

**People v Smith**

2013 NY Slip Op 32204(U)

August 9, 2013

Supreme Court, Kings County

Docket Number: 6713/1998

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.

DATED: August 9, 2013

JULIO ISLEY SMITH,  
Defendant.

INDICT NO: 6713/1998

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Defendant moves pro se for an order to set aside his sentence pursuant to CPL article 440.10.

Based on a review of the motion papers, including defendant's reply to the People's opposition, date stamped May 2, 2013, such other papers on file with the Court, the decision and order of the Court on defendant's motion is summarily DENIED in its entirety for the following reasons.

Among other charges, defendant was found guilty of raping, sodomizing and sexually abusing his 10 year old nephew and his 9 year old niece, following the conclusion of a bench trial before Justice Gerges on June 7, 1999.

Defendant was convicted of several counts of the Penal Law, including Sodomy in the First Degree, Sexual Abuse in the First Degree, Endangering the Welfare of A Child, Rape in the First Degree and Promoting an Obscene Sexual Performance of A Child.

On October 26, 1999, Justice Gerges sentenced defendant as a second violent felony offender, to terms of 25 years to life on each rape and sodomy count; seven years for each sexual abuse count and lesser terms for the obscenity and child endangerment counts. These terms of imprisonment ran concurrently to each other for the crimes defendant committed against his 10 year old nephew and consecutively to the crimes defendant committed against his 9 year old niece.

A prior CPL 440 motion was filed pro se by the defendant on June 13, 2000. That motion was denied, pursuant to CPL 440.30 (4)(b) on January 19, 2001 by Justice Gerges, in which the court stated that defendant's claims against his trial counsel was refuted by the trial and sentencing minutes.

The facts alleged by defendant were found to be rebutted by "unquestionable documentary proof" in the record and other allegations of defendant were denied because defendant made only "conclusory allegations" without sworn specific information. The court, in defendant's 2000 440 motion, also addressed the merits of defendant's claims of ineffective assistance of counsel and held that defendant was not denied a fair trial as counsel's representation was meaningful.

Subsequently, defendant directly appealed to the Appellate Division, Second Department and on February 25, 2002, defendant's judgment of conviction was unanimously affirmed by the Appellate Division. *People v Smith*, 291 AD 2d 575

(2<sup>nd</sup> Dept 2002) Leave to appeal to the Court of Appeals was denied on July 12, 2002. *People v Smith*, 98 NY 2d 702 (2002) (Levine J.)

Subsequent to his appeal, defendant moved pro se for writ of error *coram nobis*. That motion was also denied by the Appellate Division on March 24, 2003, wherein the court held that defendant failed to establish that he was denied the ineffective assistance of appellate counsel. *People v Smith*, 303 AD 2d 695 (2<sup>nd</sup> Dept 2003) The Court of Appeals by order dated July 10, 2003, denied leave to appeal the *coram nobis* decision of the Appellate Division. *People v Smith*, 100 NY 2d 587 (2003) (Rosenblatt, J)

Defendant also filed a federal habeas corpus petition on February 10, 2003 in the United States District Court for the Eastern District of New York, claiming among other things, the ineffectiveness of his trial and appellate counsel and that his sentence was excessive. The federal court denied defendant's claims.

Defendant filed a second pro se CPL 440 motion dated August 9, 2008 where his claims included that the police subjected him to a "perp walk", thereby violating his constitutional rights; that allowing testimony of the two underage complaining witnesses violated his rights because their testimony was not corroborated; that the People did not prove beyond a reasonable doubt; ineffective assistance of counsel and actual innocence.

The 2008 440 motion was denied by decision and order dated April 23, 2009. In that decision, Justice Gerges held that some of defendant's claims were procedurally barred, mandatorily denied and without merit.

Defendant's claims, in his current third CPL 440 pro se motion, are mandatorily and permissively barred as well as denied on the merits. Some of the claims, defendant now makes were brought up previously in his prior state motions where such motions were denied, thus, defendant is mandatorily barred from bringing those claims now. Other claims of defendant were denied on the merits.

The claims defendant now makes, that were not brought up in his direct appeal or prior CPL 440 motion, are claims that could have been brought up from the record in his appeal and off the record matters in his CPL 440 motions, but defendant failed to do so and offers no justifiable reason for not doing so.

Defendant again contends that his attorney was ineffective and amid a series of vague and unsubstantiated claims put forth in his current submission, defendant now complains that copies of the victims' medical records were not provided to him; that he was excluded from several side bar conversations during the course of the proceedings; that he is innocent and conveyed such to the trial court; that defendant was coerced into a bench trial and that the prosecution's medical expert witness was allowed to cite information in the medical report of the two victims.

Defendant also includes a rambling diatribe about relationships he had during this time with his mother, assertions about his niece and nephew and about his aunt who owed him money and other confusing information that, if there was any merit to the information, such information was known to the defendant at the time of trial, at the time he filed his prior two CPL 440 motions and at the time he filed other state and federal motions in this matter. Such matters are procedurally barred from review as defendant failed to include such claims in his prior submissions filed with the court.

Also, when a defendant raises an old claim and attempts to add new facts, as here, especially regarding defendant's ineffective assistance of counsel claim, 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 2<sup>nd</sup> Dept 1990)

Decision and order on defendant's two prior CPL 440 motions found that trial counsel was effective. In the April 2009 decision by the court, Justice Gerges, who presided over the trial and had the benefit of observing defendant's attorney, stated that "the record indicates that counsel provided a competent performance including appropriate objections, based upon a reasonable strategy. The defendant was afforded meaningful representation under the circumstances."

In that decision, the court further held that, "Defendant has also failed to establish that he was prejudiced either by counsel's performance or by the unfairness of the proceedings as a whole."

Thus, the effectiveness of defendant's trial counsel was previously determined. See, CPL 440.10 (3) (c); *People v Cochrane*, 27 AD 3d 659 (2<sup>nd</sup> Dept 2006)

Defendant also again raises claims of innocence which was also rejected in the second pro se CPL 440 motion he filed, as it was "made solely by defendant and unsupported by the record or any other evidence."

Here, too, the instant claim repeating defendant's contention of innocence is barred and unsupported by any evidence pursuant to CPL 430 (4) (d) which states, "*Upon considering the merits of the motion, the court may deny it without conducting a hearing if: An allegation of fact essential to support the motion is (i) contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true.*"

However, defendant also claims new evidence in his ineffective assistance of counsel claim because he learned, just prior to filing his third CPL 440 motion, that his former trial attorney had been disbarred.

In his motion papers dated February 16, 2013, defendant suggests that “a question of sufficiency should be asked. Did his [trial attorney’s] problem cause me [defendant] to get less performance than I would have if he did not have legal problems of his own.”

Defendant has failed to establish by a preponderance of the evidence every fact essential that his claim meets the criteria for newly discovered evidence pursuant to the six factors enunciated in *People v Salemi*, 309 NY 208 (1955); *People v Latella*, 112 AD 2d 321 (2<sup>nd</sup> Dept 1985)

The bare bones ineffectiveness of counsel claim defendant now makes, in his third CPL motion, suspected because of Philip E. Sicks’ disbarment is at best a futile reach by defendant since defendant has yet to provide this court with any basis to substantiate his repeated ineffective assistance of counsel claim.

It is no secret that Mr. Sicks was disbarred in 2004, as a result of a conviction for Grand Larceny in the Fourth Degree almost seven years after the defendant was indicted in this matter, for reasons that had nothing to do with his representation of this defendant in this case nor any other case as evidenced from the public

information regarding Mr. Sicks. *See, In re Philip E. Sicks*, 15 AD 3d 5 (App Div 2<sup>nd</sup> Dept 2005)

Defendant's third CPL 440 motion is denied in its entirety as this court finds the claims defendant now makes is procedurally barred pursuant to CPL 440 nor does defendant's claim have any merit or provide this court with any legal justifiable reason to override the prior determinations made in this matter.

Defendant's claims herein that involve matters that appear on the face of the record could have been raised on his direct appeal, as such defendant is procedurally barred from raising these claims in a 440 motion to vacate his judgment of conviction.

Off the record claims defendant makes here could also have been raised in either of defendant's two CPL 440 motions, however where defendant repeats such claims, they were either procedurally barred or denied on the merits.

Regarding any new claims defendant makes now, in his third CPL 440 motion, made more than thirteen years after defendant's conviction on October 16, 1999, this court finds that defendant's claims are procedurally barred or without merit.

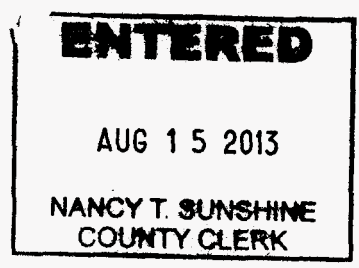
As supported by the court record, defendant was adequately represented by counsel and counsel provided meaningful representation to defendant in this

matter. Defendant's claims of ineffective assistance of counsel is unsubstantiated and without merit. *People v Stultz*, 2 NY 3d 277 (2004) ; *Strickland v Washington*, 466 US 689 (1984)

Defendant has failed to state any claims to this court upon which relief can be based pursuant to CPL 440.30 (4) (a) which states, "Upon considering the merits of th motion, the court may deny it without conducting a hearing if: The moving papers do not allege any ground constituting legal basis for the motion."

For the aforementioned reasons and for the reasons enunciated in the People's opposition papers as substantiated by record of the official court minutes and prior judicial orders relevant to the issues herein, defendant's motion is summarily denied in its entirety on the merits.

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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