

People v Torres

2010 NY Slip Op 33167(U)

November 1, 2010

Supreme Court, Kings County

Docket Number: 7312/92

Judge: Sheryl L. Parker

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 5

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THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Sheryl L. Parker

Date: October 12, 2010

-against-

DECISION & ORDER

GILLIAN TORRES,

Ind No. 7312/92

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Defendant moves pursuant to Criminal Procedure Law §§ 440.10 and 440.20 for an order vacating the judgment of conviction and setting aside the sentence.

On April 13, 1990, at approximately 9:00 a.m. in 3100 Brighton 7th Street in Brooklyn, New York, defendant shot and killed Arnold Palacios in the head with a .357 magnum. Defendant covered Palacios head with a plastic bag, wrapped an electrical cord around it to secure the bag and then extended the cord to tie his wrists several times. Defendant then stuffed Palacios body into a metal cabinet and dumped the cabinet in the Kings Plaza Mall parking lot. For these acts, defendant was charged with murder in the second degree (PL § 125.25), criminal possession of a weapon in the second degree (PL § 265.03) and criminal possession of a weapon in the third degree (PL § 265.02).

On February 22, 1993, a jury convicted defendant of murder in the second degree. On March 22, 1993, the court sentenced defendant to an indeterminate term of imprisonment of twenty-five years to life (Feinberg, J., at trial and sentence).

On appeal, defendant claimed that several comments made by the prosecutor at summation deprived him of a fair trial and that the sentence imposed was excessive. On April 17, 1995, the Appellate Division affirmed the judgment of conviction (*People v Torres*, 214

AD2d 691 [2d Dept 1995]). The Court of Appeals denied defendant leave to appeal on June 6, 1995 (*People v Torres*, 86 NY2d 742 [1995]).

Defendant next petitioned the Appellate Division for a writ of *error coram nobis* on the grounds of ineffective assistance of appellate counsel. Defendant alleged that his appellate counsel failed to (1) argue that trial counsel erred in not requesting a circumstantial evidence charge; (2) object to the prosecutor's comments on summation; (3) argue that the summation should be reviewed in the interest of justice; and (4) draft a statement of facts favorable to defendant. On September 8, 1997, the Appellate Division denied defendant's application (*People v Torres*, 242 AD2d 548 [2d Dept 1997]).

Defendant then moved to vacate the judgment of conviction, alleging that his trial counsel was ineffective for failing to (1) properly impeach the People's witnesses; (2) investigate exculpatory information in police reports; (3) object to prejudicial statements made by his wife; and (4) establish that defendant was prejudiced by the amendment of the indictment. Defendant also asserted that "newly discovered evidence" of his wife's infection with the Hepatitis B virus mandated that his conviction be vacated. On June 23, 2003, the court denied defendant's motion, holding that he had received meaningful representation and that the "newly discovered evidence" did not satisfy the statutory requirements of CPL § 440.10(1)(g).

Defendant next petitioned the United States District Court for the Eastern District of New York for *habeas corpus* relief on the grounds he raised in his writ of *error coram nobis* motion and his motion to vacate the judgment. In an unpublished order, the District Court denied his application as time-barred (*Torres v Greene*, No. 04-CV-2631, EDNY, October 26, 2004, Amon, USJ).

Defendant filed a second petition for a writ of *error coram nobis* on the ground of ineffective assistance of appellate counsel. On March 14, 2005, the Appellate Division denied defendant's petition (*People v Torres*, 16 AD3d 526 [2d Dept 2005]). The Court of Appeals denied defendant leave to appeal on May 26, 2005 (*People v Torres*, 4 NY3d 891 [2005]).

In the instant motion, defendant moves to vacate the judgment of conviction and set aside the sentence, claiming that (1) the police lacked probable cause for the arrest; (2) the search warrant issued was defective; (3) the evidence presented to the Grand Jury was insufficient to sustain the indictment; (4) the prosecutor introduced evidence of triple hearsay and defendant's prior bad acts to the Grand Jury and improperly instructed the Grand jury on the law; (5) he was improperly arraigned on the felony complaint and denied counsel at the arraignment; (6) his wife's statement to the police violated the spousal privilege doctrine; (7) his wife was threatened into testifying against him at trial; (8) his wife was improperly sworn by the court before testifying at trial; (9) the prosecutor knowingly introduced false testimony at trial; (10) the evidence at trial was legally insufficient to support the jury's verdict; (11) he was incapable of understanding or participating in the trial proceedings because of his educational background; (12) there is newly discovered evidence of his innocence; (13) he was improperly sentenced as a persistent felony offender; and (14) his sentence should be reduced in the interest of justice.

Defendant's claims in points one through five and points eight through ten are all based upon matters appearing on the record and are therefore procedurally barred. CPL § 440.10(2)(c) provides that the court must deny a motion to vacate a judgment when, "although sufficient facts appear on the record of the proceedings 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 take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him." In this instance, defendant failed to raise such grounds on appeal and offers no explanation for this failure. Accordingly, this court is now foreclosed from reviewing these claims (*People v Jossiah*, 2 AD3d 877 [2d Dept 2003]; *People v Cooks*, 67 NY2d 100 [1986]).

Moreover, pursuant to CPL § 440.10(3)(c), a court may deny a motion to vacate a judgment when "upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so." Since defendant was in a position to raise all of these allegations in his first CPL § 440.10 motion and failed to do so, the claims may be summarily denied (CPL § 440.10[3][c]).

Statements made by defendant's wife concerning the details of the murder did not violate the marital privilege doctrine. The marital privilege generally precludes disclosure of confidential communication made by one spouse to the other during marriage (*see* CPLR § 4502[b]; CPL § 60.10). The privilege, however, does not protect all exchanges between spouses. Communications between spouses made in the presence of a third person are not confidential and therefore not privileged (*People v Melski*, 10 NY2d 78 [1961]; *see People v LaPlanche*, 193 AD2d 1062 [4th Dept 1993]; *see also People v McCormack*, 278 AD 191 [1st Dept 1951]). In this instance, the wife stated that defendant shot "Red" twice in the head and tied a plastic bag over his head. She indicated that defendant then folded "Red's" body in half, stuffed the body in a metal box and disposed of it at the Kings Plaza Mall parking lot. The wife further stated that this information was also disclosed to her sister as she was present on numerous occasions when

defendant spoke of the murder. Under the circumstances, such communication was never intended to be confidential, and is therefore not a communication protected by the marital privilege doctrine.

Defendant's assertion that his wife was coerced into testifying against him at trial is made solely by him and is unsupported by any other evidence. As there is no reasonable possibility that the claim is true, it is rejected pursuant to CPL § 440.30(4)(d).

Similarly unavailing is defendant's claim that he was incapable of understanding or participating in the trial proceedings because of his educational background. There is no basis in the record to conclude that defendant lacked the capacity to understand the proceedings against him or that he was unable to assist in his defense. In any event, as defendant has failed to substantiate this allegation with any evidence or essential facts, it is denied pursuant to CPL § 440.30(4)(b)

The vague assertion that newly discovered evidence establishes defendant's innocence is also unfounded. Defendant claims that "continued research and new found knowledge in the law library, and researching law journals" is newly discovered evidence of his innocence. In this instance, other than his own self-serving affidavit, defendant fails to set forth sworn allegations of fact adequate to establish this claim (CPL § 440.30[4][b]).

As for defendant's claim that he was sentenced as a persistent felony offender, this allegation is refuted by the Sentence and Commitment order and is thus rejected on procedural grounds (CPL § 440.30[4][c]).

Defendant also requests that his sentence be reduced in the furtherance of justice. The court, however, finds no basis to reduce the imposed sentence. A sentence within permissible

statutory ranges will not be disturbed unless extraordinary circumstances exist warranting a modification (*People v Robinson*, 262 AD2d 795 [3d Dept 1999]). Defendant was convicted of brutally murdering Palacios by shooting him in the head, stuffing his body in a cabinet and then dumping it in a parking lot. Given the brutal nature of the crime, there are no extraordinary circumstances or reasons to modify the sentence imposed in the interest of justice (*People v Ballinger*, 299 AD2d 738 [3d Dept 2002]).

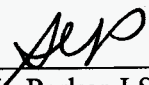
Finally, defendant's credibility is undermined by the substantial period of time that passed before submitting the claims in this motion. Defendant waited approximately fifteen years after appealing the conviction to make the present allegations. In *People v Nixon*, 21 NY2d 338, 352 [1967], the Court held that a delay of more than a decade was an important factor to be considered in evaluating the seriousness of the defendant's claims. The Court stated, "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 ..." Thus, a lengthy delay can be considered in evaluating the validity and legitimacy of a post-judgment motion (*People v Melio*, 304 AD2d 247, 252 [2d Dept 2003]; *People v Hanley*, 255 AD2d 837, 838 [3d Dept 1998]). The weakness of defendant's position is compounded by his failure to offer a reason for the extremely long delay after having submitted a number of other post-judgment motions. In light of the absence of any explanation and given that the relevant facts should have been long known to defendant, the delay is unjustifiable (*see People v Cuadrado*, 9 NY3d 362, 365 [2007] (CPL § 440.10[2][c] barred review of claim that defendant could have raised on direct appeal, where defendant delayed for twelve years in raising

claim in motion to vacate judgment; “[i]t would be at best difficult and at worst impossible for the People to revive the case against him now, and there is no good reason to require them to do so”); *People v Nixon*, 21 NY2d at 352; *People v Degondea*, 3 AD3d 148, 160-61 [1st Dept 2003]).

Accordingly, defendant’s motion is denied in its entirety.

This decision shall constitute 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.



Sheryl L. Parker J.S.C.

