

People v Miller

2011 NY Slip Op 33577(U)

November 14, 2011

Supreme Court, Kings County

Docket Number: 13826/92

Judge: John G. Ingram

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 21

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

-against-

Indictment No. 13826/92

MICHAEL MILLER,

Defendant,

-----X

INGRAM, J.

Defendant stands convicted, in Supreme Court, Kings County of two counts of Murder in the Second Degree (P.L. § 125.25(1)) and was sentenced to consecutive terms of imprisonment of twenty-five years to life on one count and twenty years to life for the other count. (Hall, J., at trial and sentence).

Defendant appealed from his judgment of conviction. In motion filed in the Appellate Division, Second Department, Defendant claimed that he was deprived of a fair trial by the admission of uncharged criminal activity and that his sentence was excessive. On November 13, 1995, the Appellate Division rejected Defendant's argument and affirmed Defendant's conviction. People v. Miller, 221 A.D.2d 477 (2d Dept. 1995). The Appellate Division held that the evidence of Defendant's uncharged crime, a robbery, was admissible because it was probative of Defendant's motive and intent and the probative value of the uncharged robbery outweighed its prejudicial effect. Miller, 221 A.D.2d at 478. In addition, the Appellate Division "found no basis in the record for disturbing the consecutive sentences imposed by the court." Id. On January 5, 1996, the Court of Appeals denied Defendant's leave application. People v. Miller, 87 N.Y.2d 923 (1996)(Smith, J.).

On April 15, 1997, Defendant moved in the Appellate Division, Second Department, for a writ of error coram nobis, on the ground of ineffective assistance of appellate counsel. On September 15, 1997, the Appellate Division held that Defendant failed to establish that he was denied the effective assistance of appellate counsel. People v. Miller, 242 A.D.2d 591 (2d Dept. 1997).

Defendant filed application for a writ of habeas corpus in the U.S. District Court for The Eastern District of New York (“District Court”). In an Order dated June 29, 2001, the U.S. District Court denied Defendant’s petition for a writ of habeas corpus. Miller v. Portuondo, 151 F. Supp.2d 245 (E.D.N.Y 2001)(Gershon, J.). The court found Defendant’s ineffective assistance claims to be procedurally barred, and in any event, to be meritless. The court also held that Defendant was not entitled to retroactive application of changes in New York’s law with regard to depraved indifference murder. By order dated March 6, 2002, the United States Court of Appeals for the Second Circuit denied Defendant’s application for a certificate of appealability from the denial of his habeas petition.

On March 28, 2005,, Defendant filed pro se motion in Supreme Court, Kings County, to vacate his judgement of conviction pursuant to C.P.L. § 440 alleging that his trial attorney was ineffective. In an Order dated October 12, 2005, Supreme Court, Kings County (Hall, J.), denied Defendant’s motion to vacate his judgment of conviction holding that his motion was procedurally barred and because Defendant failed to show that he was denied effective assistance of trial counsel.

By Order dated February 1, 2006, Defendant’s application for leave to appeal to the Appellate Division from the Order denying his motion to vacate his judgment was denied.

On December 8, 2009, Defendant moved in the Appellate Division, Second Department, for a writ of error coram nobis, on the ground of ineffective assistance of appellate counsel. On June 1, 2010, the Appellate Division held that Defendant failed to establish that he was denied the effective assistance of appellate counsel. People v. Miller, 74 A.D.3d 842 (2d Dept. 2010). Defendant applied for permission to appeal the Appellate Division's Order to the Court of Appeals. By Order dated August 23, 2010, Defendant's application for leave to appeal was denied. People v. Miller, 15 N.Y.3d 807 (2010)(Graffeo, J.).

The Motion Before the Court

In pro se motion dated August 9, 2011, Defendant now moves to vacate his judgment of conviction pursuant to C.P.L. § 440.10 on the ground that the court did not prepare a certificate of conviction and that counsel was ineffective for not informing him that the court had not prepared the certification of conviction. In papers dated September 15, 2011, the People opposed. In deciding the instant motion, this Court considered Defendant's moving papers, the People's papers in opposition, the court file, transcripts and applicable law.

The Court's Decision

All of Defendant's claims are procedurally barred from this court's review and must be denied. C.P.L. § 440.10(2)(c) provides that the Court must deny a motion to vacate a judgment when, "although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him."

Defendant's allegation that the Court failed to make a certificate of conviction, thus denying Defendant his due process rights, is denied because Defendant's claim relies on facts appearing on the record. Defendant clearly relies on the record to support his claim. Although adequate appellate review of this claim was available, Defendant failed to perfect an appeal and offers no explanation for this failure. Accordingly, this Court is now foreclosed from reviewing his claims. People v Cooks, 67 N.Y.2d 100 (1986).

In addition, this Court denies Defendant's motion because he could have raised his current claims in this first motion to vacate judgment. C.P.L. § 440.10[3] [c] authorizes summary denial of a motion to vacate judgment when "[u]pon a previous motion made pursuant to [C.P.L. § 440.10], the Defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so." In his previous C.P.L. § 440.10 motion, Defendant did not raise the claim that the court failed to make a certificate of conviction, thus denying his right to due process. Defendant has not offered any explanation for his failure to raise this claim in his prior motion. He has therefore not demonstrated that there was good cause for his failure, or why it would be in the interest of justice to consider the merits of his claim.

Furthermore, this Court denies Defendant's motion pursuant to C.P.L. 440.30(4)(c) and (d). Pursuant to C.P.L. § 440.30(4)(c) and (d), a court may deny a motion to vacate a judgment of conviction if "[a]n allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof; or...[a]n allegation of fact essential to support the motion is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true."

The court file contains a copy of the sentence and commitment order, which refutes Defendant's claim that the Court failed to prepare sufficient documents with regard to his sentencing.

Therefore, this claim is likewise procedurally barred pursuant to C.P.L. § 440.30(4)(c) and (d), in that it is conclusively refuted by unquestioned documentary proof and contradicted by court records. Consequently, Defendant's allegation that his counsel was ineffective for failing to inform him that the Court had not prepared sufficiently the certificate of conviction is without merit.

Even if this Court were to consider Defendant's argument on the merits, his motion must be denied. Defendant claims that the certificate of conviction that was issued in this case is defective because it was not signed by the sentencing judge. However, the law expressly provides that "a criminal court, or the clerk thereof:" can issue certificates of conviction. See C.P.L. § 60.60(1). Certificates of conviction that are signed by court clerks have been held to be proper. See People v. Mezon, 228 A.D.2d 621 (2d Dept. 1996). A certificate issued by the clerk of the court certifying that the judgment of conviction against Defendant has been entered in the court, as is the case here, constitutes presumptive evidence that a valid judgment of conviction was entered. See C.P.L. § 60.60(1). That certificate constitutes authority for the execution of the sentences and serves as the order of the commitment. See C.P.L. § 380.60; Haynes v. Artus, 51 A.D.3d 1075 (3rd Dept. 2008)(holding that document entitled "sentence and order of commitment" satisfies the statutory requirements).

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, Second Department, 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.

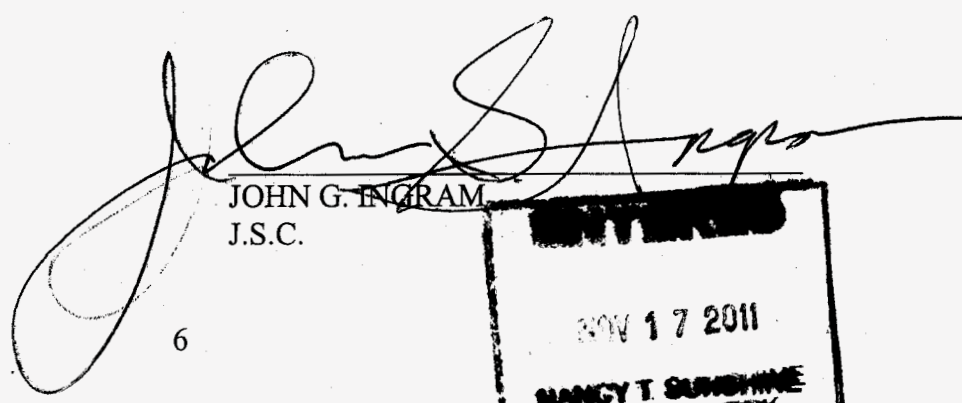
The application must contain your name and address, indictment number, the questions of law or fact which you believe ought to be reviewed and a statement that no prior application for such certificate has been made. You must include a copy of the court order and a copy of any opinion of the court. In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

APPELLATE DIVISION, 2ND Department
 45 Monroe Place
 Brooklyn, NY 11201

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

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

Dated: November 14, 2011
 Brooklyn, New York


 JOHN G. INGRAM
 J.S.C.

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 COUNTY CLERK