

People v Cherry

2013 NY Slip Op 32014(U)

August 15, 2013

Supreme Court, Kings County

Docket Number: 15285/1996

Judge: Desmond A. Green

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

-----X
THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

Memorandum
Decision and Order

Against

IND. 15285/1996

LAMONT CHERRY,

AUGUST 15, 2013

Defendant.

-----X

GREEN, J.

Upon a notice of motion, defendant moves pro se' for an order pursuant to Criminal Procedure Law (CPL) sections 440.20 (1) to have his sentence therewith set aside.

Defendant's claims are procedurally barred and without merit, thus defendant's motion is summarily DENIED in its entirety.

Among other motions challenging his conviction and sentence, this is defendant's second CPL 440.20 motion.

Defendant was charged in this indictment with Murder in the 2nd Degree, Criminal Possession of A Weapon in the 2nd Degree and Criminal Possession of A Weapon in the 3rd Degree for the crime of shooting and killing a fellow drug dealer in the heroin trafficking business at 466 Madison Avenue in Kings County on the night of October 2, 1995.

After the conclusion of a trial by jury wherein the defense of extreme emotional disturbance was charged, the jury on October 29, 1997, found defendant guilty of Manslaughter in the 1st Degree and Criminal Possession of A Weapon in the 2nd Degree.

At sentencing on November 20, 1997, Hon. Robert Kreindler sentenced defendant to 12 and a half to 25 years for Manslaughter and seven and one half to 15 years for the Weapon Possession charge to be served concurrently with the Manslaughter sentence.

Defendant also filed an appeal in this matter and the Appellate Division affirmed defendant's conviction. *People v Cherry*, 275 AD 2d 796 (App Div 2nd Dept 2000) On December 29, 2001, defendant's leave to appeal to the Court of Appeals was denied. (Rosenblatt, J)

Defendant raises the same claims he raised in his prior CPL 440.20 motion adding on additional reasoning, however defendant could have raised these claims in his prior appeal or in his prior 440.20 motion.

In the decision denying defendant's CPL 440.20 motion, dated April 3, 2003, Hon. Robert Kreindler, found defendant's claim without merit because defendant's conviction is controlled by the provisions of Penal Law 70.02 (4) effective October 1, 1995 as defendant committed the crimes on October 2, 1995.

Defendant's request to be adjudicated as a Youthful Offender was also denied pursuant to CPL 430.10 as defendant's sentence to a Class E felony could not be changed by the trial court "where the court has imposed a sentence and such sentence is in accordance with the law, such sentence may not be changed, suspended or interrupted once the term or period of the sentence has commenced." (Kreindler J.)

Defendant now claims ineffective assistance of counsel alleging that his prior counsel, Marvin Pope, Esq., failed to "investigate all appropriate substantive defenses both pre trial and trial, and his failure to master all of the facts relative thereto, resulted in the deprivation of defendant-petitioner's right to effective assistance of counsel." ¹

Defendant also claims in the instant motion that the trial court erred because it considered crimes for which defendant was acquitted in sentencing the defendant.

However, defendant's interpretation of the court's colloquy is in error. There is no evidence in the record that the court considered the acquittals in sentencing defendant on the crimes he was convicted for.

In denying youthful offender treatment "because of the extreme seriousness of the crime" the court noted the "substantial break by finding you [defendant] acted under extreme emotional disturbance." ²

This court takes note of the factors for considering Youthful Offender Treatment as defendant carefully outlines in his motion papers with relevant case law citation as well as the specific factors pertinent to defendant's life (including being a teenager and that he had no prior convictions) where he believes Youthful Offender Treatment should have been accorded to him.

¹ Defendant's motion papers dated March 12, 2013 at P 8.

² Defendant's motion papers dated March 12, 2013 at P 9 citing the Sentencing transcript at P 10 and 11 attached to defendant's papers as Exhibit A.

However, this issue was litigated in defendants prior CPL 440.20 motion decided by the trial judge, Hon .Robert Kreindler, who sentenced defendant subsequent to the jury trial and Justice Kreindler declined to give defendant such status despite defendant's recollection that the "probation department recommended in its pre-sentence report that the defendant be treated as a Youthful Offender." ³

Pursuant to *People v Arogundy*, 112 AD 2d 1003 (App Div 2nd Dept 1985) ⁴, the determination of a defendant's sentence is a matter resting with the sentencing court and should not be disturbed absent a clear abuse of discretion of a failure to observe sentencing principles.

As in this case, the court in *Arogundy* noted in the underlying facts of that case, "admittedly, Criminal Term declined to follow the Probation Department's recommendation. Nonetheless, a recommendation by the Probation Department is not binding on the sentencing court."

In opposing defendant's motion, the People also point out that "defendant's account of the incident and how he came to be a drug trafficker was largely perjurious, which the court was entitled to consider in imposing sentence." ⁵ *People v Williams*, 51 NY 2d 803 (1980)

Justice Kreindler stated at sentencing, that "based on everything I heard at the trial, the sentence I am about to impose, I think [,] is a just and proper one." ⁶

Pursuant to CPL 440.20 (1), the Court may set aside a sentence only if it is unauthorized, invalid or illegally imposed. Such is not the case here.

Defendant is mandatorily prohibited from raising claims appearing on the record that he could have raised in his appeal. Regarding such claims appearing off record, such as in conversations he may have had with his former attorney, defendant is foreclosed from bringing such claims up at this juncture because he failed to bring up such claims in his prior CPL 440.20 motion.

Further, defendant provides no justifiable reason why he failed to raise such claims previously or why such claims should be considered in the interest of justice.

³ Defendant's motion papers dated March 12, 2013 at P 12 paragraph 19.

⁴ Appeal denied, *People v Arogundy*, 66 NY 2d 761 (Ct of App 1985)

⁵ People's opposition papers dated April 30, 2013 at P 26.

⁶ Sentencing minutes at P 10.

Even if defendant was not procedurally barred from bringing such claims, defendant provides no legitimate basis for this court to consider in setting aside or adjusting defendant's sentence.

Also, when a defendant raises an old claim and attempts to add new facts, to the extent that the claim is based on facts in defendant's prior motion before the Appellate Division, the claim is denied. *People v Purcell*, 160 AD 2d 899 (App Div 2nd Dept 1990)

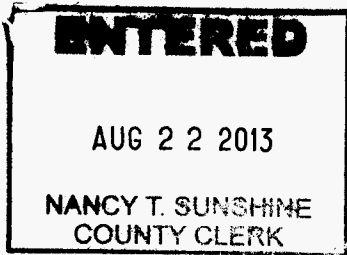
On July 22, 2003, defendant's application for leave to appeal from the denial of his prior CPL 440.20 motion to set aside the sentence was denied by the Appellate Division, 2nd Department. *People v Cherry*, No. 2003-03928 (Prudenti J.)

Defendant's instant motion is mandatorily and permissively procedurally barred; and defendant's claims are denied on the merits.

Consequently, defendant's motion herein is denied in its entirety.

Accordingly, based on the foregoing, the defendant's CPL 440.20 (1) motion to set aside his sentence is DENIED.

This constitutes the decision 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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