

People v McCoy

2012 NY Slip Op 32756(U)

October 26, 2012

Supreme Court, Kings County

Docket Number: 11358/97

Judge: William E. Garnett

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 11

THE PEOPLE OF THE STATE OF NEW YORK

-against-

RUSSELL McCOY,

Defendant.

DECISION AND ORDER

Ind. #11358/97

Date: October 26, 2012

By: Hon. William E. Garnett

The defendant moves to vacate the judgment of conviction, pursuant to CPL §§440.10(1)(a) & (h), on the ground that the felony murder count in the indictment was jurisdictionally defective.

Background

The defendant and his co-defendant were charged under Kings County Ind. #11358/97 with two counts of Murder in the Second Degree (intentional and felony murder) and eight counts of Robbery in the First Degree, et al.

The defendant was convicted after a jury trial of one count of Murder in the Second Degree (felony murder) and three counts of Robbery in the First Degree.

The defendant appealed from the judgment including that the sentences were harsh and excessive.

On June 25, 2001, the Appellate Division affirmed the judgment of conviction but modified one of the sentences. The Appellate Division modified the sentence for Robbery in the First Degree

under the fourth count of the indictment by running it concurrently with the felony murder conviction because "the robbery constituted the felony element of the felony murder offense." People v. McCoy, 284 A.D.2d 554, 555 (2d Dept. 2001). Leave to appeal to the Court of Appeals was denied. People v. McCoy, 97 N.Y.2d 707 (2002).

The defendant moved to vacate the judgment of conviction, pursuant to CPL §§440.10(1)(b) & (h), on the grounds that he was denied effective assistance of counsel and that he was denied due process by the hearing court's finding of probable cause. By decision and order dated September 14, 2011, this Court denied the defendant's motion. People v. McCoy, 33 Misc.3d 1221(A) (Sup. Ct., Kings Co. 2012).

The defendant subsequently moved for reargument. By decision and order dated, January 9, 2012, this Court granted reargument and upon reargument adhered to its original decision.

The Appellate Division, Second Department denied the defendant's application for leave to appeal the CPL §440 decision on March 29, 2012.

Discussion

CPL §440.10(1)(a) provides that a judgment may be vacated upon the ground that "[t]he court did not have jurisdiction of the action or of the person of the defendant".

CPL §440.10(1)(h) provides that a judgment may be vacated upon the ground that "[t]he judgment was obtained in violation of a

right of the defendant under the constitution of this state or of the United States."

The defendant contends that the indictment is jurisdictionally defective in that count #2, i.e., the felony murder count, failed to allege sufficient facts to provide reasonable cause to believe that the defendant caused the death of the victim. The defendant specifically maintains that the failure to have the word "defendant" inserted in the felony murder count before the words "cause the death of" rendered the count jurisdictionally defective.

The defendant's motion is denied in its entirety.

As the indictment was part of the record on appeal, the defendant's unjustifiable failure to have raised his present claim, i.e., that count #2 of the indictment was jurisdictionally defective, on direct appeal procedurally bars this claim now. CPL §440.10(2)(c); People v. Cuadrado, 9 N.Y.3d 362, 363 (2007) (CPL §440.10(2)[c] - bar precludes even claims of fundamental jurisdictional defects that were omitted from a prior appeal).

The defendant has offered no explanation for his failure to raise this issue on direct appeal (CPL §440.10(2)[c]) or to explain why he waited thirteen (13) years to raise this claim.

Even if the motion were not procedurally barred, the defendant's present claim would nevertheless be denied as meritless.

CPL 200.50(7) provides in pertinent part that an indictment must contain "[a] plain and concise factual statement in each count

which, without allegations of an evidentiary nature, assert facts supporting every element of the offense charged and the defendant's or defendants' commission thereof with sufficient precision to clearly apprise the defendant or defendants of the conduct which is the subject of the accusation."

Count 2 of the indictment before this Court clearly meets the requirements of CPL §200.50(7).

An indictment is jurisdictionally defective only if it does not effectively charge the defendant with the commission of a particular crime. People v. D'Angelo, 98 N.Y.2d 733, 734-735 (2002).

An indictment must "provide the accused with fair notice of the nature of the charge against him so that he may prepare his answer and defense to the charge..." People v. Shack, 86 N.Y.2d 529, 540 (1995), citing People v. Sanchez, 84 N.Y.2d 440, 445 (1994). An indictment must "identify the criminal conduct with sufficient specificity so that defendant, if convicted, may raise a double jeopardy claim as a bar to subsequent prosecution for the same conduct." People v. Shack, supra.

An indictment must also allege that the defendant committed acts which constitute every material element of the crime charged. CPL §200.50(7)(a); People v. D'Angelo, supra; People v. Iannone, 45 N.Y.2d 589, 598-600 (1978). "The incorporation by specific reference to the statute operates without more to constitute

allegations of all the elements of the crime." People v. D'Angelo, supra at 735.

Count #2 of this indictment read as follows:

"THE GRAND JURY OF THE COUNTY OF KINGS BY THIS INDICTMENT, ACCUSE THE DEFENDANTS OF THE CRIME OF MURDER IN THE SECOND DEGREE [P.L. 125.25-3] COMMITTED AS FOLLOWS:

THE DEFENDANTS, EACH AIDING THE OTHERS AND ACTING IN CONCERT WITH OTHER PERSONS, ON OR ABOUT OCTOBER 20, 1997, IN THE COUNTY OF KINGS, HAVING COMMITTED THE CRIME OF ROBBERY, AND IN THE COURSE OF AND IN FURTHERANCE OF SUCH CRIME AND OF IMMEDIATE FLIGHT THEREFROM, CAUSED THE DEATH OF LUIS LEMA HE BEING OTHER THAN A PARTICIPANT, BY SHOOTING HIM WITH A DEADLY WEAPON NAMELY: A REVOLVER, THEREBY INFLECTING VARIOUS WOUNDS AND INJURIES UPON LUIS LEMA, AND THEREAFTER AND ON OR ABOUT OCTOBER 20, 1997, LUIS LEMA DIED OF THE WOUNDS AND INJURIES."

Count #2 of the indictment "cited the applicable section of the penal law and sufficiently tracked the language to afford the defendant fair notice of the charges against him." People v. Rodriguez, 62 A.D.3d 728 (2nd Dept. 2009); People v. Del Pilar, 177 A.D.2d 642 (2d Dept. 1991). Thus, count #2 of the indictment was not jurisdictionally defective.

Moreover, count #2 of the indictment concisely charges both the elements of felony murder and the defendant's commission of those elements with sufficient specificity and clarity to have enabled the defendant to prepare for trial and to protect him against a second prosecution. CPL §200.50(7)(a). Specifically, if all of the dependent clauses are excised, this count clearly

alleges that the defendants, including the defendant, "caused the death of Luis Lema".

Accordingly, the defendant's motion, pursuant to CPL §§440.10(1)(a) & (h), to vacate his judgment of conviction, is denied without a hearing. The defendant's moving papers do not allege any ground constituting a legal basis for the motion. CPL §440.30(4)(a).

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

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, NY 11201 for a certificate granting leave to appeal from this determination. This application must be made within thirty days of service of this decision. Upon proof of 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 certificate granting leave to appeal is granted [22 NYCRR 671.5].

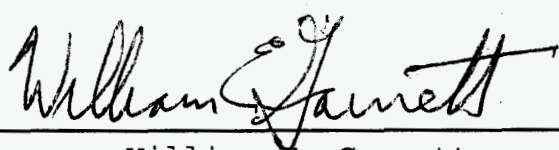
The application must contain your name and address, indictment number, the questions of law or fact which you believe ought to be reviewed and a statement that no prior application for such

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.

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

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

Dated: October 26, 2012
Brooklyn, New York



William E. Garnett
A.J.S.C.

