SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 38

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION AND ORDER
INDICTMENT NO.: 10815/94

BRENT FRAZIER,

Defendant.

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RUTH E. SMITH, J.:

By *Pro Se* Motion dated October 5, 2010 and Reply dated April 14, 2010, defendant, an inmate at the Sing Sing Correctional Facility, moves pursuant to CPLR § 2221 to renew his 1998 resentence, *nunc pro tunc*. For the reasons that follow, this court denies defendant's motion in its entirety.

PROCEDURAL HISTORY

On September 4, 1994, defendant and co-defendants, Tony Rosa, Anthony Daniel and Robert Fleming, entered the Wani Social Club, in Kings County, with shotguns and knives. While present they took money and jewelry from individuals present at the club. One of the defendants threw a chair at a person in the establishment and another individual was hit with a gun. On May 15, 1995, after a jury trial, defendant was convicted of Robbery in the First Degree (two counts), Robbery in the Second Degree (six counts), Assault in the Second Degree, Criminal Possession of Stolen Property in the Fifth Degree and Criminal Possession of a Weapon in the Fourth Degree (two counts). On May 15, 1995, defendant was sentenced, as a second violent felony offender, to consecutive terms of imprisonment of 10 to 20 years on each of the counts of Robbery in the First Degree. Defendant was also sentenced to 7 ½ to 15 years on one

count of Robbery in the Second Degree, to run consecutively to the sentences on the counts of Robbery in the First Degree and 7 ½ to 15 years on another count of Robbery in the Second Degree, also to run consecutively to aforementioned sentences. Additionally, defendant was sentenced to terms of 7 ½ to 15 years on three additional counts of Robbery in the Second Degree, a definite term of one year on each of the Criminal Possession of a Weapon in the Fourth Degree counts, 3 ½ to 7 years on the Assault in the Second Degree count and one year on the count of Criminal Possession of Stolen Property in the Fifth Degree. All of these terms ran concurrently to each other and to the consecutive terms.

On March 31, 1997, the Appellate Division, Second Department affirmed the judgment but vacated the sentences on the counts of Robbery in the Second Degree because the trial court failed to sentence defendant on the sixth count of Robbery in the Second Degree. Accordingly, it held as follows: "Ordered that the judgment is modified, on the law, by vacating the sentences imposed upon the defendant's convictions of robbery in the second degree; as so modified, the judgment is affirmed, and the matter is remitted to the Supreme Court, Kings County, for resentencing on those convictions...[T]he trial court failed to specifically pronounce sentence on each of the counts of which the defendant was convicted. Specifically, the court mentioned only five sentences for robbery in the second degree when the defendant was convicted of six counts of that crime. Accordingly, the matter must be remitted for resentencing on those convictions." (*People v. Frazier*, 237 AD2d 618, 619 [2nd Dept], *appeal denied* 90 NY2d 904 [1997]).

On April 8, 1998, defendant was resentenced on the counts of Robbery in the Second Degree. The court re-imposed the original sentence as to the five original counts of Robbery in

the Second Degree, namely, 7 ½ to 15 years (two of these counts to run consecutively and three to run concurrently). On the sixth count, however, the court sentenced defendant to 7 ½ to 15 years to run consecutively to the other four consecutive sentences.

On September 2, 1999, defendant filed a motion to reduce his sentence on the ground that it was excessive. On February 7, 2000, the Appellate Department, Second Department denied defendant's motion and affirmed his sentence, without opinion (*People v. Frazier*, 269 AD2d 885 [2nd Dept], *lv denied* 94 NY2d 947 [2000]).

On October 8, 1999, defendant filed a *pro se* motion for writ of *error coram nobis* in which he claimed ineffective assistance of appellate counsel. The Appellate Division, Second Department denied defendant's motion on December 27, 1999 (*People v. Frazier*, 267 AD2d 470 [2nd Dept 1999]).

On August 29, 2000, defendant filed a second *pro se* motion for writ of *error coram nobis* in which he claimed ineffective assistance of appellate counsel. The Appellate Division, Second Department denied defendant's motion on December 4, 2000 (*People v. Frazier*, 278 AD2d 243 [2nd Dept 2000]).

On December 8, 2004, defendant filed a third *pro se* motion for writ of *error coram nobis* in which he claimed that his appellate counsel had a conflict of interest because he had represented a co-defendant at trial. The Appellate Division, Second Department denied defendant's motion on April 4, 2005 (*People v. Frazier*, 17 AD3d 381 [2nd Dept], *lv denied* 5 NY3d 788 [2005]).

On June 20, 2006, defendant filed a *pro se* motion, with additional argument submitted

by counsel, dated April 11, 2007, pursuant to CPL § 440.20, to set aside his sentence. By Decision and Order dated November 3, 2006, defendant's motion was denied in part, and defendant was granted a hearing on a discrete matter relating to defendant's contention at sentencing that he wished to make a constitutional challenge to a previous 1991 conviction that had been used as the basis to enhance his sentence in the instant matter. Following the hearing, by Decision and Order dated April 27, 2007, the court (Ingram, J.), denied the motion since defendant had not established that his 1991 conviction had been obtained in violation of his constitutional rights.

On June 20, 2009, defendant filed a *pro se* motion, pursuant to CPL § 440.20, to set aside his sentence. In that motion, defendant claimed that 1) the consecutive sentence imposed on the resentence of the additional count of Robbery in the Second Degree (that the trial count had failed to sentence him on in the first instance) was as a result of the vindictiveness of the resentencing court; 2) that the resentencing court had violated the mandate of the Appellate Division, Second Department by resentencing him on one of the Robbery in the First Degree counts; and 3) the resentencing court failed to provide defendant with an opportunity to speak.

By Decision and Order dated April 8, 2010, defendant's motion was denied in its entirety (Guzman, J.). On September 13, 2010, the Appellate Department, Second Division denied defendant's motion for leave to appeal.

DISCUSSION

Defendant now moves to renew his 1998 resentence, *nunc pro tunc*, on the grounds that the resentencing court erred in directing that defendant serve a consecutive and not concurrent

sentence on the sixth count of Robbery in the Second Degree in violation of the directive of the Appellate Division decision. He further argues that the resentencing court violated CPL § 430.10 because it "lacked any statutory or inherent authority to modify the defendant's already commenced legal sentence by increasing the term of imprisonment by imposing consecutive terms when it was originally deemed to run concurrent" (4/14/11 Reply at 3).[1]

The People, proceeding as if defendant had filed a motion pursuant to either CPL §§ 440.10 or 440.20, argue that defendant's motion should be denied as procedurally barred since he failed to raise this issue in either of his two previous 440 motions and because his claim is without merit as it is based upon a misreading of the decision by the Appellate Division, Second Department remitting the case for resentencing.

In his reply, however, defendant points to the People's "misreading of the plain language of [defendant's] motion and moving papers, wherein defendant's instant motion is not a CPL § 440.10 or 440.20 motion, but a motion pursuant to CPLR § 2221 to renew the 1998 sentence, *nunc pro tunc*" (4/14/11 Reply at 1-2).

CPLR § 2221 provides that:

> (e) A motion for leave to renew:
>
> 1. shall be identified specifically as such;
>
> 2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and

[1]Page numbers preceded by "4/14/11 Reply" refer to Defendant's Reply to the People's Affirmation in Opposition to Motion to Renew Motion to Reduce Sentence, dated April 14, 2011.

> 3. shall contain reasonable justification for the failure to present such facts on the prior motion.

(*id.*).

Generally, "[a] motion for leave to renew must be based upon new facts not offered on the prior motion that would change the prior determination, and must set forth a reasonable justification for the failure to present such facts on the prior motion" (*Sobin v. Tylutki*, 59 AD3d 701, 702 [2nd Dept. 2009] [internal quotation marks omitted]). It is not "a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*id.*). In this case, defendant has not identified which motion he seeks to renew; has not offered any new facts that would change any prior determinations made by this court; and has not provided any reasons for his failure to do so. Accordingly, defendant's motion is denied (*see, People ex rel. Van Steenburg v. Wasser*, 69 AD3d 1135 [3d Dept], *lv to appeal dismissed in part, denied in part* 14 NY3d 883 [2010]).

CONCLUSION

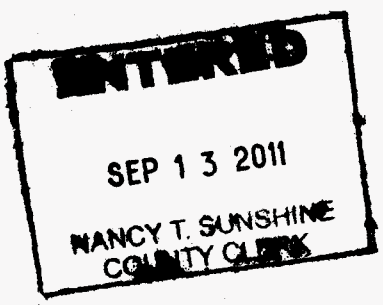
Based upon the foregoing reasons, the Court denies defendant's motion in its entirety. This Decision shall constitute the Order of the court.

The defendant is hereby advised pursuant to 22 NYCRR § 671.5 of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York 11201, for a certificate granting leave to appeal from this determination. This application must be made within 30 days of service of this decision. Upon proof of his 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 certification granting leave to appeal is granted.[2]

ENTER,

Ruth E. Smith, A.J.S.C.



[2]22 NYCRR § 671.5 .