

People v Dantzler

2011 NY Slip Op 31040(U)

March 14, 2011

Supreme Court, Kings County

Docket Number: 3588/2005

Judge: John G. Ingram

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

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THE PEOPLE OF THE STATE OF NEW YORK, DECISION AND ORDER

-against-

Indictment No. 3588/2005

RANDALL DANTZLER,

Defendant.

-----X

INGRAM, J.

Defendant stands convicted, following jury trial in Supreme Court, Kings County, of Assault in the Second Degree (P.L. 120.05(2)) and Criminal Possession of a Weapon in the Second and Third Degrees (P.L. 265.03(2) and 265.02(4)). On November 3, 2006, the court sentenced Defendant to twelve years on the second degree criminal weapon possession count, seven years on the third degree criminal weapon possession count, and seven years on the assault count, to run concurrently with each other. (Holdman, J., at trial and sentence).

Defendant appealed from his judgment of conviction. In motion filed in the Appellate Division, Second Department, Defendant claimed that he was deprived of a fair trial because the trial court granted the people's request for a missing witness charge as to Defendant's mother. Defendant also alleged that the sentence he received was excessive. In a decision dated July 1, 2008, the Appellate Division rejected Defendant's argument and affirmed Defendant's conviction. People v. Dantzler, 53 A.D.3d 504 (2d Dept. 2008). The Appellate Division held that the court properly granted the People's request for a missing witness charge and also found Defendant's sentence was

not excessive. On September 26, 2008, the Court of Appeals denied Defendant's leave application. People v. Dantzler, 11 N.Y.3d 787 (2008)(Smith, J.).

Defendant filed application for a writ of habeas corpus in the U.S. District Court for the Eastern District of New York ("District Court") on April 7, 2009. On September 22, 2009, Defendant's petition for a writ of habeas corpus was denied. On March 10, 2010, the District Court granted Defendant an extension of time in which to file a notice of appeal for the Court's decision denying his petition. Defendant refiled his petition for a writ of habeas corpus in April 2010. The District Court vacated the Order to Show Cause issued in that case and transferred Defendant's petition to the Second Circuit. In a Mandate issued on December 22, 2010, the Second Circuit denied Defendant's application to file a successive habeas corpus petition.

The Motion Before the Court

In pro se motion dated November 3, 2010, Defendant again moves to vacate his judgment of conviction pursuant to C.P.L. § 440.10 on the grounds that he was denied a fair trial because the jurors were not issued their oath as mandated by C.P.L. § 270.15(a) and that he was denied effective assistance of counsel because counsel failed to object to the Court's failure to issue the "true oath" as mandated by C.P.L. § 270.15(1)(a).

The People filed response on December 23, 2010, arguing that Defendant's claim is procedurally barred from review and is without merit.

Defendant filed a response to the People's opposition. The response was not dated or signed by Defendant.

The Court's Decision

Pursuant to C.P.L. § 440.10(2)(c) a motion to vacate a judgment of conviction must be denied when, although sufficient facts appear on the record to have permitted adequate review, the defendant unjustifiably failed to raise the issue on his direct appeal. The record presented sufficient facts from which Defendant could have raised his present claim. Since this issue could have been raised on direct appeal, it cannot properly be raised on the instant motion.

In any event, were this Court to address Defendant's allegations, it would find them without merit and frivolous. Defendant has failed to establish that his right to a fair trial was violated by the Court's failure to administer the "oath of truthfulness". Pursuant to C.P.L. § 440.30(4)(c) and (d), a court may deny a motion to vacate a judgment of conviction if "[a]n allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof; or...[a]n allegation of fact essential to support the motion is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true." The transcript of the voir dire establishes that the jury panel was sworn twice, once prior to questioning and once after the jurors were selected. Therefore, Defendant's claim is likewise procedurally barred pursuant to C.P.L. § 440.30(4)(d).

Furthermore, even if this Court considered the merits of Defendant's claim, it would fail on the merits. C.P.L. § 270.15(1)(a) requires that potential jurors selected to sit in the jury box "shall be immediately sworn to answer truthfully questions asked them relative to their qualifications to serve as jurors in the action." C.P.L. § 270.15(2) states that "prospective jurors who are not excluded from service must retain their place in the jury box and must be immediately sworn as trial jurors."

Based on the transcripts submitted by the People, the panel of prospective jurors were sworn after they entered the courtroom. In addition, at the completion of each round of jury selection, the jurors selected were sworn. Once again, after the entire jury had been selected, the jurors were sworn. Defendant's claim that the prospective jurors were not sworn after seated in the jury box is without merit. It would be redundant to swear the prospective jurors seated in the jury box after the entire panel of prospective jurors was sworn. See People v. T.F., 171 Misc.2d 414, 417 (Sup. Ct., Kings Co. 1997)(holding that it is common practice to swear entire panel upon entering courtroom without reswearing them when they are placed in jury box for voir dire). In addition, it has been held that a delay in swearing in a jury was harmless. People v. Morales, 168 A.D.2d 85 (2d Dept. 1991). In Morales, at the conclusion of the People's case and just prior to the commencement of the defendant's case, the court advised both sides that the jury had never been sworn. 168 A.D.2d at 87. The court administered the oath at that time and the jurors were asked to affirm that they would try the case fairly. Id. The Second Department held that the delay in swearing the jury was no more than a technical deviation and did not require reversal. Id. at 89. In addition, the Second Department found that the defendant never indicated in what manner he may have been prejudiced by the delay. Id. Similarly, in the case at hand, the swearing in of prospective jurors prior to being seated in the jury box is a technical deviation and in no way prejudiced Defendant. In addition, Defendant fails to establish that there was any defect in the actual swearing of the jury or how he may have been prejudiced by the manner in which the jury was sworn.

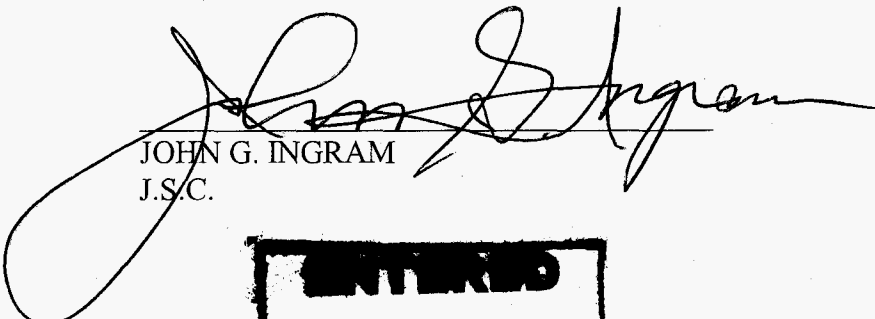
Furthermore, this Court finds Defendant's argument that his attorney was ineffective for failing to object to the court's procedure without merit. There was no reason for his attorney to object. All prospective jurors, after entering the courtroom, were initially sworn that they would

respond truthfully to the questioning. Even if defense counsel objected and the court responded to such an objection, the court would have simply repeated the oath. An attorney is not ineffective for failing to raise a futile or frivolous claim and the failure to object did not deprive Defendant of the effective assistance of counsel. See People v. Benevento, 91 N.Y.2d 708, 713 (1998); People v. Hobot, 84 N.Y.2d 1021, 1024 (1995); People v. Baldi, 54 N.Y.2d 137, 147(1981).

Accordingly, Defendant's motion is denied.

This opinion constitutes the Decision and Order of this Court.

Dated: March 14, 2011
Brooklyn, New York



Handwritten signature of John G. Ingram in cursive script.

JOHN G. INGRAM
J.S.C.

ENTERED
MAR 16 2011
NANCY T. SUNSHINE
COUNTY CLERK