

People v Wright

2013 NY Slip Op 31600(U)

June 19, 2013

Supreme Court, Kings County

Docket Number: 7334/2001

Judge: Desmond A. Green

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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

By: Hon. Desmond A. Green

Date: June 19, 2013

-against-

DECISION & ORDER

GERALD WRIGHT

Indictment No. 7334/2001

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Defendant moves, pro se, to vacate the judgment of conviction pursuant to CPL § 440.10 on numerous grounds. In this, his fourth such motion, defendant raises a long list of issues that trace his grievances back to his initial arrest. All of his complaints are subject to statutory procedural bars of a mandatory or permissive nature. Most of defendant's complaints are reserved for his trial attorney who he contends provided ineffective representation at every turn. In previous motions defense counsel has consistently been held to have performed competently in the face of overwhelming evidence of defendant's guilt. This court finds no reason to alter that view. After a thorough review, all of defendant's claims are rejected.

Background

During the summer of 2001 defendant was arrested twice for committing multiple burglaries and other crimes. In the early morning hours of July 7, 2001, Guy Gladden observed a man breaking into an apartment on Lincoln Place in Brooklyn. The police were called and as they began to investigate the burglary, Edward Medina saw a man leaving a building on Seventh Avenue that shared a backyard with the first building. The police stopped defendant nearby

where he was identified in show-up identifications by the two men who had observed him earlier. When defendant was searched upon his arrest, the police recovered a screwdriver, nine computer disks, binoculars, keys, a crack pipe, and a cell phone that defendant insisted belonged to him. Upon inspection, the cell phone displayed the name of the woman who resided at the first location. She later identified the keys, binoculars and computer disks as belonging to her or her stepson. On July 8, 2001, defendant was arraigned and bail was set.

On September 6, 2001, Yves Robert Louis chased away a man he discovered trying to enter his first floor bedroom window at 732 Schenectady Avenue. At around the same time Veronica Forrester called 911 after seeing a man enter a neighbor's first floor apartment at 684 Lenox Avenue. The police arrived in time to see defendant climb out of the apartment through a window and flee. After giving chase they apprehended defendant who was then identified by Louis and Forrester in separate show-ups. Once again defendant was searched and identifiable property from the neighbor's apartment was found on him. Additional items that defendant had dropped while being pursued were also recovered.

Defendant was indicted separately for the two incidents and testified before both grand juries. On March 8, 2002, the indictments were consolidated and defendant was charged with numerous counts of burglary in the second degree (PL § 140.25[2]), attempted burglary in the second degree (PL § 110.00/140.25[2]) and burglary in the third degree (PL § 140.20) as well as other less serious crimes. During the month of June defendant's attorney was relieved after complaining that defendant was uncooperative and new counsel, the object of defendant's present objections, was appointed. On July 8, 2002, defendant's pro se application pursuant to CPLR article 78 in the nature of prohibition and mandamus seeking to dismiss the indictment

was denied (*Matter of Wright v Greenberg*, 296 AD2d 463 [2d Dept 2002]).

On November 13, 2002, defendant was convicted by jury verdict of three counts of burglary in the second degree and was sentenced on December 3, 2002 to three concurrent terms of twenty-five years to life as a persistent violent felony offender (Feldman, J. at hearing, trial, and sentence). Defendant's conviction was affirmed by the Appellate Division Second Department (*People v Wright*, 12 AD3d 468 [2d Dept 2004]) and leave to appeal to the Court of Appeals was denied (*People v Wright*, 4 NY3d 804 [2005]).

On August 24, 2005, defendant filed his first post-judgment motion seeking to vacate the judgment of conviction and to set aside his sentence. As he does here, defendant asserted numerous complaints ranging from his illegal arrest and improper identification to prosecutorial misconduct and discovery violations. He also challenged the trial court's refusal to recuse itself, the court's preliminary instructions, his exclusion from sidebar conferences, and the denial of his speedy trial motion. He claimed that he was improperly denied transcripts of the proceedings and that the prosecution elicited perjured testimony and submitted a doctored photograph. All of these claims were summarily denied. The court further found that defendant's claim of ineffective assistance of counsel lacked merit finding many of defendant's assertions to be unsubstantiated, conclusory or groundless. Finally, the court found no legal basis to set aside defendant's sentence (*People v Wright*, 12 Misc. 3d 1164[A][Sup. Ct., Kings County 2006][Feldman, J.]). On June 14, 2006, the Appellate Division, Second Department denied defendant application for leave to appeal the denial of his motion (Lifson, J.).

On December 1, 2006, defendant's second post-judgment motion was denied (Collini, J.). The court summarily rejected defendant's claims that certain evidence should have been

precluded under CPL § 710.30(1)(b) for lack of notice and that he was improperly adjudicated as a mandatory persistent felony offender. Defendant's motion was procedurally barred on both mandatory and permissive statutory grounds (CPL §§ 440.10[2][c], [3][b],[3][c]; 440.30[1],[2]). Leave to appeal to the Appellate Division was denied (Lifson, J.).

On January 15, 2008, defendant's first application for writ of error coram nobis was denied (*People v Wright*, 47 AD3d 736 [2d Dept 2008]). The Court held that the denial of effective assistance of appellate counsel had not been established. Leave to appeal to the Court of Appeals was denied (*People v Wright*, 10 NY3d 846 [2008]). Defendant's second application for a writ of error coram nobis was denied on September 16, 2008 when the Appellate Division again found that defendant failed to establish ineffective assistance of appellate counsel (*People v Wright*, 54 AD3d 887 [2d Dept 2008]). Leave to appeal to the Court of Appeals was denied (*People v Wright*, 11 AD3d 901 [2008]).

On April 9, 2009, defendant's third post-judgment motion was denied (Carroll, J.). Defendant's claim that prospective jurors had been improperly sworn under CPL § 270.15 was barred on both mandatory and permissive procedural grounds (CPL §§ 440.10[2][c], 440.10[3][c], 44.30[4][d]). Defendant's application to the Appellate Division to appeal from the denial of his motion was denied on July 16, 2009.

On December 22, 2009, defendant's third application for a writ of error coram nobis was denied in language identical to his first two such motions (*People v Wright*, 68 AD3d 1143 [2d Dept 2009]). The Court held that defendant had "failed to establish that he was denied the effective assistance of appellate counsel". Defendant's application for leave to appeal to the Court of Appeals was once again denied (*People v Wright*, 14 NY3d 846 [2010]).

Finally, on July 8, 2010, defendant's petition for a writ of habeas corpus was dismissed as time-barred (*Wright v Lee*, 2010 WL 2730662 [E.D.N.Y. 2010][Townes, J.]. Because the petition presented no "substantial showing of the denial of a constitutional right", a certificate of appealability was denied.

Procedural Bars

Defendant's lengthy motion displays either a lack of understanding or an intentional disregard for the rules that guide a court's review of a post-judgment motion. He meticulously revisits practically every issue arising since the inception of his case, all of which are barred by statutory prohibitions. Defendant also makes a number of baseless arguments and steadfastly ignores the overwhelming volume of evidence upon which his conviction was based.

Under CPL § 440.10(2)(c) a court must deny a motion to vacate the judgment of conviction when sufficient facts appear on the record to have permitted appellate review of a legal issue but the defendant unjustifiably failed to raise that issue on appeal (*People v Cuadrado*, 9 NY3d 362 [2007]). The mandatory nature of this restriction emphasizes the well established admonition that a CPL § 440.10 motion shall not be used as a vehicle for a second appeal or as a substitute for direct appeal (*People v Cooks*, 67 NY2d 100, 103 [1986]; *People v Williams*, 5 AD3d 407 [2d Dept 2004]).

This prohibition applies to most of defendant's claims. All of the pretrial issues regarding probable cause, identification procedures, notice, defects in the indictment, and speedy trial are barred because they could have been raised on appeal but were not. As part of the pretrial hearings and also barred because they are based on the record are defendant's accusations of bias by the court and the People's failure to meet their burden of proof. Also subject to

mandatory bar are all of the trial issues that defendant raises. These include defendant's direct attacks on the credibility of trial witnesses, the court's admission of evidence defendant contends is hearsay, the court's refusal to provide defendant with certain transcripts, and the allegation that the prosecution deliberately presented perjured testimony. Defendant's contention that the absence of signed certificates of conviction undermines his adjudication as a persistent felony offender is also barred by his failure to raise the issue on direct appeal.

Defendant's claims concerning notice, the alleged jurisdictional defect in the indictment, and the certificates of conviction are also baseless. While he contends that identifying witnesses should not have been permitted to testify without proper notice, he fails to understand that any alleged deficiency in the notice requirement was excused when he moved to suppress identification testimony (*People v Kirkland*, 89 NY2d 903 [1996]; *People v Ross*, 244 AD2d 513 [2d Dept 1997]). With regard to the claim that the indictment is jurisdictionally defective because defendant's name was not repeated in each count of the indictment, the Criminal Procedure Law does not require defendant's name to be set forth in each count of the indictment when it is clear from the title and the body of the indictment that the specific counts allege his commission of the charged crime (*People v Young*, 100 AD3d 1186 [3d Dept 2012]). Finally, the claim involving the certificates of conviction is facially frivolous because CPL § 380.60 does not require the sentencing court to sign the commitment order because it pronounces sentence on the record with the defendant present. The commitment order merely constitutes the authority for the execution of sentence that the court already rendered. The commitment order has nothing to do with the legality of defendant's sentence.

Many of defendant's allegations of ineffective assistance of counsel are also barred from

collateral review under CPL § 440.10(2)(c) because the record contains sufficient facts to have permitted such claims to have been reviewed on direct appeal (*People v Maldonado*, 34 AD3d 497, 498 [2d Dept 2006]; *People v Jossiah*, 2 AD3d 877 [2d Dept 2003]). The fact that counsel failed to make certain objections during trial or that he failed to articulate certain arguments are matters that are ascertainable from the record. Defendant's claims that counsel failed to:

(1) "challenge probable cause", (2) object to the People's failure to provide CPL § 710.30 notice, (3) convince the court to provide requested transcripts, (4) argue that identifying witnesses gave perjured testimony, (5) argue that "the property stripped from defendant was a product of a poisonous tree", (6) adequately challenge the court's denial of defendant's speedy trial motion, (7) argue that all of the police witnesses lied, (8) reopen the suppression hearing, (9) object to the admission of hearsay evidence, (10) object to the prosecutor as an unsworn witness, (11) convince the court to submit lesser included offenses to the jury, (12) argue irregularities arising from the certificates of conviction, and (13) challenge defendant's adjudication as a persistent felony offender are all omissions that could have been discerned from the record and were known at the time of the judgment. Accordingly, those alleged failures, framed as claims of ineffective assistance of counsel, should have been raised on direct appeal and therefore cannot now be introduced in a motion to vacate the judgment of conviction (*see Cooks* at 103; *People v Kotler*, 271 AD2d 548 [2d Dept 2000]; *People v Donovan*, 107 AD2d 433, 443 [2d Dept 1985]).

Moreover, "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to make a motion or argument that has little or no chance of success" (*People v Caban*, 5 NY3d 143, 152 [2005]). Thus, without a viable legal basis for challenging the notice and certificate of conviction issues and with little or no chance of reopening of the suppression

hearing, or challenging the trial court's speedy trial and predicate felony decisions, counsel cannot be held ineffective for failing to pursue a potentially futile endeavor.

A number of defendant's allegations are also procedurally barred because they were already addressed on the merits in defendant's first post-judgment motion (CPL § 440.10[3][b]). There the original trial court rejected defendant's post-judgment assertions that counsel was ineffective for failing to reopen the suppression hearing, for failing to object to hearsay evidence, for failing to challenge the perjurious nature of certain testimony, and for counsel's alleged failure to consult with defendant. The court also upheld defendant's adjudication as a persistent violent felony offender. Those issues were rejected then and are procedurally barred now for having been previously determined on the merits in a prior motion.

Defendant's contention that counsel was ineffective for failing to investigate his case is also summarily rejected. CPL § 440.30(4)(b) permits a court to deny a motion without a hearing if it is "based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts" (*see People v Satterfield*, 66 NY2d 796, 799 [1985]; *People v Williams*, 24 AD3d 575 [2d Dept 2005]; *People v Wells*, 265 AD2d 589 [2d Dept 1999]). In the face of a record that reflects counsel's engagement of an investigator in defendant's case and absent any substantiated alternative to the overwhelming evidence of defendant's guilt, this claim of ineffectiveness is fatally undermined. In addition, defendant's conclusory allegations about counsel falsely billing for time spent on his case is rejected under that same statutory provision. Such unsworn allegations are insufficient and speculative.

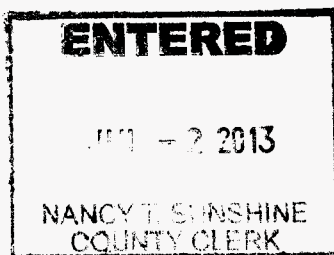
With regard to defendant's claim that he was denied the effective assistance of counsel because his attorney informed the hearing court that he would testify falsely at the suppression

hearing, the record contradicts this allegation (CPL § 440.30[3][d]). According to the record, counsel neither announced to the court that defendant intended to commit perjury or impugned his client's integrity. Rather, in broaching the subject of defendant's interest in testifying, counsel requested that defendant be permitted to do so in narrative fashion so as to balance his duty to defendant and his obligation to the court. While defendant eventually did not testify, counsel's passive refusal to participate in the presentation of defendant's prospective and potentially perjurious testimony was proper under the circumstances (*see People v Andrades*, 4 NY3d 355. 362 [2005]; *People v DePallo*, 96 NY2d 437, 441-442 [2001]; *People v Mercure*, 47 AD3d 950 [2d Dept 2008]). Moreover, the Court of Appeals in *Andrades*, noted that even if counsel had explicitly disclosed to the hearing court that his client intended to lie on the stand, such behavior would have been permissible because a client's intent to commit a crime is not a protected confidence (*Andrades* at 361-362). Thus defendant was not denied his right to a fair hearing and "absent a breach of any recognized professional duty, defendant's claim that he was denied the effective assistance of counsel must also fail". (*id.* at 362).


Finally, defendant's assertion of prosecutorial misconduct during summation is subject to a mandatory bar under CPL § 440.10(2)(a). Because that issue was decided on the merits on defendant's direct appeal, it cannot be raised again in a post-judgment motion.

Accordingly, defendant's motion is denied in its entirety.

This decision shall constitute the order of the court.



ENTER:



 DESMOND A. 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 you motion.

The application must contain you 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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