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

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

JAMES ROBINSON,
Defendant

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By: Hon. Desmond Green

Date: March 20, 2013

DECISION & ORDER

Indictment No. 6007/2000

Defendant moves, *pro se*, to vacate his judgment of conviction pursuant to CPL § 440.10 on the grounds that he was denied the effective assistance of counsel. For the following reasons, the motion is denied in part and a hearing is ordered with respect to defendant's claim that counsel failed to accurately advise him about his maximum sentencing exposure.

On February 22, 2000, defendant shot and killed Carlos Perez in connection with a gang-related dispute. He was charged with two counts of murder in the second degree (PL §§ 125.25[1], [2]) and one count each of criminal possession of a weapon in the second and third degrees (PL §§ 265.03[2], [4]).

Defendant went to trial before a jury and, on May 8, 2001, the People offered him a plea bargain in which he would plead to manslaughter in the first degree in exchange for a promised determinate sentence of fifteen years in prison. Defense counsel Charles Hochbaum informed the court, "I have related that offer to Mr. Robinson. He is not interested. I've explained to him he would do approximately twelve and a half years on that and be out without any parole situation. He's indicated to me that he's not interested." When the court asked whether this statement was correct, defendant replied, "Yes, your Honor."

Defendant's trial continued and on May 10, 2001, defendant was convicted of murder in the second degree (PL § 125.25[1]). At the sentencing proceedings on October 4, 2001, the People recommended that defendant receive the maximum sentence of twenty-five years to life in prison. Defense counsel, citing several other recent murder cases, advocated for the minimum allowable sentence of fifteen years to life. The court sentenced defendant to concurrent prison terms of twenty-five years to life on the murder count and one and one-third to four years for his violation of probation (Gerges, J. at trial and sentence).

Defendant appealed to the Appellate Division, Second Department, claiming that the court had given improper jury instructions and that the prosecutor had engaged in misconduct. On September 20, 2004, the Appellate Division affirmed the judgment of conviction (*People v Robinson*, 10 AD3d 696 [2d Dept 2004]). Leave to appeal to the Court of Appeals was subsequently denied (*People v Robinson*, 4 NY3d 767 [2005]). Defendant raised the same challenge with respect to the jury instructions in a petition for a writ of habeas corpus. The District Court denied his application without a hearing on June 20, 2008 (*Robinson v Ercole*, 2008 U.S. Dist. LEXIS 48591 [E.D.N.Y. 2008]). On January 13, 2009, the United States Court of Appeals for the Second Circuit denied defendant's motion for a certificate of appealability.

On March 1, 2011, defendant applied to the Appellate Division for a writ of error *coram nobis*, claiming that his appellate counsel was ineffective for failing to raise two claims of ineffectiveness on the part of trial counsel. He argued that trial counsel was ineffective for not objecting to the prosecutor's allegedly improper introduction of Christopher Foye's grand jury testimony implicating defendant, and for failing to object to the prosecutor's allegedly improper comments during summation. The Appellate Division denied defendant's application on August

23, 2011, finding defendant's claims without merit (*People v Robinson*, 87 AD3d 707 [2d Dept 2011]). The Court of Appeals denied his application for leave to appeal (*People v Robinson*, 17 NY3d 955 [2011]).

Defendant now moves to vacate his judgment of conviction, claiming for the first time that trial counsel: 1) failed to adequately challenge the admission of evidence on the ground that defendant's arrest in his sister's home was illegal; 2) failed to move to suppress defendant's post-*Miranda* statement on the basis of an alleged violation of defendant's right to counsel; 3) erroneously advised him that his maximum sentencing exposure upon conviction at trial was fifteen years to life. In support of his motion, defendant has submitted affidavits from his wife, Mei-Ling Lee Robinson, as well as Emily Robinson and Jonnie Alvarado.

Defendant's first two allegations of ineffective assistance of counsel are procedurally barred from collateral review. The validity of defendant's arrest is evident from the record of the pre-trial hearing, just as the voluntariness of his post-*Miranda* statement was already established on the record. Accordingly, defendant could have raised both claims on direct appeal. He nevertheless neglected to do so in his 2004 appeal, and he does not provide any justification for that failure now. The court must therefore reject defendant's arguments because sufficient facts appear on the record with respect to the grounds raised in the instant motion to have permitted adequate review thereof on appeal (CPL § 440.10[2][c]). 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, 103 [1986]; *see People v Williams*, 5 AD3d 407 [2d Dept 2004]).

In his third argument, defendant asserts that he rejected the People's plea offer because:

> ...defense counsel informed defendant not to plead guilty because if he went to trial and

> was found guilty he would receive no more than 15 years to life. Defense counsel further told defendant that there was a strong possibility if a jury returned a verdict of guilty it would be to some lesser offenses that would carry a sentencing range of no more than 15 years to life. Defense counsel also informed defendant's family that defendant would receive no more than 15 years to life if he was ultimately found guilty...

Defendant further claims that counsel never told him that he could be sentenced to twenty-five years to life and that, had he known about his maximum sentencing exposure, he would have accepted the plea offer rather than go to trial. Defendant has also provided affidavits from three people who claim to have taken part in defendant's case and consulted with Mr. Hochbaum. According to Emily Robinson, defendant's sister:

> ...we had many conversations with Mr. Hochbaum, but on this day Mr. Hochbaum informed us of a plea offer, offered to James, me and the family asked Mr. Hochbaum what was the offer to James was, and Mr. Hochbaum, stated to us that it was 15 years. Mr. Hochbaum informed us that the offer was not really a good offer, because James, would receive 15 years to life, if was to be found guilty, and he'll be home arond the same time just with parole. Mr. Hochbaum then further stated that he will inform James, not to accept this plea offer.

The affidavits of Mei-Ling Lee Robinson and Jonnie Alvarado allege the same facts, in sum and substance. Moreover, although both the defendant and People made inquiries, neither party was able to obtain a statement from defense counsel concerning his representation of defendant. According to defendant, this court should apply the Supreme Court's recent decision in *Lafler v Cooper*, __ U.S. __, 132 S.Ct. 1376 (2012), which held that a defendant's Sixth Amendment right to counsel extends to the plea-bargaining process.

Accordingly, where the People dispute defendant's allegations and the record does not clearly refute his claims, an issue of fact exists that requires resolution in a hearing (*see* CPL § 440.30[5]). Where affidavits, albeit self-serving, are sufficient to rebut the presumption that defense counsel rendered adequate assistance of counsel, an evidentiary hearing is required

People v Ferreras, 70 NY2d 630 [1987]). "At such a hearing, the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion" (CPL § 440.30[6]; *see People v Session*, 34 NY2d 254, [1974]). Defendant has a right to be present at such hearing and may present evidence and witnesses in support of his position (CPL § 440.30[5]).

A hearing is thus ordered pursuant to CPL § 440.10.

Consequently, an attorney from the 18B felony panel will be appointed by this court to represent defendant regarding the issues herein relevant to a hearing ordered by this court pursuant to CPL § 440.10. The attorney accepting such appointment is Wayne C. Bodden, Esq.,

Such hearing will be held on a date to be determined by the court.

This decision constitutes the order of the court.

ENTER:

DESMOND GREEN, J.S.C.

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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