

**People v Farr**

2010 NY Slip Op 33710(U)

December 22, 2010

Sup Ct, Kings County

Docket Number: 11860/96

Judge: Desmond A. Green

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: CRIMINAL TERM, PART 39

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THE PEOPLE OF THE STATE OF NEW YORK,  
Respondent,

Memorandum  
Decision

Against

GREEN, J.  
IND. 11860/96

JAMES FARR,

December 22, 2010

Defendant.

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Upon the notice of motion dated June 17, 2010, defendant moves pro se for a Coram Nobis order pursuant to Criminal Procedure Law (CPL) section 440.10(1)(H) to vacate the within conviction and to have his sentence therewith set aside.

Based on a review of the motion papers, such other papers on file with the Court, and the proceedings had prior thereto, the decision and order of the Court on defendant's motion is DENIED in its entirety for the following reasons.

**BACKGROUND**

As this is defendant's fourth pro se motion pursuant to CPL 440, (the last one occurring in 2002) certain elements, of the facts of this record, bears repetition.

On July 2, 1996 at approximately 1:45 am at Campus Road and Avenue H in Kings County, the defendant was alleged to have fired four (4) shots from a .25 caliber handgun about the head, neck and torso of Arvi Jason Howard, Sr. Defendant James Farr was identified by witnesses as the gunman who killed Mr. Howard and also fired upon Alan Lucas who survived uninjured.

Detective Angela Allegretti arrested the defendant on September 9, 1996 at 5:30 pm at the 70<sup>th</sup> Precinct in Kings County. Subsequently, the defendant was processed, arraigned, charged accordingly, indicted and subject to a number of prior proceedings had herein.

On June 3, 1997 pursuant to a jury trial, the defendant was adjudged guilty and convicted of Penal Law sections: 125.25(2) Murder in the Second Degree under the "Depraved Indifference" count, 265.03(1)(b) Criminal Possession of a Weapon in the 2<sup>nd</sup> Degree, 110.00/120.10 Attempted Assault in the 1<sup>st</sup> Degree and 120.25 Reckless Endangerment in the 1<sup>st</sup> Degree.

On June 17, 1997 the trial court dismissed the reckless endangerment count and sentenced the defendant to indeterminate sentences of twenty years (20) to life

on the murder count ordering the sentence to run consecutively with the sentence of three to six years (3-6) for attempted assault and concurrently with a sentence of seven and a half to fifteen (7 ½ -15) years for weapon possession.

Defendant, James Farr inmate number 97-A-4513, is currently being held at the Eastern Correctional Facility in Napanoch, New York.

Defendant was previously represented by counsel. The within submission for review and decision by this court is defendant's fourth pro se motion to set aside his conviction. The three prior motions submitted by defendant were all denied.

The defendant previously filed an appeal with the Appellate Division and on June 28, 1999 the appellate court unanimously affirmed defendant's conviction (See, *People v Farr*, 262 AD2d 655).

On August 27, 1999, the defendant's request to the Court of Appeals for leave to appeal from the order of the Appellate Division was denied by a Judge of the Court of Appeals (See, *People v Farr*, 93 NY2d 1017 [1999] [Wesley, J.]

In his pro se submission dated March 14, 2000 the defendant requested the court to set aside his judgment of conviction pursuant to CPL sections 440.10 (1) (d) and (h) and 440.20 based on the following grounds: 1) Ineffective assistance of counsel; 2) Violation of right to counsel; 3) An unduly prejudicial and suggestive line-up; 4) Failure of prosecution to prove the elements of the crimes charged beyond a reasonable doubt and 5) That the weight of evidence did not support the verdict. The court's decision dated June 6, 2000 and entered June 13, 2000 denied the defendant's application in its entirety. Most of defendant's claims were summarily denied because they were claims that defendant could have raised on appeal, but failed to do so. In particular, defendant at that time raised the claim that there was a lack of evidence to sustain the intent element of depraved indifference murder. The court also denied defendant's claim of ineffective assistance of counsel on the merits as well as defendant's claim that the court lacked jurisdiction. *People v Farr*, No. 11860/96, Memorandum Decision (Sup Ct Kings Cty June 6, 2000)

Defendant's pro se application (his second CPL 440 motion on March 14, 2000) was denied because defendant raised issues that he could have raised on appeal but failed to do so. A subsequent petition for permission to appeal therefrom was summarily denied. *People v Farr*, No. 11860/96 Memorandum (Sup Ct Kings Cty June 22, 2001) In addition, defendant's application to the Appellate Division for a writ of error *coram nobis* was denied. *People v Farr* 286 AD 2d 776 (2<sup>nd</sup> Dept 2001)

Defendant followed with a federal writ of *habeas corpus* dated October 8, 2001 reiterating many of the claims he previously filed along with new statements for ineffective assistance of trial counsel. The U. S. District Court for the Eastern

District administratively closed defendant's habeas corpus petition on September 13, 2002 except for defendant's new claims which were directed back to state court.

In state court, defendant moved pro se for his third application pursuant to CPL 440 on August 26, 2002, including the new ineffective assistance of counsel claims; along with two other claims: 1) that his due process rights were violated because the court did not adequately explain the recklessness element of depraved indifference murder and did not adequately explain the difference between the charges of second degree murder and second degree manslaughter; 2) that the court illegally imposed consecutive sentences. The court summarily denied defendant's third CPL 440 motion in a decision and order dated March 14, 2003. *People v Farr*, No.11860/96 Memorandum Decision (Sup Ct Kings Cty March 14, 2003) Defendant's application to the Appellate Division for permission to appeal this order was denied September 5, 2003. *People v Farr*, No. 2003-03935 (2<sup>nd</sup> Dept Sept 5, 2003) (Florio, J.)

Defendant then renewed and supplemented his prior pro se petition for federal writ of *habeas corpus* dated September 29, 2003 among other subsequent filings and decisions as outlined in the People's opposition papers herein.

### **ARGUMENT HEREIN**

Defendant's motion herein argues that several errors occurred on the record at trial resulting in prejudice to the defendant and therefore the conviction should be reversed or set aside because had the errors not occurred the verdict would have been different and such is in violation of his State and Federal Constitutional rights. Specifically, defendant again revisits one of his prior contentions that the verdict was against the weight of the evidence. However, he believes it is because of legally insufficient evidence that he was convicted for depraved indifference such that the mens rea for the crime is unintentional and he argues there is no evidence in the record to support the jury's finding of an unintentional crime and that the change in the depraved indifference statute should be applied retroactively to his matter.

The People oppose defendant's motion and outline extensively in its memorandum of law reasons (some of which is reiterated in the background portion of this decision) that defendant's motion should be summarily denied. Notably, the People point out that on December 7, 2004, the Federal Court, Eastern Division appointed counsel for defendant and on March 10, 1996, with the assistance of counsel, defendant filed supplemental papers arguing two primary points: 1) ineffective appellate representation because appellate counsel failed to argue that trial counsel was ineffective for failure to motion to dismiss the depraved-indifference count and 2) that the trial court erred when it submitted the depraved indifference murder charge to the jury.

The Eastern District, by order dated April 10, 2007, denied defendant's petition for writ of *habeas corpus* on the merits pursuant to the federal magistrate's recommendation. *Farr v Greiner*, 01-CR 6921, 2007 U.S. Dist. LEXIS 26401 (EDNY April 10, 2007) (Gershon, J); *Farr v Greiner*, 01-CR 6921 (NG) (MDG), 2007 U.S. Dist LEXIS 30184 (EDNY Feb 23, 2007) (Go, M.J.). The People here reiterate that the "Eastern Division specifically held that, [pursuant to] *Herbert v Policano*, 7 NY 3d 588 (2006), under New York State law applicable at the time of defendant's conviction, the jury reasonably could have concluded that defendant acted with recklessness and not with the intent to murder." *Farr v Grenier*, 2007 U.S. Dist. LEXIS 26401 at 1-2

### CONCLUSION

As the court noted in its June 6, 2000 decision, analyzing whether the elements of the crime of Depraved Indifference Murder in the 2<sup>nd</sup> Degree were proven beyond a reasonable doubt, the defendant did not raise the issues he presented at that time in his submission to the Appellate Division and offered no valid reason for failing to do so. In the motion under consideration herein, the defendant also did not present the specified issue to the Appellate Division and offers no justifiable reason for not doing so.

Here, the issues defendant presents in his instant motion were known at the time of judgment and defendant had the opportunity to present such issues heretofore for appellate review.

Further, as the Eastern District has pointed out, and this court concurs with *Policano*, pursuant to the applicable NYS law at the time of defendant's trial and conviction, the jury reasonably could have concluded that defendant acted with recklessness and not the intent to murder. Consequently, even if defendant's claims herein were not barred, the record is ripe with evidence to gird the jury's finding and there is no basis to support defendant's argument that there has been any change in the depraved indifference statute that would be applied retroactively to this matter.

Accordingly, defendant is barred from raising the issue of evidentiary insufficiency in this collateral proceeding pursuant to CPL 440.10 (2) (c) which states: (2) *Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment when: (c) Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from said 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*

Further, determining whether a verdict is against the weight of the evidence is the purview of the function of an intermediate appellate court, and not a trial court. The proper forum for consideration of defendant's issues herein was on direct appeal to the Appellate Division. Under these circumstances, this court does not have the jurisdiction to entertain defendant's application whether or not defendant had a justifiable reason for failing to remit his issues hereunder for appellate review.

Consequently, defendant's motion herein must be denied in its entirety.

Accordingly, based on the foregoing, the defendant's CPL 440.10 (1) (h) motion to set aside his conviction and overturn his sentence is DENIED.

This constitutes the decision and order of the Court.

**Notice of Right to Appeal for a Certificate Granting Leave to Appeal**

Defendant is informed that his right to appeal from this order determining the within motion is not automatic except in the single instance where the motion was made under CPL 440.30 (1-a) for forensic DNA testing of evidence. For all other motions under article 440, defendant must apply to a Justice of the Appellate Division for a certificate granting leave to appeal. This application must be filed within 30 days after your being served by the District Attorney or the court with the court order denying your motion.

The application must contain your name and address, indictment number, the questions of law or fact which you believe ought to be reviewed and a statement that no prior application for such certificate has been made. You must include a copy of the court order and a copy of any opinion of the court. In addition, you must serve a copy of your application on the District Attorney.

Dated: December 22, 2010  
Kings County, NY

**ENTERED**  
JAN 20 2011  
NANCY T. SUNSHINE  
COUNTY CLERK

  
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Hon. Desmond A. Green, J.S.C.