

People v Lambert

2011 NY Slip Op 31178(U)

April 12, 2011

Sup Ct, Kings County

Docket Number: 6919/03

Judge: Raymond Guzman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 9

----- X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER
Ind No.: 6919/03

GARY LAMBERT,
Defendant.
----- X
RAYMOND GUZMAN, J.S.C.

INTRODUCTION

On September 24, 2003, at approximately 9:20 p.m., defendant and an unapprehended other followed Merrill Hollis and Noel Johnson into the Bedford-Nostrand subway station. Once in the station, defendant grabbed Hollis by the throat and searched Hollis' pockets while his accomplice attacked Johnson and stole Johnson's cell phone and forty dollars. Two undercover police officers witnessed this event, and after responding to the victims, gave chase to defendant and his accomplice. The officers arrested defendant approximately two blocks from the scene of the robbery and searched his pants pockets where they recovered Johnson's cell phone.

For these crimes, defendant was charged under Kings County Indictment Number 6919/03 with Robbery in the Second Degree (Penal law § 160.10[1]), Attempted Robbery in the Second Degree (Penal Law § 110/160.10[1]), Robbery in the Third Degree (Penal Law § 160.05), Attempted Robbery in the Third Degree (Penal Law § 110/160.05), Grand Larceny in the Fourth Degree (Penal Law § 155.30[5]), Attempted Grand Larceny in the Fourth Degree (Penal Law § 110/155.30[5]), Petit Larceny (Penal Law § 155.25), Attempted Petit Larceny (Penal Law § 110/155.25), and Criminal Possession of Stolen Property in the Fifth Degree (Penal Law § 165.40).

Following a jury trial, defendant was convicted of Robbery in the Second Degree (Penal Law § 160.10[1]) and Attempted Robbery in the Second Degree (Penal Law § 110/160.10[1]). Defendant was sentenced on October 19, 2004, as a persistent felony offender to an indeterminate term of imprisonment of eighteen (18) years to life on both counts, to run concurrently.

Defendant appealed his conviction to the Second Department, alleging a total of six grounds in his attorney filed brief and a supplemental brief filed pro-se. The six grounds were: (1) the hearing court erred in failing to suppress the show-up identification made by the two victims because it was unduly suggestive; (2) the evidence was legally insufficient to support a conviction because the testimony was incredible as a matter of law; (3) the prosecutor made improper remarks during summation; (4) this court erred in giving an adverse inference instruction; (5) this Court erred in giving a recent and exclusive possession charge; and (6) the hearing court should have suppressed the identification because there were no exigent circumstances warranting the use of a show-up identification procedure.

The Second Department affirmed defendant's conviction by decision and order dated October 2, 2007. People v Lambert, 44 AD3d 688 (2d Dept 2007). The Second Department held that the hearing court was in error for failing to suppress the show-up identification, the error was harmless in light of the overwhelming evidence of defendant's guilt. Id. Additionally, defendant's other contentions were found to be either unpreserved for review or meritless. Id.

Defendant filed a writ of error *coram nobis*, alleging that he was denied the effective assistance of appellate counsel. By decision and order dated April 22, 2008, the Second Department denied defendant's application, holding that he had received effective assistance from his appellate counsel. People v Lambert, 54 AD3d 420 (2d Dept 2008). Defendant's application for leave to

appeal this decision was denied by the Court of Appeals (Pigott, Jr., J).

Defendant filed a writ of *habeas corpus* with the United States District Court for the Eastern District of New York. Defendant again alleged he was denied the effective assistance of appellate counsel, for the same reasons alleged in the writ of error *coram nobis*. Defendant's application was denied by decision and order dated May 1, 2009, (Cogan, J.). Defendant's application for a certificate of appealability was denied by the United States Court of Appeals for the Second Circuit on October 8, 2009.

Defendant now moves this Court pursuant to Criminal Procedure Law § 440.10 for an Order vacating his judgment of conviction on the following three grounds: (1) that this Court lacked jurisdiction because the indictment was defective in that it did not state his name in the counts, only in the caption; (2) that this Court erred in failing to conduct an independent source hearing to support the in-court identification made by the victims; and (3) that he did not receive effective assistance of trial counsel because his trial counsel failed to move to reopen the Wade hearing based on inconsistent testimony by the victims.

Additionally, defendant has moved this Court pursuant to CPL § 440.20 for an order setting aside his sentence on the grounds that a change in law requires resentencing.¹

For the following reasons defendant's applications are denied.

¹Defendant filed two separate motions, one seeking relief under CPL § 440.10 and the second seeking relief under CPL § 440.20. The Court has considered both applications and addresses them in this single decision and order.

LEGAL ANALYSIS

Criminal Procedure Law, § 440.10(2) provides in pertinent part:

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 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.

The Court of Appeals has explained, “The purpose of [these] provisions is to prevent CPL § 440.10 from being employed as a substitute for direct appeal when defendant was in a position to raise an issue on appeal (CPL § 440.10[2][b]) or could readily have raised it on appeal but failed to do so (CPL 440.10[2][c]).” People v Cooks, 67 NY2d 100, 103-104 (1986)(citing, People ex rel. Gibbs v. Vincent, 39 NY2d 918 [1976]; Bellacosa, Practice Commentaries, McKinney's Cons.Laws of NY, Book 11A, CPL § 440.10, p 320).

The law is clear in this area, a motion brought pursuant to CPL § 440.10(1) *must* be denied when the circumstances described in CPL § 440.10(2) exist. *See*, People v Cuadrado, 9 NY3d 362 (2007). Defendant’s motion falls under CPL §440.10(2)(c), in that he failed to advance any of the three claims at the center of the instant motion though sufficient facts appeared on the record when he filed his appeal. Therefore, defendant’s motion is procedurally barred from CPL § 440.10 review. Even were the motion not procedurally barred, defendant’s motion would still be meritless.

Defendant claims that this Court lacked proper jurisdiction because his name did not appear in the individual counts, but rather only in the caption. Defendant cites to People v Lopez, 4 NY3d 686 (2005), in support of his argument. Lopez is easily distinguished from the instant action. In the current case, defendant was the only defendant charged in the caption, therefore, when it referred to defendant in each count, there was no other person to whom the indictment could have been referring, unlike in the Lopez case.

“An indictment is jurisdictionally defective only if it does not effectively charge the defendant with the commission of a particular crime – for instance, if it fails to allege that the defendant committed the acts constituting every material element of the crime charged.” People v D’Angelo, 98 NY2d 733, 734-735 (2002) (*citing* People v Iannone, 45 NY2d 589, 600 [1978]).

The Court of Appeals explained the three traditional purposes for an indictment. “First and foremost, an indictment has been considered as the necessary method of providing the defendant with fair notice of the accusations made against him, so that he will be able to prepare a defense.” People v Iannone, 45 NY2d at 594 (*citing* People v Armlin, 6 NY2d 231, 234 [1959]).

“Another traditional function of the indictment qua document has been to provide some means of ensuring that the crime for which the defendant is brought to trial is in fact one for which he was indicted by the Grand Jury, rather than some alternative seized upon by the prosecution in light of subsequently discovered evidence.” Id. (*citing* Russell v United States, 369 US 749, 770 [1962]).

“Finally, the indictment has traditionally been viewed as the proper means for indicating just what crime or crimes defendant has been tried for, in order to avoid subsequent attempts to retry him for the same crime or crimes.” Id. at 595 (*citing* People v Williams, 243 NY 162, 165 [1926]).

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The indictment in the current case was not jurisdictionally defective, and fulfilled all of these functions. Defendant was provided fair notice of what the pending charges were and had ample opportunity to prepare his defense. Defendant was tried for the same crimes that were presented to the Grand Jury. Lastly, it is clear that defendant is not in danger of being retried on the same charges because the indictment was specific as to what the charges defendant was convicted of committing. Accordingly, defendant has shown neither a valid jurisdictional defect, nor any prejudice concerning the indictment and his application on that ground is denied.

Defendant further alleges that this Court should have conducted an independent source hearing to test whether the two eyewitnesses had a sufficient basis for making an in-court identification during the trial. Initially, it is worth noting that no application for an independent source hearing was requested by defendant during the trial. Further, this issue was not raised by defendant in his appeal. Even were this issue not procedurally barred, it would still be without merit.

In People v Lambert, 44 AD3d 688 (2d Dept 2007), the Second Department ruled that the hearing court should have suppressed the pre-trial identification by the victims. However, the Appellate Division also held that despite this defect the evidence against defendant was so overwhelming as to make the error harmless beyond a reasonable doubt, and affirmed the judgment of conviction. Id. As such, this Court cannot overrule the holding of the Appellate Division as to the identification issue. Therefore, defendant's motion with respect to the independent source hearing is denied.

Defendant further alleges that he was denied the effective assistance of trial counsel when his attorney failed to move to reopen the pre-trial identification hearing after impeaching the eyewitnesses with prior inconsistent statements. Defendant argues that trial counsel's failure to seek

to reopen the pre-trial hearing denied him his rights under both the United States and New York State Constitutions. Like the other two claims in this motion, defendant failed to raise this issue on his direct appeal of the conviction.

Notwithstanding the procedural bar, defendant's claim of ineffective assistance of counsel fails. Looking first at the Federal standard for effective assistance of counsel as defined by the United States Supreme Court in Strickland v Washington, 466 US 668 (1984), defendant must show establish both that his attorney was ineffective and that the attorney's errors resulted in prejudice to the defendant. Williams v Taylor, 529 US 362, 390-391 (2000). Counsel is ineffective when her efforts fall below an objective standard of reasonableness. Id. see also, Strickland v Washington, 466 US at 688. To prove the prejudice prong of this test, defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 391.

Defendant in the instant case fails both prongs of this test. It cannot be said that his attorney's failure to seek to reopen the pre-trial identification hearing was so egregious as to fall below the objective standard of reasonableness. As evidenced by the record, defense counsel offered both opening and closing remarks advancing the theory of defendant's innocence, made appropriate and timely objections, and as highlighted by defendant's moving papers, she conducted a withering cross-examination of the two victims in this case exposing the prior inconsistent statements between their trial testimony and grand jury testimony. Further, defendant has failed to show that but for this error there exists a reasonable probability that the outcome of this case would be different.

As stated in People v Lambert, *supra*, the evidence in this case included not just the testimony of the two victims, but also, “the in-court identification of the defendant by two police officers who saw the defendant with the complainants, pursued him, and arrested him within moments of the crime, and the recovery from the defendant's person of a complainant's mobile telephone.” Id. On this evidence the Second Department found any error by the hearing court to be harmless beyond a reasonable doubt. Id. Defendant, therefore, cannot make a showing that there exists a reasonable probability that the outcome of his trial would have been different had his attorney sought to reopen the pre-trial identification hearing.

The standard for ineffective assistance of counsel under the New York State Constitution differs from the federal Strickland standard. The first prong of the New York test is the same as Strickland, in that a defendant must show that his attorney's performance fell below an objective standard of reasonableness. People v Turner, 5 NY3d 476, 480 (2005). The difference between the two standards is in the second prong. Under New York law, the “question is whether the attorney's conduct constituted egregious and prejudicial error such that defendant did not receive a fair trial.” People v Benevento, 91 NY2d 708, 713 (1998). As the Court of Appeals explained, under New York law the focus of the inquiry is ultimately whether the error affected the “fairness of the process as a whole.” Id. at 714. Thus, under the second prong of the New York standard, a defendant is not required to show that the outcome of the case would have been different but for the errors, rather a defendant must demonstrate that he was deprived of a fair trial overall. People v Caban, 5 NY3d 143, 155-156 (2005).

Defendant's application fails under the New York standard as well. As stated above, it cannot be said that defense counsel's efforts fell below an objective standard of reasonableness.

Additionally, defendant cannot claim that he was deprived his right to a fair trial because of his attorney's conduct. As detailed above and shown by the trial record, defense counsel provided meaningful representation to defendant. *See, People v Hewlett*, 71 NY2d 841, 842 (1988). Accordingly, defendant has not met his burden to show that he was denied the effective assistance of counsel under either the United States or New York State Constitutions.

Finally, defendant argues that his sentence is illegal and should be set aside pursuant to CPL § 440.20. Defendant avers that there was a change in the sentencing law, specifically that Penal Law § 70.08 was repealed on September 1, 2009, and that this change should be applied to his sentence.

Defendant was sentenced as a persistent violent felony offender on October 19, 2004. At the time of defendant's sentence and at present, the sentence imposed by this Court is a legal sentence under Penal Law § 70.08. Since the time of defendant's sentencing in 2004, the minimum term that a court may give has been lowered by the Legislature from sixteen years to eight years. Penal Law § 70.08 was not repealed by the Legislature as defendant contends, but merely amended to reflect this change. The lowered minimum sentence does not go into effect until September 1, 2011. *See*, L. 2009, Ch. 56 § 21 (Part U).


Defendant offers no reason why his sentence should be set aside apart from this amendment to the law. There exists no reason for this Court to set aside defendant's sentence, and apply a retroactive lower minimum sentence, especially where this Court declined to sentence defendant to the minimum term allowable following trial in 2004. Accordingly, this part of defendant's application is denied in its entirety.

CONCLUSION

For the foregoing reasons, defendant's motions to vacate his judgment of conviction pursuant to CPL § 440.10 to set aside his sentence pursuant to CPL § 440.20 are denied.

This opinion shall constitute the decision and order of this court.

Dated: April 12, 2011
Brooklyn, New York



RAYMOND GUZMAN
Justice of the Supreme Court

ENTERED
APR 13 2011
NANCY T. SUNSHINE
COUNTY CLERK