

People v Brown

2010 NY Slip Op 33415(U)

December 9, 2010

Supreme Court, Kings County

Docket Number: 640/96

Judge: Thomas J. Carroll

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

-----X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

Indictment No.: 640/96

By: Hon. Thomas J. Carroll

NELSON BROWN,

Dated: December 9, 2010

Defendant

-----X

Defendant moves pursuant to Criminal Procedure Law § 440.10 for an order vacating the judgment of conviction on the ground that the trial court's instructions to the jury regarding criminal possession of a weapon in the third degree (PL § 265.02) were improper.

On the evening of January 15, 1996, defendant learned that his younger brother had been shot by Jamal Windley, also known as "Peezo." That night, at approximately 9:00 p.m., defendant and codefendants McKinley Miller, Rodney Green and Andre Tucker gathered at defendant's apartment located at 61 Thatford Avenue in Brooklyn. Soon after, the men equipped themselves with weapons and proceeded to the rooftop of the apartment complex. On the ground below, defendant and the codefendants observed Peezo and a group of his friends. Defendant and the codefendants fired their guns at Peezo and his group of friends. Peezo and his friends fired shots back. A stray bullet smashed through the window of an apartment on the fourth floor and struck Lammel Adams, a fourteen-year-old boy, in the head. As a result of the bullet wound, Adams suffered brain damage and lost sight in one eye.

For these acts, defendant and the codefendants were charged with one count of attempted murder in the second degree (PL § 110/125.25[1]), two counts of assault in the first degree (PL § 120.10[1], [3]), one count of attempted assault in the first degree (PL § 110/120.10[1]), four counts of criminal possession of a weapon in the second degree (PL § 265.03), four counts of

criminal possession of a weapon in the third degree (PL § 265.02[4]), and one count of reckless endangerment in the first degree (PL § 120.25). In addition, defendant was also charged with one count of criminal possession of a weapon in the third degree (PL § 265.02[1]), one count of criminal possession of a controlled substance in the third degree (PL § 220.16[1]), one count of criminal possession of a controlled substance in the fourth degree (PL § 220.09[1]) and one count of criminal possession of marijuana in the fifth degree (PL § 221.10[2]).

On June 18, 1997, the jury convicted defendant of one count of criminal possession of a weapon in the third degree and acquitted defendant of all the remaining charges. On September 23, 1997, the court sentenced defendant, as a discretionary persistent felony offender, to an indeterminate term of imprisonment of fifteen years to life (Starkey, J., at trial and sentence).

On appeal, defendant claimed that (1) the evidence was legally insufficient to establish his guilt of criminal possession of a weapon in the third degree and that the verdict was against the weight of the evidence; (2) the trial court erroneously instructed the jury that constructive possession encompasses a firearm found “on the person” or “in the control of a partner in crime;” and (3) the trial court abused its discretion and improperly sentenced defendant as a discretionary persistent felony offender. On January 31, 2000, the Appellate Division affirmed the judgment of conviction (*People v Brown*, 268 AD2d 593 [2d Dept 2000]). The Appellate Division, however, vacated defendant’s sentence holding that the sentencing court failed to state on the record the conduct and circumstances upon which it had relied in determining defendant’s status as a discretionary persistent felony offender (*People v Brown*, 268 AD2d at 594). The matter was then remitted to the Kings County Supreme Court for resentencing in compliance with PL §

70.10[2] (*Id.*). The Court of Appeals denied defendant leave to appeal on April 13, 2000 (*People v Brown*, 94 NY2d 945 [2000]).

On March 9, 2000, the court determined that defendant was a persistent felony offender and set forth the reasons for making such a determination on the record. The court resentence defendant to an indeterminate term of imprisonment of fifteen years to life (Starkey, J., at resentence).

Defendant appealed the resentence imposed by the court. On June 11, 2001, the Appellate Division affirmed the resentence holding that the sentencing court complied with the mandates of PL § 70.10[2] (*People v Brown*, 284 AD2d 406 [2d Dept 2001]). The Court of Appeals denied defendant leave to appeal on August 2, 2001 (*People v Brown*, 96 NY2d 916 [2001]).

Defendant next petitioned the United States District Court for the Eastern District of New York for *habeas corpus* relief, asserting that his constitutional rights were violated under *Apprendi v New Jersey*, 530 US 466 [2000]). On March 21, 2003, the District Court issued a memorandum and order granting defendant's petition (*Brown v Greiner*, 253 F Supp2d 413 [EDNY 2003]). On March 27, 2003, the District Court issued an amended memorandum and order superceding its March 21, 2003 order and granting defendant's petition (*Brown v Greiner*, 258 F Supp2d 68 [EDNY 2003]).

The Kings County District Attorney's Office appealed the District Court's order. On June 3, 2005, the United States Court of Appeals for the Second Circuit reversed the District Court's order granting defendant's *habeas corpus* petition (*Brown v Greiner*, 409 F3d 523 [2d

Cir 2005]). On March 20, 2006, the Supreme Court of the United States denied defendant's petition for a writ of certiorari (*Brown v Ercole*, 547 US 1022 [2006]).

In the instant motion, defendant moves to vacate the judgment of conviction, claiming that (1) the trial court, in its jury instruction, failed to assign a specific gun to each of the four counts of criminal possession of a weapon in the third degree, and (2) the trial court erroneously instructed the jury that defendant could be convicted of gun possession if the weapon is found "on the person" or "in the control of a partner in crime."

Defendant's claim that the court failed to assign a specific gun to each count of criminal possession of a weapon in the third degree is based upon matters appearing on the record and is therefore procedurally barred. CPL § 440.10(2)© provides that the court must deny a motion to vacate a judgment when, "[a]lthough 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 ground on appeal and offers no explanation for this failure. Accordingly, this court is now foreclosed from reviewing this claim (*People v Jossiah*, 2 AD3d 877 [2d Dept 2003]; *People v Cooks*, 67 NY2d 100 [1986]).

Moreover, in its charge of criminal possession of a weapon in the second degree, the court stated, in relevant part:

Now, the next charges include the charges of criminal possession of a weapon in the second degree. Those counts charge that the defendants each aiding the others on or about January 15, 1996, in the County of Kings, knowingly and unlawfully possessed a loaded firearm, namely, as to the first count, a .10 millimeter pistol; as

to the second count, a .9 millimeter pistol; as to the third count, a .45 millimeter pistol; and as to the final one, .380 caliber pistol with intent to use the same unlawfully against another.

Subsequently, during the instruction of the four counts of criminal possession of a weapon in the third degree, the court stated:

The next four charges relate to the crime of criminal possession of a weapon in the third degree, and those relative to the same weapons charge, that the defendants each aiding the others on or about January 15, 1996 in the County of Kings knowingly and unlawfully possessed a loaded firearm, namely, the four weapons referred to earlier, such possession not being in the defendant's home or place of business, that is to say, there is an identical charge relative to each of the four weapons.

When read as a whole, it is apparent that the weapons listed by the court in the charge of the four counts of criminal possession of a weapon in the second degree also coincided with the charge of the four counts of criminal possession of a weapon in the third degree. Accordingly, under the circumstances, the court adequately instructed the jury on the law to apply to each of the possession counts.

As for defendant's allegation that the trial court erroneously instructed the jury that defendant could be convicted of gun possession if the weapon is found "on the person" or "in the control of a partner in crime," the claim is also procedurally barred. CPL § 440.10(2)(a) provides that a court must deny a motion to vacate a judgment when, "[t]he 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." On appeal, defendant made the same claim when he argued that the trial court erroneously instructed the jury that constructive possession encompasses a firearm found "on the person" or "in the control of a partner in crime" (*People v Brown*, 268 AD2d 593).


Since the Appellate Division previously determined the merits of defendant's claim and affirmed the judgment of conviction, and there has been no retroactive effective change in the law controlling such issue, defendant's claim is barred from this court's review (CPL § 440.10[2][a]).

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.¹

E N T E R,



HON. THOMAS J. CARROLL
J.S.C.

ENTERED
DEC 9 - 2010
NANCY T. SUNSHINE
COUNTY CLERK

¹ 22 NYCRR § 671.5.