

**People v Bishop**

2011 NY Slip Op 33492(U)

October 25, 2011

Supreme Court, Kings County

Docket Number: 5427/2005

Judge: John G. Ingram

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

-----X  
THE PEOPLE OF THE STATE OF NEW YORK,      DECISION AND ORDER

-against-

Indictment No. 5427/2005

DARREN BISHOP,

Defendant.

-----X

INGRAM, J.

Defendant stands convicted, following a jury trial in Supreme Court, Kings County, March, 14, 2006 of Assault in the First Degree (P.L. 120.10(1)), Assault in the Second Degree (P.L. 120.05(1)), Assault in the Third Degree (P.L. 120.00(1)) and Criminal Possession of a Weapon in the Fourth Degree (P.L. 265.01(2)). On April 28, 2006, Defendant was sentenced as a predicate felony offender to concurrent prison terms of twenty-two years for Assault in the First Degree, six years for Assault in the Second Degree and one year each for both the Assault in the Third Degree and Criminal Possession of a Weapon in the Fourth Degree. (Ingram, J., at trial and sentence).

Defendant appealed from his judgment of conviction. In motion filed in the Appellate Division, Second Department, Defendant claimed that his counsel provided him with ineffective assistance because he failed to serve a notice of a psychological defense, failed to obtain an admissible set of Defendant's medical records and improperly focused the defense on police misconduct rather than justification. Defendant also claimed that his sentence should be reduced. Defendant filed a pro se supplemental brief in which he claimed that his trial counsel provided him with ineffective assistance because he chose to assert a justification defense rather than a psychiatric

defense and failed to obtain an admissible set of his medical records. In addition, he claimed that his sentence was excessive.

On March 31, 2009, the Appellate Division rejected Defendant's argument and affirmed Defendant's conviction. People v. Bishop, 60 A.D.3d 1076 (2d Dept. 2009). The Appellate Division held that Defendant's trial counsel provided him with effective representation and that the sentence was not excessive. Bishop, 60 A.D.3d at 1076.. On July 13, 2009, the Court of Appeals denied Defendant's leave application. People v. Bishop, 12 N.Y.3d 923 (2009)(Ciparick, J.).

#### The Motion Before the Court

In a pro se motion dated June 9, 2010, Defendant moves to vacate his judgment of conviction pursuant to C.P.L. § 440.10 on the grounds that his trial counsel provided ineffective assistance in that he failed to: serve notice that Defendant was going to present a psychological defense, obtain an admissible set of Defendant's medical records, include an expert on his witness list and correctly advise him on the plea offer and what his maximum jail sentence would be if he was convicted after trial.

The People filed their response on July 22, 2010, arguing that every aspect of Defendant's ineffective assistance of counsel claim, except for the claim concerning the advice related to the plea offer, is procedurally barred from review and is without merit.

#### The Court's Decision

Pursuant to C.P.L. § 440.10(2)(a) a motion to vacate a judgment of conviction must be denied if the issue was determined previously on the merits upon an appeal of the judgment. Defendant's claim that his counsel was ineffective because he failed to serve notice of a

psychological defense and failed to obtain an admissible copy of his medical records are the same claims that he raised on his direct appeal and were rejected by the Second Department. See People v. Bishop, 60 A.D.3d 1076 (2d Dept. 2009). Therefore, the claims are procedurally barred from review. C.P.L. § 440.10(2)(a).

In addition, Defendant's claim regarding counsel's failure to list an expert witness on the defense's witness list is also procedurally barred from review. A motion to vacate a judgment of conviction must be denied if there are sufficient facts on the record to have allowed adequate review of the issue on direct appeal. C.P.L. § 440.10(2)(c). A motion to vacate a judgment of conviction should not be "employed as a substitute for direct appeal when Defendant was in a position to raise the issue on appeal, but failed to do so." People v. Cooks, 67 N.Y.2d 100, 103 (1986). Defendant's claim that he received ineffective assistance of counsel because of his counsel's failure to list a witness on the witness list is purely record based. The record presented sufficient facts from which Defendant could have raised his present claim. However, Defendant unjustifiably failed to do so. Since this issue could have been raised on direct appeal, it cannot properly be raised on the instant motion.

Finally, Defendant's claim that counsel improperly advised him about the People's plea offer and incorrectly informed him about his maximum sentencing exposure after a trial conviction must also be rejected. In considering the merits of Defendant's motion, the court may deny it if an allegation of fact essential to support the motion is contradicted by a court record or other official document or is made solely by Defendant and is unsupported by any other affidavit or evidence and under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true. C.P.L. § 440.30(4)(d). Defendant's claim is rejected because it is being

made solely by Defendant, without any evidence to support it, and is controverted by Defendant's trial counsel, William Martin, Esq., who provided an affidavit which contradicts Defendant's claim.

Accordingly, Defendant's motion is denied.

*This opinion constitutes the Decision and Order of this Court.*

You are advised that your right to an appeal from the order determining your motion is not automatic except in the single instance where the motion was made under CPL §440.30(1-a) for forensic DNA testing of evidence. For all other motions under Article 440, you must apply to a Justice of the Appellate Division for a certificate granting leave to appeal. This application must be filed within 30 days after your being served by the District Attorney or the court with the court order denying your motion.

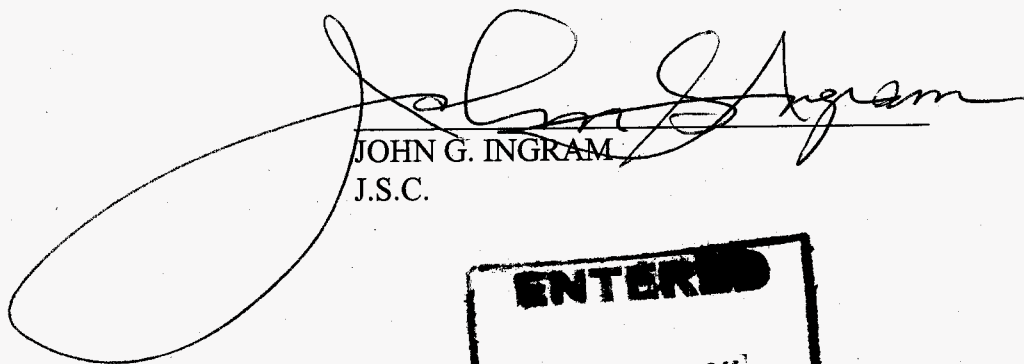
The application must contain your name and address, indictment number, the questions of law or fact which you believe ought to be reviewed and a statement that no prior application for such certificate has been made. You must include a copy of the court order and a copy of any opinion of the court. In addition, you must serve a copy of your application on the District Attorney.

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Dated: October 25, 2011  
Brooklyn, New York



JOHN G. INGRAM  
J.S.C.

**ENTERED**  
OCT 26 2011  
NANCY T. SUNSHINE  
COUNTY CLERK