

**People v Smith**

2012 NY Slip Op 30573(U)

February 1, 2012

Supreme Court, Kings County

Docket Number: 981/2006

Judge: Schillingford

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

-----X  
THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION AND ORDER  
INDICTMENT NO.: 981/2006

BLAIR SMITH,

Defendant.

-----X  
Ruth Shillingford, J.:

By *Pro Se* motion dated May 4, 2011, defendant, an inmate at the Fishkill Correctional Facility, moves pursuant to CPL § 440.10(h) to vacate his judgment of conviction, entered on or about April 2, 2007, following a jury trial, convicting him of Criminal Sale of a Controlled Substance in the Third Degree and Criminal Possession of a Controlled Substance in the Third Degree, respectively, and sentencing him, as a second violent felony offender, to concurrent terms of ten years incarceration and three years post release supervision. For the reasons that follow, this Court denies defendant's motion.

PROCEDURAL HISTORY

This case stems from a buy and bust operation wherein one undercover, who was being observed by a ghost undercover, gave George Quintana buy money. They then walked to meet defendant, whereupon Quintana gave him the money in return for the vial which Quintana gave to the undercover officer. Defendant was arrested shortly thereafter with thirty-four matching vials and \$619, including the \$10 in buy money. A chemist for the New York City Police Department tested the vial purchased by the undercover officer. It was determined that the substance in the vial was cocaine. A second chemist weighed one of the thirty-four vials

## DISCUSSION

Relying on CPL § 440.10(h), defendant now moves to vacate his conviction due to the ineffective assistance of counsel, essentially reiterating the claims that he made in his coram nobis application, instead now focusing directly on the failures of trial counsel.

The People argue that pursuant to CPL § 440.10 (2)(a) and (c), defendant's motion should be denied as procedurally barred, because all of the claims are based upon facts that appear on the record. They contend further that defendant's claim concerning the improper closure of the courtroom was specifically rejected on appeal. This Court agrees.

CPL § 440.10 (2)(c) provides that:

2. Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate judgment when:

(c) 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

(*id.*).

In supporting his contentions, defendant cites repeatedly to the record. On his direct appeal, defendant unjustifiably failed to raise these claims, "although sufficient facts appear on the record to have permitted adequate appellate review" (*People v. Mobley*, 59 AD3d 741, 742 [2<sup>nd</sup> Dept], *lv denied* 12 NY3d 856 [2009]). Accordingly pursuant to CPL § 440.10 (2)(a) and (c), defendant's motion vacate his conviction is denied.

recovered from defendant, and based upon the weight of that vial, projected the total weight of all the vials to be 41.6 grams. He also re-tested the substance found in the vial purchased by the undercover, and tested one of the thirty-four vials recovered from the defendant and concluded that the substance in both vials was cocaine.

On appeal, defendant argued that he had been denied his right to a fair trial because the court (1) closed the courtroom without a showing that an open courtroom would present a particularized risk to the undercover officers or their investigations; and (2) improperly responded to the jury's request for a readback of the testimony.

On December 2, 2008 the Appellate Division affirmed defendant's conviction, rejecting his claims as both unpreserved and without merit. Thus, as to the jury claim, it held that "the Supreme Court providently exercised its discretion in seeking clarification of the jury's request for a readback..." and "moreover, the court did not pressure the jury to abandon its initial request..." (*People v. Smith* 57 AD3d 579, 580 [2<sup>nd</sup> Dept], *lv denied* 12 NY3d 762 [2009]).

On July 26, 2010, defendant filed a petition for a writ of error coram nobis claiming, *inter alia*, that his appellate counsel was ineffective for failing to argue that (1) defendant was denied his right to a public trial due to the court's decision to close the courtroom during the testimony of the undercover officers' testimony, and (2) was deprived of a fair trial due to the court's response to the request, by the deliberating jury, for a readback of certain testimony. Defendant also decried appellate counsel's failure (1) to challenge the classification of cocaine as a narcotic drug; (2) to employ a pharmacological expert, and (3) to attack trial counsel's generally deficient performance. The Appellate Division denied his petition (79 AD3d 1152 [2<sup>nd</sup> Dept. 2010]).

Furthermore, CPL § 440.10 (2)(a) provides that:

2. Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate judgment when:

(a) The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue;

(*id.*).

Defendant's aforementioned claims, regarding the trial court's closure of the courtroom during the testimony of the undercover officers, and its response to the request by the jury for a readback of testimony, was previously argued and decided on the merits on appeal (*see People v. Smith*, 57 AD3d 579, 580 [2<sup>nd</sup> Dept] *lv denied* 12 NY3d 762 [2009]). Accordingly, pursuant to CPL §440.10 (2)(a), these claim is barred.

#### CONCLUSION

Based upon the foregoing reasons, the Court denies defendant's motion in its entirety.

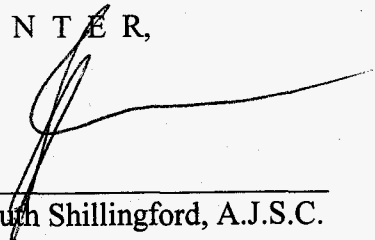
This Decision shall constitute the Order of the court.

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.<sup>1</sup>

Dated: Brooklyn, New York  
February 1, 2012

ENTER,



Ruth Shillingford, A.J.S.C.

**ENTERED**  
**FEB - 2 2012**  
**NANCY T. SUNSHINE**  
**COUNTY CLERK**

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<sup>1</sup> 22 NYCRR § 671.5 .