

People v Khatib

2013 NY Slip Op 32012(U)

August 21, 2013

Supreme Court, Kings County

Docket Number: 7127-02

Judge: Deborah A. Dowling

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M E M O R A N D U M

**SUPREME COURT: KINGS COUNTY
(Criminal Term, Part 1)**

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PEOPLE OF THE STATE OF NEW YORK,

DECISION AND ORDER

By: Justice Deborah A. Dowling

- against -

Dated: August 21, 2013

Indictment No: 7127-02

MOHAMMED KHATIB

Defendant.

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The defendant submitted the instant motion, *pro se*, seeking an Order setting aside his sentence pursuant to Criminal Procedure Law §440.20. The defendant contends his current sentence was improperly imposed and is invalid as a matter of law. Specifically, the defendant contends his constitutional rights were violated when this Court improperly adjudicated him as a second felony offender in the instant matter. The defendant further asserts good cause exists for failing to challenge the constitutionality of his previous conviction prior to sentencing. The People oppose the defendant's motion. For the reasons stated herein the defendant's motion is denied in its entirety.

PROCEDURAL HISTORY

On December 4, 2003, the defendant was convicted of four counts of conspiracy in the second degree and one count of criminal sale of a firearm in the third degree. The charges arose out of the defendant's plan to hire a "hitman" to execute his wife, her son, her son-in-law and her sister. The defendant provided the detective with his target's addresses, phone numbers, photographs and a .38 caliber revolver. The person the

defendant believed to be a “hitman” was actually a detective posing as a Mafia “hitman” and ultimately foiled the defendant’s plot. After being convicted of the crimes detailed herein the defendant was sentenced as a second felony offender to concurrent prison terms of twelve (12) and one-half years to twenty-five (25) years incarceration for each conspiracy count and three and one-half (3½) to seven (7) years for the criminal sale of a firearm.

On April 24, 2006, the defendant moved, *pro se*, to set aside his sentence pursuant to CPL §440.20. He asserted he was improperly adjudicated a second felony offender since the predicate crime used to make the determination was a class A misdemeanor. This Court denied the defendant’s motion in a decision dated December 6, 2003. On July 19, 2007, the defendant’s application for leave to appeal from this decision to the Appellate Division, Second Department, was denied.

The defendant then moved, *pro se*, to vacate his judgment of conviction pursuant to CPL §440.10, on March 20, 2007. The defendant claimed his trial counsel was ineffective. On June 29, 2007, this Court denied the defendant’s motion to vacate his judgment on the grounds the defendant’s claims were procedurally barred pursuant to CPL §440.10(2)(b). The defendant again attempted to appeal from this decision to the Appellate Division, Second Department. On December 24, 2007, the defendant’s leave application was denied.

The defendant submitted yet another motion seeking to set aside his judgment of conviction pursuant to CPL §440.10 and again claiming he was improperly adjudicated a second felony offender. The motion contained arguments similar to those raised in the defendant’s first motion and was denied by the court, on September 26, 2007. The

defendant also appealed his judgment of conviction to the Appellate Division, Second Department. The defendant raised a myriad of claims including his claim trial counsel rendered ineffective assistance of counsel. On February 15, 2011, the Appellate Division unanimously affirmed the defendant's judgment of conviction finding the defendant's claims of ineffective assistance of counsel were meritless. *People v. Khatib*, 81 A.D.3d 852 (2nd Dept. 2011). Leave to appeal was denied by the Court of Appeals on May 26, 2011. *See People v. Khatib*, 16 N.Y.3d 896 (2011).

On April 20, 2012, the defendant moved for a second time, *pro se*, to vacate his judgment pursuant to CPL §440.10 claiming ineffective assistance of counsel. This Court denied defendant's motion in a decision, dated July 18, 2012. Subsequently, the Appellate Division, Second Department, denied the defendant permission to appeal from this Court's decision. On February 22, 2013, the defendant then moved, *pro se*, for a writ of error *coram nobis* claiming he was denied effective assistance of appellate counsel. The Appellate Division denied defendant's motion by decision and order dated June 26, 2013. The defendant now submits the instant motion seeking to set aside his sentence.

CONCLUSIONS OF LAW

As stated above, the defendant now moves, *pro se*, to set aside his sentence based upon his contention, he was improperly adjudicated a second felony offender at the time of sentencing. The defendant argues the conviction used as the court's basis to adjudicate him as second felony offender was unconstitutional.

Criminal Procedure Law §400.21(7)(b) states a defendant may, at any time during the course of the second felony offender hearing controvert an allegation with respect to

the second felony conviction on the grounds the conviction was unconstitutionally obtained. However, failure to challenge the previous conviction constitutes a waiver by the defendant of any allegation of unconstitutionality unless good cause is shown for failing to make a timely challenge.

In the instant case, a second felony offender hearing was conducted before this Court, on December 23, 2003, to determine the defendant's felony offender status. During the course of the hearing it was established the defendant was convicted of a non-violent felony in 1995. At the time of the hearing the defendant unambiguously admitted being convicted of the felony used to adjudicate him a second felony offender and admitted receiving a copy of the predicate statement. The hearing minutes reflect the following conversation with the defendant,

THE COURT CLERK: Mr. Khatib, have you received a copy of the predicate statement?

THE DEFENDANT: Yes.

THE COURT CLERK: Have you discussed this matter with your lawyer?

THE DEFENDANT: Yes

THE COURT CLERK: Do you admit you are the person who's convicted of this felony?

THE DEFENDANT: Yes.

THE COURT CLERK: Finally, do you wish to challenge the constitutionality of this prior conviction?

THE DEFENDANT: No.

THE COURT: Defendant will be adjudicated as a second felony offender. *Transcript*, pg. 7-9.

Under CPL §400.21(7)(b) failure to challenge the constitutionality of a predicate conviction at the time of the hearing constitutes a waiver of future allegations of unconstitutionality. However, if a defendant can show good cause for failing to assert a timely challenge a court may nonetheless consider a defendant's claim of unconstitutionality. *Id.*

Here, the defendant argues good cause exists for his untimely challenge because he contends trial counsel advised him that any challenge to his prior felony conviction would result in consecutive sentences instead of concurrent sentences for his conspiracy convictions. The defendant further asserts his trial attorney failed to produce the sentencing transcript of the prior conviction that would have supported a challenge to the prior conviction before his second felony offender hearing.

The defendant's claims are not supported by credible evidence. The defendant has failed to adduce any evidence to support his contention of being advised to forego objecting to an unconstitutional proceeding. Moreover, even assuming, arguendo, the 1995 sentencing transcript were ambiguous as to the nature of his conviction, the defendant concedes in his own papers that he was informed about the underlying felony conviction prior to his 2003 hearing. The defendant at no time prior challenged the constitutionality of the underlying felony conviction and did not challenge the conviction on the record at that time of sentencing or thereafter. The defendant effectively waived his rights by failing to make a challenge at the time of the hearing.

This Court has denied similar CPL §440.20 motions by the defendant on several occasions. The defendant has failed to set forth any grounds upon which this Court can rely upon to set aside the defendant's sentence. A thorough predicate hearing was held prior to the defendant's sentencing and the previous conviction was set forth before this Court. The court relied upon that conviction in finding the defendant is a second felony offender. The defendant has filed numerous post conviction motions and instigated numerous appeals of his conviction and sentence. Each attempt has been denied and the instant motion is a continuation of the defendant's thinly veiled attempt at either reducing

his sentence or setting aside his conviction. As the procedural history of this case suggests, this case has been marked by significant post conviction motion practice. However, throughout the tortured post-conviction posture of this case, the defendant has failed to submit a scintilla of evidence establishing he was afforded anything other due process of the law. Accordingly, the defendant's motion to set aside his sentence is denied.

The defendant is advised that his right to an appeal from this 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.

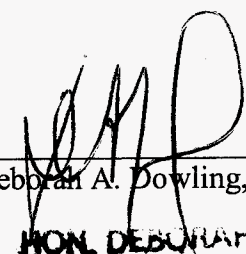
APPELLATE DIVISION, 2ND Department
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Brooklyn, NY 11201

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

Kings County District Attorney

Appeals Bureau
350 Jay Street
Brooklyn, NY 11201

This shall constitute the decision and order of this Court.



Deborah A. Dowling, J.S.C
HON. DEBORAH A. DOWLING

ENTERED

AUG 27 2013

NANCY T. SUNSHINE
COUNTY CLERK