, which was parked nearby. Defendant prevented complainant from closing the vehicle door, then proceeded at gunpoint and aided by an accomplice to take various items from Mr. David. In attempting to remove a bracelet from complainant's arm, the perpetrators injured Mr. David. Complainant told the men that they could have the bracelet and handed it to them. Defendant then threatened the victim. Mr. David, in the belief that he was about to be killed, sounded the horn of his truck, causing both men to flee. Defendant was apprehended June 25, 2002.

Defendant was indicted for Robbery in the First Degree, Robbery in the Second Degree, Robbery in the Third Degree and Grand Larceny in the Fourth Degree.

Defendant was represented by the Legal Aid Society throughout the pre-trial and trial proceedings. The record is devoid of any reference to retention of private counsel by defendant or his family. On July 21, 2003, after a jury trial, defendant was convicted of Robbery in the First Degree. On September 29, 2003 defendant was sentenced to a term of incarceration of ten years. At sentence, defendant was represented by Mr. Stuart Rubin, a privately retained attorney. On the record, Mr. Rubin stated that he would be filing a motion to vacate the judgment of conviction “based on things that didn’t happen on the record.”

An appeal from the judgment of conviction was filed with the Appellate Division, Second Department. The conviction was affirmed (*People v. Blackman*, 13 AD2d 640 [2004]). Leave to appeal to the Court of Appeals was denied (*People v. Blackman*, 4 NY3d 796 [2005]).

By *pro se* petition dated February 16, 2006, defendant filed a writ of *habeas corpus* in the United States District Court for the Eastern District of New York, raising the same claims as raised on direct appeal. On December 17, 2009, the petition for habeas relief was denied (*Blackman v. Ercole*, ___ F2d ___, 2009 WL 4891767 [EDNY 2009]).

Defendant now brings the instant motion, claiming that after jury selection had commenced his mother retained Mr. Fields, a private attorney, to second seat Mr. Borrero, the Legal Aid Society attorney who tried the case. According to defendant, Mr. Borrero consulted with the attorney but would not permit Mr. Fields to assist at trial. Defendant contends that this constituted ineffective assistance of counsel and he was entitled to choose his own counsel.

Law

CPL 440

CPL 440.10 (3) (a) permits a court to deny a motion to vacate a judgment without a hearing where a defendant could have, with due diligence and before sentencing, placed

all essential facts on the record (*People v Friedgood*, 58 NY2d 467, 473 [1983]; *People v Thorsen*, 20 AD3d 595, 597-598 [2005]; *People v Degondea*, 3 AD3d 148, 159-161 [2003]; *People v Blake*, 232 AD2d 288, 288 [1996]; *People v Berezansky*, 229 AD2d 768, 771 [1996]).

In the instant case, defendant could have placed all these facts on the record. It is this court's longstanding policy to permit all parties to make a full and complete record on any issue. At no time, did defendant, Mr. Fields, or Mr. Borrerro request that this issue be put on the record. As the alleged conversation between Mr. Borrerro and Mr. Fields occurred after jury selection, there were opportunities to develop a complete record on the issue. Defendant's failure to make such a record warrants denial of this claim.

Delay

Furthermore, in this case, the defendant delayed in making his motion to vacate a judgment for more than six years. In *People v Nixon* (21 NY2d 338, 352 [1967]), the Court stated:

“Quite important too, as revelatory of the seriousness of defendant's present claims, is that defendant waited over a decade before asserting them. In stale cases, defendants have all to gain by reopening old convictions, retrial being so often an impossibility. These are factors to consider in determining how valid the assertions are; albeit, if they are made out, justice requires that they be explored in a hearing (cf. *People v Chait*, 7 AD2d 399, 401, *affd.* 6 NY 2d 855).”

A delay in making a claim can be considered in evaluating the seriousness and validity of

a claim and may undermine the legitimacy of the claim (*People v Melio*, 304 AD2d 247, 252 [2003]; *People v Hanley*, 255 AD2d 837, 838 [1998]).

A lengthy delay in making a motion to vacate a criminal judgment can also be considered when the court determines whether to exercise its discretion in applying permissive procedural bars under CPL 440.10 and CPL 440.30 (*People v Degondea*, 3AD3d 148, 160-161 [2003]).

In addition to defendant's inexplicable failure to put the issue on the record, defendant delayed bringing the instant motion for over six years. This despite Mr. Rubin's remarks at sentence that there were significant off the record claims to be made and that a CPL 440 motion would be forthcoming. While the court can only speculate that this is the issue Mr. Rubin was referring to at sentencing, defendant has completely failed to explain the six year delay.

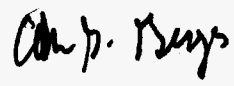
The motion to vacate the judgment is hereby denied.

This constitutes the decision and order of the court.

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, NY 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 (22 NYCRR 671.5).

E N T E R,



J. S. C.

HON. ABRAHAM GERGES

ENTERED
MAY 26 2010
NANCY T. SUNSHINE
COUNTY CLERK