

People v Muhammad
2013 NY Slip Op 31900(U)
July 31, 2013
Supreme Court, Kings County
Docket Number: 1780/1994
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,
Respondent,

Decision

Against

BY: GREEN, J.

July 31, 2013

MALIK MUHAMMAD,

INDICT NOS:
1780/1994
9332/1996
6750/2000

Defendant.

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Defendant moves, *pro se*, for an order to vacate his judgment and set aside his sentence pursuant to Criminal Procedure Law (CPL) § 440.10 and § 440.20.

Based on a review of the motion papers submitted, the decision and order of the Court on defendant's *pro se* instant motion is **SUMMARILY DENIED**.

Based on the following, this court finds that defendant's claims here are mandatorily barred pursuant to CPL § 440.10 (2) (c) and wholly meritless.

Defendant's request for a hearing is also denied.

On indictment 9332/1996, defendant was convicted after a jury trial of two counts of Murder in the 2nd Degree and one count of Robbery in the 1st Degree. He was sentenced as a juvenile offender to concurrent terms of eight years to life

on each of the murder counts and to a consecutive term of three to nine years for the robbery charge. (Jones J. at trial and sentence) ¹

On indictment number 6750/2002, the defendant pled guilty to one count of Rape in the 1st Degree and was sentenced as a juvenile offender to an indeterminate term of imprisonment of two to six years to be served consecutively to two sentences that defendant was serving on unrelated cases. (Feldman J. at plea and sentence)

On indictment number 1790/1994, defendant pled guilty to Attempted Murder in the 2nd Degree.

This is defendant's sixth CPL 440 motion to vacate the judgment within indictment 10997/1994 which he presents essentially the same arguments and claims presented in his five prior CPL § 440 motions, each of which was denied by four different Supreme Court Justices. ²

¹ Defendant successfully motioned pursuant to CPL 440.20 and defendant's sentence for first degree robbery was amended to run concurrently with the murder sentences.

² In indictment number 9332/94, Defendant's first 440.10 motion was denied on October 30, 2003 by Justice Theodore Jones who presided at trial and sentence. A motion to set aside the sentence pursuant to CPL 440.20 was granted on October 17, 2005 also by Justice Jones based on an error in the sentencing structure pointed out by the defendant who was re-sentenced accordingly. Defendant's second 440.10 motion was denied on August 1, 2006 by Justice Sullivan. Defendant's third 440.10 motion was denied on April 7, 2008 by Justice Del Giudice. Defendant's fourth 440.10 motion was denied on November 13, 2008 by Justice Konviser. Defendant's fifth 440.10 motion was denied on March 26, 2009, also by Justice Konviser. A copy of each of the 440.10 decisions and orders is attached to the People's opposition papers. Leave to appeal was

This court finds that defendant's sixth CPL 440.10 motion is procedurally barred under CPL § 440.10 (2) © and wholly meritless.

The instant motion is also defendant's second CPL 440.10 in indictment number 6750/2002.³

This is defendant's first CPL 440.10 motion in indictment number 1780/1994.

Referencing all three, aforementioned, indictment numbers, defendant makes the same claims. He maintains that all three attorneys in three separate matters were ineffective for not raising competency claims on behalf of the defendant. Defendant cites his background, challenges growing up and his propensity for a difficult personality.

Defendant has either raised these claims previously or could have raised the claims and failed to do so, making no justification for not doing so previously.

The claims are entirely denied because defendant's motion is procedurally barred pursuant to CPL 440.10 (3) (C) as defendant's claims either were raised or could have been raised in any of his prior motions.

also denied regarding these matters.

³ Defendant's first CPL 440.10 motion in indictment number 6750/2002 was denied on December 20, 2007 by Justice Plummer Lott. A copy of this decision and order is attached to the People's opposition papers.

Further, defendant presents bare bones assertions not substantiated by any documentation supporting his claim that he was incapable of understanding the proceedings. In fact, defendant again makes claims of his mental health issues and states that his attorney failed to establish his competency and the court also sua sponte failed to order a 730 exam.

However, defendant provides no medical documentation to support his claim and does not even assert that he informed his attorneys that he was undergoing mental deficiencies to the extent that he did not understand and could not fully participate in the proceedings.

In fact, this court finds defendant's assertions improbable as defendant participated in his murder trial at a pre-trial *Huntley* hearing by testifying and asserting self defense. Through out the record of these three proceedings, defendant provided no reasonable basis for the court to find or even to inquire about defendant's competency or lack thereof. *People v Shaffer*, 81 AD 3d 989 (App Div 2nd Dept 2011)

In addition, defendant pled guilty to rape in 2002 and challenged the validity of that matter by alleging that his prosecution was time barred. Regarding defendant's 1994 case, he did not move to withdraw the plea there and he did not appeal.

For almost twenty years, from 1994 to the instant motion, defendant had not asserted that he was not capable of understanding the proceedings of any of these matters.

Defendant has proven to be a seasoned pro se litigant with a particular skill towards understanding the proceedings enough to file a significant amount of matters which belies his assertions that he was incapable of understanding the proceedings that he is now challenging.

Further, defendant provides no basis to support a finding that counsel was ineffective for not ordering or requesting a competency hearing.

Here, defendant has not established that his counsel provided ineffective representation under the applicable federal and state constitutional standards in *Strickland v Washington*, 466 US 668 (1984) and *People v Baldi*, 54 NY 2d 137 (1981)

Pursuant to Criminal Procedure Law section 440.10 (2) (C), the court must deny a motion to vacate when *“although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant’s unjustifiable failure to take or perfect an appeal during the prescribed period or to*

his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him."

Claims defendant makes here could have also been raised in his prior appeal as the facts were known to defendant at the time of judgment. *People v Cochrane*, 27 AD 3d 659 (App Div 2nd Dept 2006)

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]).

Here, the defendant has not provided any issues of fact pursuant to CPL § 440.30 [5] requiring resolution in a hearing. As such, this matter is denied without a hearing.

Defendant's judgment of conviction in this matter was affirmed by the Appellate Division, Second Department. An application for a writ of habeas corpus and coram nobis motions was also filed, pro se, by defendant.

All of defendant's state and federal motions were denied in this matter, with the exception of defendant's CPL 440.20 which was granted to extent of correcting defendant's sentence on indictment 9332/1996.

Pursuant to CPL § 440.10(3)(b), the court may deny a motion to vacate a judgment when *“the ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state, other than an appeal from the judgment, or upon a motion or proceeding in a federal court; unless since the time of such determination there has been a retroactively effective change in the law controlling such issue.”*

As the United States Supreme Court stated in *Lafley v Cooper*, “the benchmark for judging any claim of ineffective assistance of counsel must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”

Defendant’s motion here is both procedurally barred and denied on the merits.

Defendant’s motion contains matters that were known to him at the time of his appeal, and at the time of his prior 440 motions, which could have been raised on appeal or in the 440 motions, but defendant makes no reasonable justification for not raising such matters at the time of his appeal or in his earlier CPL 440.10 motions. As such, defendant is mandatorily and permissively precluded from raising these matters now.

A court must deny a motion to vacate a judgment of conviction when sufficient facts appear on the record for appellate review of such legal issues but when the defendant unjustifiably failed to raise such issues on appeal. *People v Cuadrado*, 9 NY 3d 362 (2007) ; CPL section 440.10(2) (C)

The argument defendant makes regarding his conviction by trial and his two convictions by plea are facts that exist in the record and were not brought up on appeal by the defendant. Defendant does not provide this court with any justifiable reason why this issue was not brought up on appeal.

Any off the record discussions, that defendant may have had with his attorney and now complains of, are matters that should have been brought before the trial judge or at the time of plea. Further, the claim defendant makes is improbable as it dehors the record.

Defendant is mandatorily restricted from bringing the claim in a CPL § 440.10 motion because such motion shall not be used as a vehicle for a second appeal or as a substitute for direct appeal. *People v Cooks*, 67 NY 2d 100 (1986); *People v Williams*, 5 AD 3d 407 (2nd Dept 2004).

Defendant's claims here are barred both because they could have been raised on appeal, but were not and because they are based on the record which dehors defendant's claims.

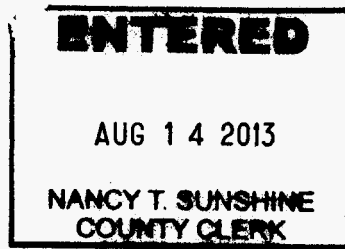
In order for defendant to prevail on a claim of ineffective assistance of counsel under the state standard, defendant must show that he was denied "meaningful representation". *People v Stultz*, 2 NY 3d 283 (2004).

There being no showing by defendant that he was denied "meaningful representation", upon examination of the evidence, the law and the circumstances of this particular case, viewed in totality based on the record before this court, the defendant's attorney is presumed to have rendered effective assistance to his client. *People v Benevento*, 91 NY 2d 708 (1998); *People v Baldi*, 54 NY 2d 137 (1981); *Strickland v Washington*, 466 US 668 (1984)

As such, defendant's allegations fail to establish any basis, for consideration by this court, for the relief sought.

Accordingly, defendant's CPL § 440 motion is denied in its entirety.

This shall constitute the Decision, Opinion and Order of the Court.



ENTER:

Hon. Desmond A. Green, J.S.C.

Notice of Right to Appeal for a Certificate Granting Leave to Appeal

Defendant is informed that his right to appeal from this order determining the within 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, defendant 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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