

People v Crichlow
2012 NY Slip Op 32002(U)
June 25, 2012
Sup Ct, Kings County
Docket Number: 7621/05
Judge: Raymond Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 9

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

DECISION AND ORDER
Indictment # 7621/05

-against-

KEVIN CRICHLOW,

Defendant,

----- X
RAYMOND GUZMAN, J.S.C.

INTRODUCTION

On January 29, 2007, detectives from the New York City Police Department Warrant Squad arrived at 238 New York Avenue in Kings County for the purpose of arresting defendant on an outstanding New York County warrant. After knocking on the door and alerting defendant to the reason for their arrival, the detectives noticed flames shooting out from under defendant's apartment door. The Fire Department was called and the flames were extinguished before they could spread any further throughout the residential apartment building.

While the fire was burning in the front of defendant's apartment, defendant himself attempted to escape through a window into an air shaft between his building and the building next door. Finding himself trapped in the air shaft, defendant attempted to gain entry to the apartment of a neighbor in the adjacent building by breaking the window and climbing into the apartment. Defendant was soon captured by the police who were alerted to his presence by the woman that lived in the adjacent apartment defendant had broken into.

For these crimes, defendant was charged by Kings County Indictment Number 1283/2007 with Arson in the Second Degree (Penal Law § 150.15); Arson in the Third Degree (Penal Law §

150.10[1]); Arson in the Fifth Degree (Penal Law § 150.01); and Criminal Mischief in the Fourth Degree (Penal Law § 145.00[1]).

Following a jury trial before this Court, defendant was convicted of Arson in the Second Degree (Penal Law § 150.15) and Criminal Mischief in the Fourth Degree (Penal Law § 145.00[1]). On June 17, 2008, the Court sentenced defendant to a determinate term of imprisonment of twenty years with five years post-release supervision for the Arson in the Second Degree conviction, and a determinate term of one year imprisonment for the Criminal Mischief in the Second Degree conviction.

Defendant filed a previous *pro se* motion to vacate his judgment of conviction following his conviction, which this Court denied by decision and order dated December 16, 2010. Defendant also filed an appeal on this matter. By slip opinion dated December 28, 2010, defendant's judgment of conviction was affirmed. People v Crichlow, 79 AD3d 1144 (2d Dept 2010).

By *pro se* motion papers dated November 16, 2011, and supplemented December 16, 2011, defendant moves this Court for an Order vacating his Judgment of Conviction pursuant to Criminal Procedure Law § 440.10, on the grounds that: (1) the Court allowed impermissible evidence of defendant's prior bad acts; (2) he was denied his Sixth Amendment right to counsel due to the ineffective representation of trial counsel for five separate reasons;¹ (3) the Court misinstructed the jury when charging Criminal Mischief in the Fourth Degree; (4) his sentence was improper because it exceeded the pre-trial plea offer made by the People; and (5) the sentence violated double jeopardy.

The People filed opposition to defendant's motion and supplemental brief. Defendant filed a reply to the People's opposition. For the following reasons, defendant's motion is denied.

¹ These grounds for relief will be more fully explained in the Legal Analysis.

LEGAL ANALYSIS

Defendant's motion to vacate his judgment of conviction rests on five separate grounds, as enumerated above. Each of those grounds is either procedurally barred or entirely without merit.

Defendant's contention that the Court erred in admitting evidence of his warrant status was previously decided by the Second Department, who rejected that argument in affirming defendant's judgment of conviction. People v Crichlow, 79 AD3d 1144, 1145 (2d Dept 2010). Accordingly, defendant's application premised on these grounds is denied pursuant to CPL § 440.10(2)(a).

Defendant claims he was denied the effective assistance of counsel on multiple grounds. Defendant asserts that his trial counsel failed to object when the prosecutor "violated the Victim/Advocate witness rule." Defendant offers no explanation as to how the prosecutor became an advocate witness, and even were this claim more defined, it would be procedurally barred pursuant to CPL § 440.10(2)(c). Accordingly, it is denied.

Defendant further contends that he was denied the effective assistance of counsel when his counsel failed to call an expert witness on his behalf. Defendant fails to allege sufficient facts to support a claim of ineffective assistance of counsel based on the failure to call an expert witness. Defendant does not say what an expert called on his behalf would have established in support of his defense, nor does he make a showing of how an expert would have undermined the testimony of the People's expert. Defendant fails to show that his representation was deficient to the point of being ineffective, and furthermore, fails to show how any alleged deficiency prejudiced his defense.

Defendant also fails to make any showing that his counsel failed to conduct a pre-trial investigation regarding defendant's ability to hear. Defendant claims that his trial counsel was unaware that he had a problem with his hearing, and the hearing problems explain why defendant

did not answer the door when the police first arrived. Defendant offers nothing in support of this assertion about his hearing, such as a sworn affirmation from a health professional or any type of medical record. Also, the testimony during trial contradicts this claim insofar as the detectives testified that defendant did, in fact, speak to them through the closed door prior to the fire starting.

Defendant next argues that his trial counsel was ineffective for failing to make a Clayton motion to dismiss the indictment in the interests of justice. A motion to dismiss pursuant to People v Clayton, 41 AD2d 204 (2d Dept 1973) is governed by CPL § 210.40(1). Defendant fails to allege how a Clayton motion brought pursuant to the criteria set forth in the CPL would not be frivolous. Thus, the fact that trial counsel did not file what could very likely be a frivolous motion does not amount to ineffective assistance.

Finally, the last claim of ineffective assistance of counsel alleged by defendant is that he was denied his right to testify in the Grand Jury. The case law is clear, a counsel's failure to secure a defendant's right to testify before the Grand Jury does not constitute ineffective assistance of counsel. *See, People v Wiggins*, 89 NY2d 872 (1996); People v Griffith, 76 AD3d 1102 (2d Dept 2010); People v Nobles, 29 AD3d 429 (1st Dept 2006); People v Brooks, 258 AD2d 527 (2d Dept 1999).

Defendant's argument that the Court erred in instructing the jury of the elements of Criminal Mischief in the Fourth Degree is both without merit and procedurally barred. Defendant failed to raise this claim on his direct appeal of the case and therefore it is denied pursuant to CPL § 440.10(2)(c).

In his moving papers, defendant argues two grounds which would more properly be brought under CPL § 440.20, as a motion to set-aside his sentence. The Court will examine those claims as if they were brought under CPL § 440.20.

Defendant claims that his sentence was greater than a pre-trial plea offer, and thus violates his rights under the US Constitution. There is no legal basis for this claim as the case law makes clear that a court may sentence a defendant who goes to trial to a greater term of imprisonment than was offered during plea negotiations. People v Pena, 50 NY2d 400, 412 (1980).

Additionally, defendant argues that he was sentenced to a period of post-release supervision, which violates the Double Jeopardy Clause of the Fifth Amendment to the US Constitution. The term of post-release supervision defendant was sentenced to was part of his sentence for the conviction, and not an additional imposition of punishment for the same offenses. Therefore, defendant fails to state a legal basis for either of his claims concerning his sentence and his motion to set-aside is denied.

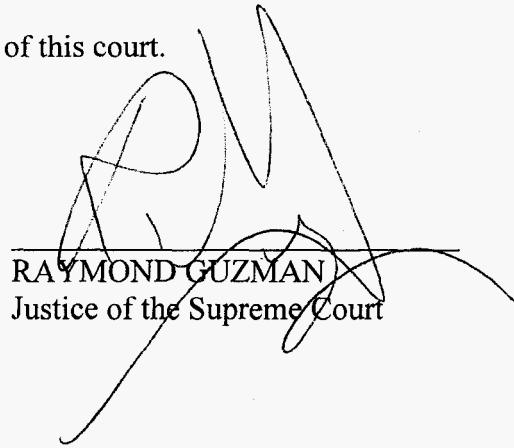
Finally, because all of the claims that defendant has brought in the instant motion either have no legal basis or do not contain sworn allegations substantiating or tending to substantiate all of the essential facts alleged by defendant, the Court need not conduct a hearing. Based on all of the forgoing reasons, defendant's motion is denied in full.

CONCLUSION

For the foregoing reasons, defendant's motion to vacate his judgment of conviction pursuant to CPL § 440.10 is denied, and his motion to set-aside his sentence pursuant to CPL § 440.20 is denied.

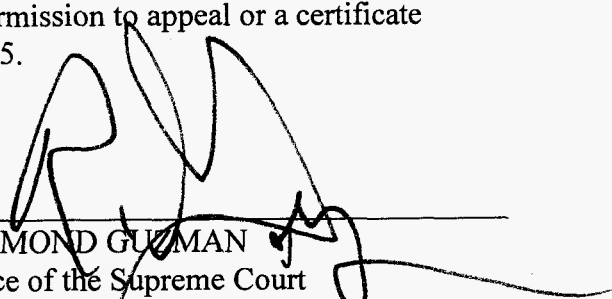
This opinion shall constitute the decision and order of this court.

Dated: June 25, 2012
Brooklyn, New York



RAYMOND GUZMAN
Justice of the Supreme Court

The defendant is hereby advised 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 financial inability to retain counsel and to pay the costs and expenses of such 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 certificate granting leave to appeal is granted. See 22 NYCRR §671.5.


RAYMOND GUZMAN
Justice of the Supreme Court

