

People v Folk

2010 NY Slip Op 33419(U)

November 22, 2010

Supreme Court, Kings County

Docket Number: 7495/94

Judge: Thomas J. Carroll

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

PEOPLE OF THE STATE OF NEW YORK
against

Keith Folk,
Defendant

Indictment No.: 7495/94

By: Hon. Thomas J. Carroll

Dated: November 22, 2010

Defendant filed a pro se motion pursuant to CPL 440.10 to vacate his judgment of conviction. In deciding this motion, the court has considered the motion papers, the affirmation in opposition, the defendant's reply and the court file.

Background

Defendant was charged under Kings County Indictment Number 7495/94 with one count of robbery in the first degree (PL § 160.15 [4]) and one count of grand larceny in the fourth degree (PL § 155.30 [5]). All charges were submitted to the jury.

Defendant was convicted, after a jury trial, of robbery in the first degree and grand larceny in the fourth degree.

At sentencing the clerk of the court noted that the defendant had been provided with a statement pursuant to CPL §§ 400.15, 400.16 and 400.21, wherein the defendant's previous felony convictions were enumerated along with the corresponding periods of time and penal institutions where he was incarcerated. People's Exhibit A, p.17, and Exhibit B.

The clerk also elicited from the defendant that he had discussed his predicate felony status with his lawyer. In response to the clerk's questions, the defendant admitted to his prior convictions and stated that none were obtained in violation of his constitutional rights. People's

Exhibit A, p.17.

The court then adjudicated the defendant a persistent violent felony offender and a second felony offender. The defendant was sentenced, as a persistent violent felony offender, to a prison term of twenty-five years to life on the robbery count, and as a second felony offender, to a prison term of two to four years for the grand larceny count, both terms to run concurrently (Garson, J., at trial and sentence).

Defendant appealed from his judgment of conviction to the Appellate Division, Second Department, wherein he raised four claims:

1. The trial court erred in allowing the People to call two rebuttal witnesses;
2. The line-up procedure was unduly suggestive;
3. The evidence was legally insufficient to establish the defendant's guilt and the jury's verdict was against the weight of the evidence; and
4. Defendant's sentence was harsh and excessive.

On November 18, 1996, the Appellate Division affirmed the defendant's conviction.

People v. Folk, 233 AD2d 462 (2d Dep't 1996).

On January 27, 1997, leave to appeal to the Court of Appeals was denied. People v. Folk, 89 NY2d 942 (1997) (Kaye, C. J.).

According to the People's Affirmation, on December 30, 1997, by pro se motion, the defendant moved to vacate his judgment of conviction pursuant to CPL § 440.10. In his motion he claimed that his conviction should be vacated as he had received ineffective assistance of trial counsel. On December 23, 2003, the Supreme Court, Kings County, denied the defendant's

motion finding that the defendant's claim was procedurally barred and meritless.

According to the People's Affirmation, on February 3, 2004, by pro se motion, the defendant applied for permission to appeal to the Appellate Division from the order dated December 23, 2003. On March 31, 2004, a justice of the Appellate Division denied defendant's motion for permission to appeal (Miller, H., J.).

According to the People's Affirmation, on June 9, 2004, by pro se motion, the defendant moved in the Appellate Division for a common law writ of error coram nobis, claiming that appellate counsel was ineffective. On October 18, 2004, the Appellate Division denied defendant's motion noting that he "failed to establish that he was denied the effective assistance of appellate counsel (citation omitted)." People v. Folk, 11 AD3d 637 (2d Dep't 2004).

On December 21, 2004, a judge of the Court of Appeals denied defendant permission to appeal. People v. Folk, 4 NY3d 743 (2004) (Smith, G.B., J.).

According to the People's Affirmation, on January 18, 2005, the defendant applied in the United States District Court for the Eastern District of New York for a writ of habeas corpus. In his petition, the defendant raised the same claims he had raised on direct appeal and in his prior motions. On November 30, 2007, the district court denied the defendant's petition and denied the defendant a certificate of appealability. On February 28, 2008, the Second Circuit Court of Appeals denied defendant a certificate of appealability.

Defendant is currently incarcerated pursuant to the judgment of conviction.

In the current motion, the defendant moves, for the second time, to vacate his judgment of conviction pursuant to CPL § 440.10. Defendant claims that he was improperly sentenced as a

persistent violent felony offender because of a typographical error in the second sentence of CPL § 400.15(2). Defendant further claims that his trial attorney's failure to raise this issue at the time of his sentence constitutes ineffective assistance of counsel.

Statutory Bar

CPL § 440.10 (2)(d) states that a court must deny a motion to vacate judgment when "the ground or issue raised relates solely to the validity of the sentence and not the validity of the conviction".

All of the defendant's claims in the instant motion relate to defendant's sentence and not his conviction. Accordingly, the defendant's motion is subject to a mandatory procedural bar.

Typographical Error/ Ineffective Assistance of Counsel

Were this court to convert the defendant's motion to a motion to set aside the sentence pursuant to CPL § CPL 440.20, it would nevertheless be rejected.

CPL § 430.10 provides that except when specifically authorized by law, a legal sentence may not be changed once the sentence has commenced (*People v Richardson*, 100 NY2d 847, 850-851 [2003]). A specific exception to this rule is found in CPL § 442.20 which provides for the vacatur of sentence where the original sentence is "unauthorized, illegally imposed or otherwise invalid as a matter of law". In this instance, however, defendant has failed to establish any defect or illegality in his sentence.

According to People's Exhibit A, the minutes of defendant's sentencing, the defendant was provided with a Predicate Felony Statement prior to his sentencing. The People have

included a copy of the Statement as People's Exhibit B.¹ On pages 16-17 of People's Exhibit A, the clerk of the court read the defendant's prior felony convictions listed on the statement to the defendant. The clerk then asked if he had discussed the matter with his attorney, to which the defendant replied "yes", if the defendant admitted those prior convictions, to which the defendant replied "yes" and if any of his constitutional rights were violated in pursuit of those convictions, to which the defendant replied "no". The court then adjudicated the defendant a second felony offender and a persistent violent felony offender.

The court then sentenced the defendant on the robbery in the first degree count as a persistent violent felony offender to a prison term of twenty-five to life. The court sentenced the defendant on the grand larceny in the fourth degree count as a second felony offender to a prison term to two to four years. Both sentences were to run concurrently. People's Exhibit A, pp. 24-25.

The defendant's claim that a typographical error contained within the second sentence of CPL § 400.15(2) invalidates his sentence is without merit. The sentence refers to PL § 70.04(1)(c)(v), which does not exist. The correct section is PL § 70.04(1)(b)(v), which authorizes tolling of the ten year limitation during periods when a defendant is incarcerated. The People's Predicate Felony Statement in this case fully complied with CPL § 400.15(2). People's Exhibit B. A clerical or typographical error in the statute does not render the sentencing of the defendant as a violent persistent felony improper. That sentence refers specifically to tolling time and it is obvious

¹ On People's Exhibit B, certain information is handwritten. Attached to this decision as Court's Exhibit 1 is a copy of a statement in the court file on which certain information is typed.

that the legislative intent was to refer to PL§ 70.049(1)(b)(v), and should be so construed. People v. Finnegan, 85 NY2d 53 (1995).

The purpose of a Predicate Felony Statement is to give notice to a court of a defendant's prior felony convictions and to give the defendant notice and an opportunity to be heard. People v. Bouyea, 64 NY2d 1140, 1142 (1985); People v. Harris, 61 NY2d 9, 20 (1983).

Here, the court was aware of the defendant's prior violent felony record at sentencing, the defendant was given an opportunity to admit or deny or stand mute regarding his prior felony convictions and he admitted them to the court. People's Exhibit A, p.17. Thus, any possible defect in the Predicate Felony Statement was cured and the purpose of the Predicate Felony Statement was fulfilled. See Bouyea, 64 NY2d at 1142; Harris, 61 NY2d at 20; People v. Haynes, 70 AD3d 718 (2010).

Defendant's claim that trial counsel was ineffective for failing to challenge his persistent violent felony adjudication on the basis of the typographical error in CPL§ 400.15(2) is also without merit. An attorney is under no duty to raise a claim that has little or no chance of succeeding. People v. Ennis, 11 NY3d 403, 415 (2008). It should be noted that trial counsel made an extensive CPL§ 330.30(1) motion to set aside the verdict prior to defendant's sentencing. People's Exhibit A, pp. 2-14. Defendant has failed to demonstrate that trial counsel was ineffective.


Therefore, the motion to vacate judgment is denied in all respects.

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, 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 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.²

E N T E R,



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

ENTERED
NOV 23 2010
NANCY T. SUNSHINE
COUNTY CLERK

² 22 NYCRR § 671.5.

COURT'S EXHIBIT 1