

People v Mill

2011 NY Slip Op 32779(U)

September 14, 2011

Supreme Court, Kings County

Docket Number: 10216-99

Judge: William E. Garnett

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

<p>THE PEOPLE OF THE STATE OF NEW YORK</p> <p>-against-</p> <p>BRIAN MILL, a/k/a BRIAN JACKSON, a/k/a BRYAN JACKSON</p> <p>Defendant.</p>

DECISION AND ORDER

Ind. #10216-99

Date: September 14, 2011

By: Hon. William E. Garnett

The defendant moves, pursuant to CPL §440.20, to set aside his April 24, 2001 sentence as a persistent violent felony offender on the ground that the sentence was invalid, illegally imposed and unauthorized as a matter of law. The defendant maintains that he should have only been sentenced as a second violent felony offender.

Background

On August 21, 1986, the defendant pleaded guilty to Criminal Possession of a Weapon in the Third Degree and was sentenced to six months incarceration concurrent with five-years probation on Kings County Indictment #4471/85.

On December 3, 1989, the defendant was arrested in New York County for Robbery in the First Degree and other charges. On September 5, 1990, he pleaded of guilty to Attempted Robbery in the Second Degree and was sentenced as a second violent felony offender to three to six years. This sentence was ordered to run

consecutively to an undischarged Nassau County sentence and was ordered to be served nunc pro tunc to December 17, 1989, the day that the defendant had been arrested in Nassau County for Criminal Possession of a Weapon in the Third Degree. On July 26, 1990, he had pleaded guilty to Attempted Criminal Possession of a Weapon in the Third Degree in the Nassau County case and had been sentenced to two to four years in prison as a second violent felony offender.

On July 21, 1994, the defendant was arrested in Kings County for Attempted Murder in the Second Degree. On February 23, 1995, he pleaded guilty to Attempted Criminal Possession of a Weapon in the Third Degree. The Predicate Violent Felony Statement listed the three prior convictions in Kings, New York and Nassau counties. The defendant was adjudicated a persistent violent felony offender and was sentenced to two years to life. This sentence was ordered to run concurrently with the previous undischarged sentences imposed in New York County and Nassau County cases.

On April 6, 2001, the defendant was convicted by a jury of Burglary in the First Degree and Robbery in the Second Degree in Kings County for crimes which had occurred on December 23, 1999.

On April 24, 2001, the District Attorney provided a Predicate Violent Felony Statement which listed the four prior violent felony convictions. The defendant admitted the prior convictions and sentences. He declined to challenge the constitutionality of any of those convictions. The court adjudicated the defendant a persistent

violent felony offender. The defendant was sentenced to concurrent terms of twenty-two and one-half (22 1/2) years to life for each conviction.

The defendant appealed the judgments of conviction on the ground that the evidence was insufficient to establish that the complainant had suffered physical injury. On December 2, 2002, the Appellate Division, Second Department affirmed. People v. Mill, 300 A.D.2d 323 (2d Dept. 2003). Leave to appeal to the Court of Appeals was denied. People v. Mill, 99 N.Y.2d 617 (2003).

Conclusions of Law

As the defendant failed to seek review of his adjudication as a persistent violent felony offender after the imposition of the 1995 Kings County sentence that determination became binding on him in his 2001 sentencing proceeding. CPL §400.16(2); CPL §400.15(8); People v. Loughlin, 66 N.Y.2d 633, 635-636 (1985); People v. O'Garra, 1 Misc.3d 901(A) (Sup. Ct., Bronx Co. 2003), aff'd, 16 A.D.3d 251 (1st Dept. 2005). Thus, he cannot now contest the use of the Kings County, New York County and Nassau County convictions as predicate violent felony convictions. CPL §400.16(2); CPL §400.15(8); People v. Tocci, 52 A.D.3d 541 (2d Dept. 2008); People v. O'Garra, supra.

In any event, the defendant was properly adjudicated a persistent violent felon.

Pursuant to PL §70.08(1)(a), "a persistent violent felony offender is a person who stands convicted of a violent felony offense ... after having been subjected to two or more predicate violent felony convictions as defined in paragraph (b) of subdivision one of section 70.04".

To qualify as a predicate violent felony conviction under PL §70.04(1)(b)(ii), the "[s]entence upon such prior conviction must have been imposed before commission of the present felony."

The Court of Appeals in People v. Morse, 62 N.Y.2d 205 (1984), has construed PL §70.08 to require sequentiality not only "between the present and predicate convictions" but also "between the predicate convictions as well as." People v. Morse, supra at 225.

Thus, in order for a defendant to be adjudicated a persistent violent felony offender under PL §70.08, the sentence on each predicate violent felony offense must have been sequential, i.e., imposed prior to the commission of the next predicate offense. People v. Morse, supra at 213, 225 (1984).

The defendant contends that this Court must vacate his current sentence because the predicate convictions could not be used to enhance his sentence as they violated the rule of sequentiality.

Specifically, the defendant maintains that his 1986 Kings County conviction could not serve as a predicate violent felony conviction because the conviction had been reversed. People v. Jackson, 149 A.D.2d 532 (2d Dept. 1989). The defendant's contention

is without merit. CPL §§440.30(4)(c), (d).

In 1987, the defendant was convicted after trial of Robbery in the First Degree under Kings County Ind. #5628/87. In 1989, the Appellate Division reversed that conviction. People v. Jackson, supra. Thus, the defendant's 1986 conviction for Criminal Possession of a Weapon in the Third Degree was not reversed and could serve as a predicate violent felony conviction.

Clearly, the defendant's 1986 conviction for Criminal Possession of a Weapon in the Third Degree was untainted by the reversal in the robbery case.

The defendant also contends that his 1990 New York County conviction cannot serve as a predicate violent felony conviction because the sentencing court ran his sentence nunc pro tunc to December 17, 1989.

A nunc pro tunc order does not change the date of sentencing. "[T]he date ... when sentence was imposed as part of the final judgment-is the controlling date, and ... the trial court's decree that the sentence run, 'nunc pro tunc', from a prior date, is irrelevant to the predicate felony sentencing statutes." People v. Lewis, 143 Misc.2d 752, 754 (Sup. Ct., Kings County 1989), mod. on other grounds, 175 A.D.2d 885 (1991). Thus, the defendant's 1990 New York County conviction is a predicate violent felony conviction.

The defendant further contends that his 1995 Kings County

conviction could not serve as a predicate violent felony conviction because that sentencing court had directed that his sentence run concurrently with his 1990 New York County and Nassau County sentences. The defendant maintains that the running of the sentences concurrently violated the rule of sequentiality.

Contrary to the defendant's contention, the running of sentences concurrently does not make "each of the sentences into one sentence".

In People v. Morse, supra, the defendant had had two prior violent felony convictions. He had pled guilty to each on separate indictments on the same day and had been sentenced on the same day to concurrent prison terms.

The Court of Appeals vacated the defendant's persistent violent felony offender adjudication, not because the sentences were to run concurrently, but rather, because the sentence on the first offense had not been imposed prior to the commission of the second offense and therefore, for the purposes of the violent persistent statute, these convictions constituted only one conviction.

Moreover, in Morse, supra, the Court of Appeals concluded that the date on which the offenses was committed and the date on which the sentences was imposed were determinative of whether the convictions constituted one or two prior violent felony convictions.

The imposition of concurrent sentences does not change those dates. Thus, the 1995 Kings County sentence stands alone as a prior violent felony conviction as this crime occurred after the imposition of the sentences on the earlier cases, i.e., the 1990 New York County and Nassau County sentences which were ordered to run concurrently with the new sentence.

In this case, the 1990 New York County and Nassau County convictions are but one conviction for the purpose of the defendant's adjudication as a persistent violent felon. The sentence on the New York County offense was not imposed prior to the arrest on the Nassau County offense.

Nevertheless, before the defendant was sentenced in this case, he admitted the four past violent felony convictions alleged in the Predicate Violent Felony Statement. Thus, the defendant conceded that he had sustained violent felony convictions in 1986, 1990 and 1995. Although the convictions in the 1990 cases count as only one conviction for the purpose of this persistent violent felony offender adjudication, the defendant has suffered three prior violent felony convictions which amply justify the defendant's adjudication as a persistent violent felon. Thus, his conviction in 2001 for violent felony offenses, committed after the imposition of the three, prior violent felony convictions, mandated the imposition of a sentence as a persistent violent felon.

The sentencing court's silence in regard to which predicate

violent felony convictions it was relying on in adjudicating the defendant a persistent violent felon is of no significance. Thus, in 2001, the sentencing court clearly had the requisite number of predicate violent felony convictions to justify the predicate violent felon designation.

Accordingly, based on the foregoing discussion and analysis, the defendant's motion to vacate the sentence pursuant to CPL §440.20(1) is denied. CPL §440.30(4)(a). The sentence imposed was neither "unauthorized, illegally imposed or otherwise invalid as a matter of law." CPL §440.20(1).

The defendant's remaining contention is likewise without merit.

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

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, NY 11201 for a certificate granting leave to appeal from this determination. This application must be made within thirty days of service of this decision. Upon proof of financial inability to retain counsel and to pay the costs and expenses of the appeal, the defendant may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Application for poor person relief will

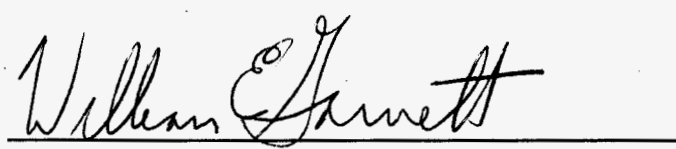
be entertained only if and when permission to appeal or a certificate granting leave to appeal is granted [22 NYCRR 671.5].

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.

Kings County District Attorney
Appeals Bureau
350 Jay Street
Brooklyn, NY 11201

Kings County Supreme Court
Criminal Appeals
320 Jay Street
Brooklyn, NY 11201

Dated: September 14, 2011
Brooklyn, New York



William E. Garnett
A.J.S.C.

ENTERED

SEP 19 2011

NANCY T. SUNSHINE
COUNTY CLERK