

People v Simmons

2011 NY Slip Op 32050(U)

June 14, 2011

Supreme Court, Kings County

Docket Number: 7634/91

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. 7634/91

NOAH HANCOCK SIMMONS,

Defendant.

-----X

INGRAM, J.

Defendant stands convicted, after jury trial in Supreme Court, Kings County on June 18, 1990 of Attempted Murder in the Second Degree, Attempted Robbery in the First Degree and Criminal Possession of a Weapon in the Second Degree. On September 11, 1992, Defendant was sentenced to concurrent term of imprisonment of fifteen years to life on the kidnaping count, eight and one-third to twenty-five years on the attempted murder count, and four to twelve years on the attempted robbery and weapon possession counts. (Firetog, J., at Wade hearing; Meyerson, J., at independent source hearing, trial and sentence).

Since his conviction, Defendant has pursued a myriad of post conviction remedies. Defendant appealed from his judgment of conviction to the Appellate Division, claiming that the court committed numerous errors during trial, including giving improper charge to the jury, failing to give curative instructions, and conducting improper inquiry of jurors. Defendant filed supplemental brief raising additional claims, including claims that the lineup identification and the testimony of his co-defendant, Nellie Tucker, should have been suppressed and the identification of Defendant by Winfred Broadnax, the independent source witness, should have been suppressed. On

March 6, 1995, the Appellate Division denied Defendant's motion and affirmed his conviction. People v. Simmons, 213 A.D.2d 433 (2d Dept. 1995). On June 6, 1995, the Court of Appeals denied leave to appeal. People v. Simmons, 86 N.Y.2d 741 (1995)(Ciparick, J.).

On October 11, 1995, Defendant sought writ of habeas corpus in United States District Court for the Eastern District of New York ("EDNY"), which was denied on April 25, 1996. (Trager, U.S.D.J.).

On May 10, 1996, Defendant sought to set aside his conviction pursuant to C.P.L. § 440.10, claiming that the identification of Defendant at trial was flawed, trial counsel was ineffective, prosecutor engaged in misconduct and the testimony of co-defendant, Nellie Tucker, should have been suppressed. On March 17, 1997, Judge Liebowitz denied Defendant's motion. On May 21, 1997, the Appellate Division denied Defendant's motion and affirmed his conviction. On June 19, 1997, the Court of Appeals denied leave to appeal. People v. Simmons, 90 N.Y.2d 863 (1997)(Ciparick, J.).

On October 8, 1997, Defendant filed a *pro se* notice of appeal from the order of EDNY dismissing his habeas petition. By order dated March 13, 1998, the Second Circuit granted Defendant a Certificate of Probable Cause. In brief dated May 15, 1998, Defendant alleged that the district court had improperly dismissed Defendant's *pro se* habeas petition. By Order dated November 18, 1998, the Second Circuit found that Defendant's claim was moot. Defendant's case was remanded to EDNY. Simmons v. Artuz, 165 F.3d 14 (2d Cir. 1998). Defendant submitted Memorandum of Law, dated December 28, 1999, in which he raised the claims of "malicious" prosecution, ineffective assistance of counsel and the court's improper handling of instructions to jurors. By Order dated July 13, 2000, Defendant's petition for a writ of habeas corpus was denied

and Defendant was denied leave to appeal. Simmons v. Artuz, CV-95-4229 (E.D.N.Y. July 13, 2000)(Ross, J.).

By papers dated August 15, 2001, Defendant filed a motion in this Court, pursuant to C.P.L. § 440.10, to vacate his judgment of conviction, claiming that the evidence before the grand jury was insufficient. On November 21, 2001, Defendant's motion was denied. (Leventhal, J.). On February 8, 2002, the Appellate Division denied Defendant's motion and affirmed his conviction. On March 6, 2002, the Court of Appeals denied leave to appeal. People v. Simmons, 97 N.Y.2d 761 (2002)(Grafteo, J.).

By *pro se* papers dated February 22, 2003, Defendant moved for an order pursuant to C.P.L. §§ 710.20, 710.60 and 710.70 to reopen the pretrial suppression hearing. By Order dated March 31, 2003, Defendant's motion was denied. (Firetog, J.).

By *pro se* papers dated July 26, 2004, Defendant moved a third time pursuant to C.P.L. § 440.10 to vacate the judgment of conviction, as well as, pursuant to C.P.L. § 440.20 to set aside the sentence because it violated the rule in Apprendi v. New Jersey and the Fifth Amendment of the United States Constitution. On September 23, 2004, Judge Silverman denied Defendant's motion. On August 10, 2005, the Appellate Division denied Defendant's application for leave to appeal to the Appellate Division.. On September 6, 2005, the Court of Appeals denied leave to appeal. People v. Simmons, 5 N.Y.3d 832 (2005)(Kaye, J.). On September 16, 2005, Defendant's application for reconsideration was denied. People v. Simmons, 5 N.Y.3d 833 (2005)(Kaye, J.).

By *pro se* papers dated July 6, 2008, Defendant moved a fourth time to vacate his judgment of conviction pursuant to C.P.L. § 440.10. Defendant raised the same claim that he had raised in his

May 10, 1996 §440.10 motion - that the People engaged in misconduct and bolstered the testimony of a witness. On November 7, 2008, Judge Parker denied Defendant's motion.

On December 28, 2008, Defendant moved *pro se* for writ of error coram nobis. The Appellate Division denied the application. People v. Simmons, 60 A.D.3d 1093 (2d Dept. 2009).

The Motion Before the Court

In a *pro se* motion dated March 5, 2011, Defendant now moves to vacate his judgment of conviction pursuant to C.P.L. § 440.10 on the grounds that the testimony of his codefendant, Nellie Tucker, should have been suppressed as fruits of Defendant's warrantless arrest. The People filed response on June 15, 2009 arguing that Defendant's claim is procedurally barred from review and is without merit. Defendant filed response to the People's opposition papers, dated May 11, 2011. In deciding the instant motion, this Court has considered Defendant's moving papers, the People's papers in opposition, copy of Indictment 7634/91 and applicable law.

The Court's Decision

Defendant's motion is procedurally barred. With respect to the claim that the testimony of his codefendant, Nellie Tucker, should have been suppressed as the fruit of his warrantless arrest, this claim must be denied as it was previously determined on the merits upon an appeal from judgement. C.P.L. § 440.10(2)(a); People v. Chapman, 10 Misc.3d 211, 213 (Sup. Ct. Kings County 2005). The Appellate Division, Second Department, held that Defendant's contentions raised in his supplemental *pro se* brief, which included the claim that testimony of Nellie Tucker should have been suppressed as the fruits of his illegal warrantless arrest, were "unpreserved for appellate review or without merit." People v. Simmons, 213 A.D.2d 433, 434 (2d Dept. 1995). Since this issue was

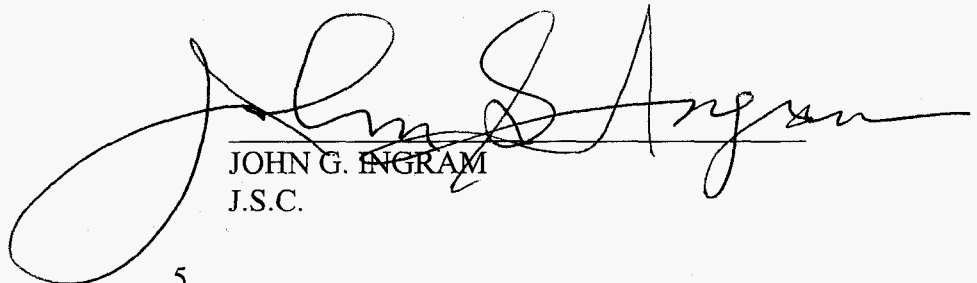
previously determined on the merits, as part of Defendant's direct appeal, this motion to vacate judgment must be summarily denied pursuant to C.P.L. § 440.10(2)(a). To the extent that the Appellate Division held that Defendant failed to preserve this claim for appellate review, Defendant's motion must be denied pursuant to C.P.L. § 440.10(2)(c). 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 that the testimony of his codefendant, Nellie Tucker, should have been suppressed as the fruit of his warrantless arrest. Since these issues could have been raised on direct appeal, they cannot properly be raised on the instant motion. C.P.L. § 440.10(2)(c); People v. Jossiah, 2 A.D.3d 877 (2d Dept. 2003); People v. Levine, 188 A.D.2d 665 (2d Dept. 1992).

Furthermore, Defendant's motion is denied pursuant to C.P.L. § 440.10(3)(b). Section 440.10(3)(b) permits the Court to deny a 440.10 application when the merits of a motion have previously been decided. Since Defendant's claim was raised in his May 10, 1996 C.P.L. 440.10 motion and denied, the Court denies Defendant's motion.

Accordingly, Defendant's motion is denied in its entirety

This opinion constitutes the Decision and Order of this Court.

Dated: June 14, 2011
Brooklyn, New York


JOHN G. INGRAM
J.S.C.