

People v Hope
2012 NY Slip Op 31085(U)
April 10, 2012
Sup Ct, Kings County
Docket Number: 6946/99
Judge: Joel M. Goldberg
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 22**

THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER

- vs -

HON. JOEL M. GOLDBERG

IND. NO. 6946/99

DATE: APRIL 10, 2012

**ANTWAN HOPE
AKA ANTWAN HOPKINS,**

DEFENDANT.

The defendant's *pro se* motion pursuant to CPL 440.10, dated December 15, 2011, to vacate the judgment of February 7, 2000 convicting him upon his plea of guilty to Conspiracy in the Fourth Degree and sentencing him as a second felony offender to a term of imprisonment of one and one-half to three years to run concurrently with two New York County sentences, upon consideration of the People's answer, dated March 12, 2012, is denied.

By an undated motion with an attached "verification of unavailable notary public services" dated March 19, 2012, the defendant moved for an order granting him the right to either withdraw this motion or allow him 90 days to amend it, because he believed his legal claims had not been adequately presented and because he wished to raise additional claims concerning ineffective assistance of counsel, the details of which were not specified. For the reasons discussed below, the defendant's motion to withdraw or amend this motion is denied.

Procedural History

The defendant was originally indicted with 17 co-defendants under Kings County Indictment Number 5120/99, filed August 23, 1999, for Conspiracy in the Fourth Degree involving gang-related activities. The indictment also charged some of the co-defendants with Robbery in the First Degree. Prior to all of the defendants being arraigned on this indictment, a superceding indictment, the indictment herein, was filed on September 10, 1999. That indictment included four additional co-defendants. The indictment included similar charges of Conspiracy in the Fourth Degree, i.e., agreeing to commit crimes constituting a Class B felony. Additional substantive crimes were also charged. The defendant in this indictment was charged with personally committing one count each of Assault in the Second Degree and Criminal Possession of a Weapon in the Fourth Degree, neither of which is a Class B or C felony which is a required object crime to support a charge of Conspiracy in the Fourth Degree.

The defendant was arraigned on the superceding indictment on September 13, 1999. By operation of law, upon this arraignment, pursuant to CPL 200.80, the charges in the original indictment on which neither the defendant nor any of his co-defendants had been arraigned were dismissed, because those same charges were all contained in the superceding indictment along with additional charges and additional defendants.

On January 27, 2000, the defendant pleaded guilty to one count of Conspiracy in the Fourth Degree in satisfaction of this indictment and was subsequently sentenced as noted above. Due to the age of the case, there has been difficulty in obtaining the plea minutes.

The Defendant's Motion

The defendant's first point is entitled "Insufficiency of Evidence." In this point

the defendant states that the record of the proceedings does not reflect that he was ever positively identified in a lineup. Furthermore, the defendant argues that neither of the two substantive crimes he was charged with was a Class B or Class C felony and, therefore, the indictment did not support the charges of Conspiracy in the Fourth Degree which requires an agreement to engage in conduct constituting a Class B or Class C felony (PL 105.10 [1]).

The defendant's second point is entitled "Nature and Elements." In this point the defendant seems to argue that he was not convicted of either of the two substantive crimes for which he was indicted. Therefore, no overt act was shown to have been performed by him or his co-conspirators in furtherance of the conspiracy.

The defendant's third point is entitled "Malicious Prosecution." In this point the defendant asserts that he was improperly prosecuted on the superceding indictment after the original indictment was dismissed. The defendant asserts (1) that the first indictment was dismissed after the prosecutor determined there was insufficient evidence to prosecute the defendant, (2) that the prosecutor did not believe in the defendant's guilt, and, (3) that the superceding indictment reflected a malicious, baseless prosecution.

The defendant's fourth point is entitled "Double Jeopardy." This point also relates to the dismissal of the first indictment and contends that the dismissal barred the defendant's prosecution under the superceding indictment based on double jeopardy principles.

The defendant's fifth point is entitled "Due Process." Under this point, the defendant contends he was unconstitutionally prosecuted after the original indictment was dismissed due to "lack of evidence." Further, the defendant contends that the charges

were wrongfully resubmitted to a second Grand Jury and he was wrongfully not given notice of this resubmission and an opportunity to testify before the second Grand Jury.

Discussion of the Motion to Vacate the Judgment

With one exception to be discussed below, all of the defendant's claims relate to matters on the record which could have been raised on a direct appeal from the conviction. Because the defendant did not appeal from the judgment, CPL 440.10 (2) (c) requires that the motion based on these claims be denied. *People v Cooks*, 67 NY2d 100, 103 (1986). The defendant's contentions (1) that the indictment did not support a charge of Conspiracy in the Fourth Degree, (2) that his guilty plea to Conspiracy in the Fourth Degree was simultaneous with "dismissals" of the assault and weapons counts in the indictment and, therefore, there was no overt act established, (3) that he was maliciously prosecuted on a superceding indictment after the charges in the first indictment were all dismissed, and (4) that his double jeopardy and (5) due process rights were violated by his prosecution following a dismissed indictment that had been superceded, all involve facts that sufficiently appear on the record to have permitted adequate review of these claims on appeal. The defendant's unjustifiable failure to take an appeal from this judgment now requires that this motion be denied.

The additional claim in the motion that the evidence against the defendant was insufficient because the "defendant was never positively identified in a lineup" does not establish a legal basis to grant the motion to vacate the judgment, because any claims regarding insufficiency of the evidence supporting the indictment were waived by the defendant's guilty plea. *People v Hansen*, 95 NY2d 227, 233 (2000); *People v Dunbar*, 53 NY2d 868, 871 (1981); *People v Melendez*, 48 AD3d 960 (1st Dept. 2008); *People v Eul Sin Jang*, 17 AD3d 693, 694 (2nd Dept. 2005). Therefore, that part of the motion based on this claim may be denied without a hearing. CPL 440.30 (4) (a).

Furthermore, the defendant's claims, in addition to being procedurally barred, also have no substantive merit. The charges in the original indictment, contrary to the defendant's assertions, were not dismissed on evidentiary grounds. Rather, the original indictment was dismissed, because the identical charges in that indictment were contained in the superceding indictment which also contained additional charges. The law recognizes that it would not be proper for the identical charges to be contained in two separate indictments. That is why CPL 200.80 requires that charges contained in the first indictment that are also contained in a superceding indictment be dismissed upon a defendant's arraignment on the superceding indictment.

In addition, the defendant claims that the two substantive charges against him of assault and possession of a weapon in the superceding indictment were dismissed on the merits which then somehow undermined the validity of the conspiracy charge. However, what actually happened was that the defendant's guilty plea to the charge of Conspiracy in the Fourth Degree in satisfaction of all the charges in the superceding indictment, which was entered with the permission of the Court and the consent of the People pursuant to CPL 220.10 (4) (a), required that the remaining charges against him in that indictment be deemed to have been dismissed. CPL 220.30 (2) states that, "The entry and acceptance of a plea of guilty to part of the indictment constitutes a disposition of the entire indictment." Therefore, the two substantive charges against the defendant were dismissed only because the defendant pleaded guilty to another count in the indictment. Further, establishing the defendant's guilt on the substantive charges was not necessary to establish the defendant's guilt on the conspiracy charge to which he pleaded guilty. Therefore, the defendant's assertion that the conspiracy charge was undermined by the dismissal of the two substantive charges is without merit.

Further, the charge of Conspiracy in the Fourth Degree did not, as the defendant asserts, require that the defendant also be separately charged with personally having committed a Class B or Class C felony, but only that the defendant did agree with one or more persons to commit such a felony and that an overt act, whether by the defendant or by some other member of the conspiracy, was committed in furtherance of the commission of that conspiracy. PL 105.10 (1) and PL 105.20.

Finally, the dismissal of the original indictment and the prosecution of the defendant on the superceding indictment did not constitute a violation of the defendant's double jeopardy protections, because the defendant had not gone to trial on or pleaded guilty to the original indictment. CPL 40.20 (1), which embodies the constitutional protections against double jeopardy, states that "A person may not be twice prosecuted for the same offense." CPL 40.30 states a person "is prosecuted" when an accusatory instrument is filed against a person and (a) terminates in a conviction upon a plea of guilty or (b) proceeds to the trial stage by either the swearing of a jury or, in the case of a trial without a jury, when a witness is sworn. Because the original indictment against the defendant did not result in a guilty plea or the commencement of a trial, the defendant's double jeopardy rights were not violated by the dismissal of the original indictment and his subsequent prosecution on a superceding indictment.

For the same reasons, the defendant has failed to set forth facts establishing a violation of his due process rights or establish that he was maliciously prosecuted merely because a superceding indictment was filed which resulted, by operation of law, in a dismissal of the charges in the original indictment. Further, the defendant's right to testify before the Grand Jury was not violated, because he never made a request to do so. CPL 190.50 (5) (a). Further, no motion to dismiss the superceding indictment for failure to provide the defendant with an opportunity to testify was made within five days of the

defendant's arraignment as required by CPL 190.50 (5) (c), thereby waiving the challenge to the indictment on that ground.

Discussion of the Motion to Withdraw or Amend the Motion

After the defendant's motion was filed, the People spent time and effort researching the underlying facts of this case and answering the defendant's motion. Further, prior to the defendant making his March 2012 request to withdraw or amend this December 2011 motion three months after it was filed, the Court also spent time researching the issues and drafting its decision on the motion. Considering that the defendant has long ago completed serving his sentence in this case, the Court, under all of the circumstances, including considerations of judicial economy, believes the defendant's request to withdraw or amend this motion should be denied.

The Court is aware that CPL 440.10 (3) [c] provides that a subsequent motion to vacate a judgment may be denied where the subsequent motion for the first time raises a ground or issue that the defendant "was in a position adequately to raise" on a prior motion. However, the Court is also aware that the same statute provides the Court with the discretion to nevertheless consider the newly raised ground or issue if it is otherwise meritorious and vacate the judgment if good cause is shown for not previously raising the ground or issue.

Accordingly, the defendant's motions are denied without a hearing.

SO ORDERED


JOEL M. GOLDBERG
JUDGE

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