

People v McGuire

2011 NY Slip Op 32047(U)

July 26, 2011

Supreme Court, Kings County

Docket Number: 4477/89

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

DECISION AND ORDER
Indictment # 4477/89

-against-

GEORGE MCGUIRE,

Defendant,

-----X
RAYMOND GUZMAN, J.S.C.

INTRODUCTION

On December 25, 1989, defendant, along with two other accomplices, fired into a crowd outside a nightclub following a dispute with another patron named Leslie Lewis. The shots fired hit Lewis as well as three other people, John Paul Michel, Robert James, and Dexter Simmons. Lewis received multiple gunshot wounds to his legs and one arm. Michel and James were both wounded in their lower extremities. Dexter Simmons was shot in the back and the bullet traveled through his lung and into his heart. Simmons died as a result of the shooting.

Following a jury trial, on October 20 1990, defendant was convicted of one count of Murder in the Second Degree, one count of Attempted Murder in the Second Degree, three counts of Assault in the First Degree, and three counts of Criminal Possession of a Weapon in the Second Degree. Defendant was sentenced on November 13, 1990, to an indeterminate term of twenty-five years to life imprisonment on the Murder in the Second Degree count; to an indeterminate term of twelve and one-half to twenty-five years imprisonment for the Attempted Murder in the Second Degree count; three indeterminate terms of seven and one-half to fifteen years imprisonment for the Assault in the First Degree counts; and three indeterminate terms of seven and one-half to fifteen years

imprisonment for the Criminal Possession of a Weapon in the Second Degree counts. (Laguna, J., at trial and sentencing).

Additionally, the sentencing court ran the Murder and Attempted Murder counts consecutive to one another, the three Assault counts concurrent to one another but consecutive to the Murder and Attempted Murder counts, and the three Criminal Possession of a Weapon counts concurrent with one another but consecutive to the Murder, Attempted Murder and Assault counts. Because these counts were run consecutively, defendant's total sentence was an aggregate of sixty years to life. Defendant remains incarcerated on the instant case.

By motion papers dated October 25, 2010, defendant has moved this Court for an Order to set aside his sentence pursuant to CPL § 440.20, Article I, Section 6 of the New York State Constitution, and the Fourteenth Amendment to the United States Constitution. Defendant contends that the sentencing court relied on false information in determining the sentence, and thus has violated his due process rights mandating the need for a new sentence.

The People filed opposition to defendant's motion on February 10, 2011, arguing that defendant had failed to raise this claim previously and thus has waived it, and further that the claim is meritless.

For the foregoing reasons, defendant's motion is granted.

POST-CONVICTION PROCEDURAL HISTORY

The instant motion represents defendant's fourth application for post-conviction relief pursuant to Article 440 of the Criminal Procedure Law. Defendant's first post-conviction motion, filed on April 20, 1993, sought to vacate his conviction pursuant to CPL § 440.10, and was filed while his direct appeal was pending. In this motion, defendant argued that his arrest was illegal, his

speedy trial rights were violated, and that his trial counsel was ineffective. Before this initial motion was decided, defendant again moved under CPL § 440.10 for an order to vacate his conviction on March 19, 1995. The supplemental CPL § 440.10 motion alleged ineffective assistance of counsel on different grounds than the original motion to vacate, as well as errors by the trial court.

Most of these applications were denied on May 1, 1997, but defendant was assigned counsel and a hearing was scheduled on the issue of whether defendant's trial attorney was ineffective for failing to call two exculpatory witnesses. Two hearing dates were held in 1998, and on January 31, 2002, (Opinion, Garson, J.) defendant's application for an Order vacating his judgment of conviction was denied.

Defendant's third application for post-conviction relief was filed on June 5, 2002. Defendant again moved under CPL § 440.10 for an Order vacating his judgement of conviction on the grounds that there was newly discovered evidence, specifically, affidavits from his two accomplices to the shooting which stated that defendant had not participated in the shooting. A hearing was conducted regarding defendant's application on December 10, 2003. On March 22, 2004, (Opinion, Tomei, J.) defendant's application was denied.

Defendant was granted leave to appeal the Supreme Court's decision by the Second Department. On October 23, 2007, the Second Department affirmed the Order of Supreme Court denying defendant's motion to vacate based on the newly discovered evidence. People v McGuire, 44 AD3d 968 (2d Dept 2007). Defendant's application for leave to appeal to the Court of Appeals was denied. People v McGuire, 10 NY3d 813 (2008).

By *pro se* motion papers dated June 18, 2004, defendant moved for an Order to set-aside his sentence pursuant to CPL § 440.20. Defendant alleged that his pre-sentence probation report was

incomplete, and that his consecutive sentences were illegally imposed. On December 14, 2004, defendant's motion was denied (Opinion, Silverman, J.). Defendant's application for leave to appeal the CPL § 440.20 motion decision was denied. (April 13, 2005 Order, Miller, J.).

Defendant also filed an appeal in this case on September 3, 1992, arguing that: (1) the People's opening statement was insufficient; (2) he was absent for a material stage of the trial; (3) the trial court failed to give a missing witness charge for two of the victims; (4) the verdict sheet was prejudicial; (5) the verdict sheet was repugnant; (6) the sentence was unduly harsh and excessive; and (7) he received the ineffective assistance of counsel. Defendant's conviction was affirmed by the Second Department which held that defendant received effective assistance of counsel and the sentence wasn't unduly harsh. Defendant's other claims were found to be without merit. People v McGuire, 205 AD2d 805 (2d Dept 1994). The Court of Appeals denied defendant's application for leave to file an appeal, People v McGuire, 84 NY2d 870 (1994), and denied defendant's application for reconsideration of his application for leave to appeal. People v McGuire, 84 NY2d 1013 (1994).

Additionally, defendant has filed two writs of error *coram nobis*. The first writ of error *coram nobis* was filed on August 8, 2007, and alleged that defendant was denied the effective assistance of appellate counsel, that the trial court failed to make findings of fact when rendering its decision on the pre-trial suppression hearing, and that appellate counsel filed a brief without examining the minutes from the trial's voir dire. The Second Department held that defendant has received effective appellate counsel and the writ of error *coram nobis* was denied. People v McGuire, 46 AD3d 922 (2d Dept 2007). The Court of Appeals denied defendant's application for leave to appeal this decision. People v McGuire, 10 NY3d 867 (2008).

Defendant filed a second writ of error *coram nobis* on May 29, 2008, again alleging

ineffective assistance of appellate counsel. The Second Department denied defendant's second application for a writ of error *coram nobis*. People v McGuire, 55 AD3d 853 (2d Dept 2008). The Court of Appeals denied defendant leave to appeal this decision. People v McGuire, 11 NY3d 927 (2009).

On February 4, 2009, defendant moved for a writ of *habeas corpus* in the United States District Court for the Eastern District of New York on the grounds that: (1) the extended delay in deciding the first 440.10 motions defendant filed was a denial of his due process rights; (2) trial counsel was ineffective; (3) he is actually innocent of the crimes he was convicted of committing; and (4) the sentence of sixty years to life imprisonment is improper, unduly harsh, and excessive. By an opinion dated August 26, 2010, defendant's application for a writ of habeas corpus was denied (Opinion, Ross, J.). Defendant was granted a certificate of appealability on the due process and ineffective assistance of counsel claims, but not for the actual innocence or sentencing claims.

FACTS AND LEGAL ANALYSIS

As more fully detailed above, defendant was found guilty following a jury trial and sentenced to an aggregate term of imprisonment of between sixty years and life.

The People argue that defendant is procedurally barred from bringing this motion to set aside his sentence because he raised no objection to the statements of the sentencing court at the time he was sentenced, and thus there is no matter of law to be decided (CPL § 470.05[2]; People v Garson, 69 AD3d 650 [2d Dept 2010]).

Defendant concedes the point in his reply papers that his counsel failed to raise the appropriate objection in order to preserve the issue for appeal. In light of this concession, defendant asks this Court to examine the claim in the interests of justice under the authority of CPL §

470.15(6). The scope of review for this Court is not addressed in CPL § 470.05 or CPL § 470.15, which details the scope of review of the intermediate appellate courts. The Court does not agree with the People's position that because the issue was not preserved for appellate review it cannot be raised on a post-conviction motion.

The present motion was brought pursuant to CPL § 440.20, and will be considered in accordance with the strictures as defined therein. Neither CPL § 440.20(2) nor CPL § 440.20(3) procedurally bars defendant from filing a motion based on the legality of his sentence where there has been no prior request for relief on the ground or issue now raised for the first time. As such, there is no procedural bar for this Court to consider defendant's motion on the merits.

A motion to set aside a sentence pursuant to CPL § 440.20 applies to a sentence which is unauthorized, illegally imposed, or otherwise invalid as a matter of law (*see generally, People v. Minaya*, 54 NY2d 360 [1981], *cert. denied*, 455 US 1024[1982]). The only question presented by defendant's current application is whether that sentence was based on material misinformation, and thus illegally imposed. Specifically, defendant contends that the sentencing court relied on incorrect information about his criminal history when imposing the sentence in this matter.

At sentencing, the court stated:

I will only make one comment. That's addressed to the issue of the defendant's rehabilitation.

His past history doesn't seem to indicate that he is in any way going to be rehabilitated – would be rehabilitated. He has committed various crimes. He has a YO for burglary. Then he get convicted of a burglary. He got an 18 and four months sentence after he got five years probation.

He really could be sentenced as a persistent felony offender. But the nature of my sentence, as recommended, not because it was recommended by Miss Gutman – I think she knew what I was going to do so that’s why she made the recommendations – the nature of my recommendation is tantamount to the same sentence that he would get as a persistent felony offender. (Sentencing Minutes, p. 17-18).

There is no dispute among the parties that at the time of the sentencing, defendant would not have been eligible for sentencing as a persistent felony offender. Furthermore, it is clear from the records that defendant was not sentenced as a persistent felony offender, but rather, he was properly adjudicated a second violent felony offender and sentenced as such. Also, there is no question that the sentence was within the permissible range of sentences for a second violent felony offender.

“Generally, as a matter of due process, an offender may not be sentenced on the basis of “‘materially untrue’ assumptions or ‘misinformation’” (People v Naranjo, 89 NY2d 1047, 1049 [2d Dept 1997] [*citing* United States v Pugliese, 805 F2d 1117, 1123, (2d Cir 1986) *quoting* Townsend v Burke, 334 US 736, 741[1948]). “Rather to comply with due process ... the sentencing court must assure itself that the information upon which it bases the sentence is reliable and accurate” (*Id. citing* People v Outley, 80 NY2d 702, 712 [1993]).

“The rule is that ‘on an application to vacate [a sentence] the party challenging the [sentence's] validity bears the burden of coming forth with allegations sufficient to create an issue of fact’” People v Adams, 164 AD2d 546, 553 (1991) (*quoting* People v. Session, 34 NY2d 254 [1974]).

Defendant’s allegations that the sentencing court relied on incorrect information about his criminal history when imposing the sentence in this matter is supported by the clear statement made by the sentencing court. The sentencing court stated his belief that defendant was a persistent felony

offender, but more importantly in the context of this motion, also stated that, "...the nature of my recommendation is tantamount to the same sentence that he would get as a persistent felony offender." (Sentencing Minutes, p. 17-18).

The People contend that there is ample evidence suggesting the Court knew defendant was a second violent felony offender and sentenced him as such. The court file contains both the Article 400 statement which was filed before sentence was pronounced and the commitment order reflecting defendant's sentence. The Article 400 statement includes defendant's correct criminal history, and the commitment order shows defendant was sentenced as a second violent felony offender to a permissible sentence for a second violent felony offender. The People suggest the sentencing court was well aware of the correct status of defendant, and then add that had the court known defendant could have been sentenced as a persistent felony offender, it would have done so. That argument is undermined by the statement the sentencing court made before handing down the sentence. In any event, defendant does not need to show that he was sentenced as a persistent felony offender, but rather, he must demonstrate a violation of due process.

In order to establish that a due process violation exists in this case, it is not required of defendant to demonstrate that the court enhanced his sentence based solely on his misapprehended criminal history. Defendant need only show that the sentencing court took into account its belief that defendant could be sentenced as a persistent felony offender when making its sentencing determination. *See, People v Barnes*, 60 AD3d 861, 863 (2d Dept 2006) (*citing United States v McDavid*, 41 F3d 841, 844 [1994]; *King v Hoke*, 825 F2d 720, 724 [1987]; and *United States v Malcolm*, 432 F2d 809, 816 [1970]).

The only reasonable inference that can be drawn from the statements made by the sentencing court is that the incorrect assertion that defendant could be a persistent felony offender was a factor

the sentencing court took into account when making its determination. What that necessarily means, is that the sentencing court considered an incorrect criminal history for defendant by either factoring in a youthful offender adjudication as a conviction, or by considering a conviction that simply does not exist. Therefore, defendant is correct that the sentencing court imposed an illegal sentence based upon a violation of defendant's due process rights. Accordingly, defendant's motion pursuant to CPL § 440.20 to set aside his sentence is granted.

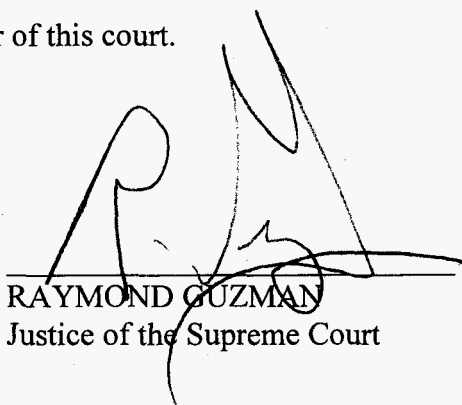
In accordance with CPL § 440.20(4), the validity and status of defendant's underlying conviction is not effected by this order. Defendant is to be produced before this Court on August 5, 2011, for resentencing in accordance with the law.

CONCLUSION

For the foregoing reasons, defendant's motion to set aside the sentence pursuant to CPL § 440.20 is granted.

This opinion shall constitute the Decision and Order of this court.

Dated: June 24, 2011
Brooklyn, New York


RAYMOND GUZMAN
Justice of the Supreme Court

ENTERED

JUN 28 2011

NANCY T. SUNSHINE
COUNTY CLERK