

People v Anderson

2013 NY Slip Op 30439(U)

January 28, 2013

Supreme Court, Kings County

Docket Number: 3297/1992

Judge: Carolyn E. Demarest

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART CV19

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THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Carolyn E. Demarest

Date: January 28, 2013

-against-

DECISION & ORDER

SHAWN ANDERSON

Indictment No. 3297/1992

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Defendant moves, pro se, to vacate his judgment of conviction pursuant to CPL § 440.10¹, claiming that he was not afforded due process of law and that he was deprived of his constitutional rights to counsel and against self-incrimination. Specifically, defendant contends that the court should have held a suppression hearing before it admitted into evidence statements contained in a letter that defendant wrote to his co-defendant while both men were incarcerated. The motion is procedurally barred and also without merit.

On March 6, 1992, defendant and two accomplices, one of whom was Marvin October, robbed a photography studio in Brooklyn. During the course of the robbery defendant shot and killed Stephen Murray, the owner of the studio. When he was arrested several days later, defendant made a statement at the police precinct on March 12, 1992 admitting that he had shot Murray but claiming that the gun had gone off by accident.

¹Defendant cites CPL § 440.10 and also refers to his motion as a common law writ of error coram nobis. As most of the grounds for coram nobis relief previously authorized under the common law were codified in CPL § 440.10 and the instant claim is cognizable under CPL § 440.10, this court will review this motion pursuant to the Criminal Procedure Law (*People v Syville*, 15 NY3d 391, 398 [2010]; *People v Corso*, 40 NY2d 578 [1976]).

Defendant was subsequently tried before a jury, which heard testimony from October and the surviving studio employees. The People did not introduce defendant's statement from the police precinct. The People did, however, introduce testimony that October had pleaded guilty in September 1992 to robbery in the first degree in exchange for agreeing to testify against defendant. The People also introduced the letter defendant had written to October while both were incarcerated. Before the letter was read to the jury, however, the court had an on-the-record discussion with both parties about the propriety of admitting it into evidence. Though defense counsel initially objected to the admission of the letter, the parties consented to redact the portions which referred to defendant's prior inculpatory statement. The jury heard the remaining, unredacted parts of the letter.

For his acts, defendant was convicted by a jury of murder in the second degree (felony murder) (PL § 125.25[3]), manslaughter in the first degree (PL § 125.20[1]), and two counts of robbery in the first degree (PL § 160.15[3]). On April 14, 1993, defendant was sentenced to a prison term of twenty-five years to life on the murder count and to concurrent terms of eight and one-third to twenty-five years on each of the remaining counts (Demarest, J. at trial and sentence).

On November 22, 1994, defendant moved to vacate his conviction pursuant to CPL § 440.10 on the grounds that his attorney was ineffective and that the People had failed to turn over *Rosario* material. This court denied defendant's motion and the Appellate Division, Second Department denied his application for leave to appeal from this court's order (Bracken, J., March 22, 1995).

Defendant also appealed from his judgment of conviction, claiming that 1) the trial court

violated his right to be present during voir dire conferences; 2) he was denied his right to select the counsel of his choice; 3) he was denied the effective assistance of counsel; and 4) his sentence was excessive. On January 8, 1996, the Appellate Division affirmed defendant's judgment of conviction (*People v Anderson*, 223 AD2d 547 [2d Dept 1996]). Leave to appeal to the Court of Appeals was denied (*People v Anderson*, 88 NY2d 980 [1996]).

Defendant also sought a writ of habeas corpus in the United States District Court for the Eastern District of New York, claiming that he was denied his right to select the counsel of his choice. His application was denied in a Memorandum and Order (1998 WL 661466 [EDNY, Aug. 6, 1998]). Defendant's applications to United States Court of Appeals for the Second Circuit (October 19, 1999) and the Supreme Court of the United States (*Anderson v Walker*, 528 US 1194 [2000]) were also rejected.

Defendant now moves this court to vacate his judgment of conviction pursuant to CPL § 440.10, claiming that his constitutional rights to counsel, due process and against self-incrimination were violated when the court allowed into evidence inculpatory statements contained in defendant's letter to co-defendant Marvin October. On June 6, 1992, while both men were incarcerated, defendant wrote to October expressing "friendship, camaraderie, shared gossip, secrets and personal feelings undoubtedly." At the time he wrote the letter, defendant believed that October was "still his friend" and did not know that he "was an informant who was serving the purpose of aiding the investigation in the process of being a cooperating state witness." Based upon these misconceptions and his suggestion that October was acting on behalf of law enforcement, defendant now argues that the court should have held a hearing to determine the voluntariness of statements contained in the letter.

Defendant's letter, the unredacted portions of which were read to the jury, reads in pertinent part:

What up? Yo, I hear you ready to cut a deal. Man, don't sell me out to them crackers, man. Yo, I could beat this shit as long as you don't tell them anything about me. Yo, I know it hard, man, but try to handle it, man. Today I had a fight and the guy busted me nose, but I gave him a shiner. And I know how it feel to be locked down and don't know what's going to happen. But the longer you wait the better. You see they don't have anything on me. On my indictment paper is murder in second degree, and if I go to trial, I can't beat this shit, but if you cop out then you must tell them (your lawyer and DA) I wasn't involved. I don't know if what you told the DA, but I hope it wasn't anything against because you could send me to prison for the rest of my life. So, please, Black, hold your head, man.

The letter continues, "Don't cop out unless your statement say something like you planned it. But make sure you could try to see you it looks. Yo, so what up, man? Tell me how you feel, man, because I'm scared to death. I don't want to go to prison." Defendant concludes, "So chill. Write me and tell me what up with your case and your feeling."

Defendant's claim is procedurally barred because it could have been raised on appeal.

The court must deny a motion to vacate judgment when sufficient facts appear on the record to permit review on appeal, but no such review has occurred owing to the defendant's unjustifiable failure to raise the issue on appeal (CPL § 440.10[2][c]). In this instance, defendant's claim with respect to the statements made in his letter is based on matters appearing on the record. Both the redacted letter and the fact that the People had a cooperation agreement with October were introduced into evidence at trial. It is evident from the letter itself that defendant, not October, initiated the correspondence and that defendant's statements were not elicited or induced by October. Defendant also makes apparent in the letter his knowledge that October was "ready to cut a deal", indicating that he was not mislead into writing under a false apprehension.

Accordingly, the voluntariness of defendant's statements in his letter could have been determined on direct appeal and his failure to do so is unjustified. Moreover, a motion to vacate the judgment of conviction should not be employed as a substitute for an appeal (*People v Cooks*, 67 NY2d 100, 500 [1986]).

The motion is also without merit. Defendant's argument that the admission of the redacted letter deprived him of his constitutional rights is rejected because the writing of the letter was a voluntary act on his own initiative that did not involve law enforcement in any way. In *People v Ray*, 65 NY2d 282, 286 (1985), the Court of Appeals established the standard to determine when private conduct "become[s] so pervaded by governmental involvement that it loses its character as such", thus triggering constitutional protections. These indicia include a clear connection between police and private investigation, the completion of a private act at the instigation of police, close supervision of private conduct by police, and a private act undertaken on behalf of police to further a police objective (*id.*). To the extent that defendant is claiming that October was acting as an agent of law enforcement on account of his cooperation agreement, there is no evidence that any of these factors existed in the communication between defendant and October (*People v Haile M.*, 160 AD2d 1027, 1028 [2d Dept 1990] [suppression unwarranted where there was "...no proof adduced that the complainant was an agent of the police or was acting either at the direction of or in cooperation with the police at the time the statement was purportedly made"]; *People v Graham*, 120 AD2d 674 [2d Dept 1986] [trial court properly denied defendant's motion to suppress a statement made to a friend after he was arrested and placed in a cell at the police precinct, since there was absolutely no evidence adduced indicating the friend was acting at the direction of or in cooperation with law enforcement

officials]).

The statements in defendant's letter were also made spontaneously, outside the context of a custodial interrogation to which constitutional limitations attach (*Miranda v Arizona*, 384 US 436, 444 [1966]; *People v Grant*, 96 AD3d 779 [2d Dept 2012] [no suppression warranted where statement was "uttered by the defendant spontaneously and voluntarily, and was not the result of an interrogation"]; see, e.g., *People v Baybury*, 30 AD3d 627, 628 [3d Dept 2006] [where defendant wrote a letter to the police department while incarcerated and awaiting trial, letter was properly admitted at trial because the admissions therein were made voluntarily and not the product of any police interrogation]). It is clear from the letter itself that defendant wrote to October in an attempt to stop him from cooperating with the District Attorney, and that it was not written in response to any inducement or interrogation by October. Rather, defendant asks October to write back to him. The mere existence of a cooperation agreement, even if unbeknownst to defendant, does not render his spontaneous statements involuntary or the product of fundamentally unfair deception (*People v Marano*, 150 AD2d 611 [2d Dept 1989] [proper admission of tape recorded confession made by defendant to his accomplice, who was cooperating with police]). In reviewing the letter with counsel and the court, defendant never challenged its voluntariness and there was no suggestion that October was colluding with law enforcement. Thus, no hearing was required (*People v Huntley*, 15 NY2d 72, 78 [1965] ["the defense, if it intends to attack the confession or admission as involuntary, must, in turn, notify the prosecutor of a desire by the defense of a preliminary hearing on such issue"]).

Accordingly, the motion is denied in its entirety.

This decision shall constitute the order of the court.

ENTER:



CAROLYN E. DEMAREST, J.S.C.

ENTERED

FEB - 7 2013

NANCY T. SUNSHINE
COUNTY CLERK

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 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.

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