People v Smith
2013 NY Slip Op 32699(U)
September 23, 2013
Supreme Court, Kings County
Docket Number: 2928/1998
Judge: Desmond A. Green

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,

-against-

AKEEM SMITH

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By: Hon. Desmond A. Green

Date: September 23, 2013

DECISION & ORDER

Indictment Nos. 2928/1998
13485/1994

Defendant moves to vacate his sentence pursuant to CPL § 440.20 on the grounds that he was improperly sentenced as a persistent violent felony offender. In support of this claim, defendant has made two pro se submissions, dated November 7, 2012 and December 12, 2012, which this court will address together. Specifically, defendant alleges that both the People and the sentencing court erroneously relied on a prior non-violent felony conviction when it was determined that he had two previous violent felony convictions. Accordingly, defendant seeks to be resentenced as a second violent felony offender. For the following reasons, the motion is denied.

Defendant was convicted of two violent felonies prior to his conviction in the instant case. On September 25, 1991, defendant pleaded guilty to attempted robbery in the second degree (PL §§ 110/160.10[1]) under Indictment No. 13883/90. Defendant does not contest the use of this conviction as a predicate felony. On June 26, 1995, defendant pleaded guilty to attempted criminal possession of a weapon in the third degree (PL §§ 110/265.02[4]) under Indictment No. 13475/94. Defendant was sentenced under the 1994 indictment as a second violent felony offender. It is this 1994 conviction that defendant now challenges as a predicate

with respect to the sentence imposed for the instant conviction.

Defendant's conviction in the instant case stems from his role in the 1998 robbery of a Brooklyn social club. Defendant and an accomplice, brandishing a shotgun and a handgun, ordered the patrons to the ground and robbed the patrons and the club operator of cash, jewelry, small electronics and other personal items. As they left the club, one of the perpetrators fired a warning shot. For his conduct, defendant was charged under Indictment No. 2928/98 with twenty-two counts of robbery in the first degree (PL § 160.15[2], [4]) and multiple other related counts.

On March 13, 1999, defendant was convicted by jury verdict of two counts of robbery in the first degree (PL § 160.15[2]), four counts of robbery in the first degree (PL § 160.15[4]), six counts of robbery in the second degree (PL § 160.10[2]), and one count each of criminal possession of a weapon in the second and third degrees (PL § 265.03, § 265.02[4]). On March 29, 1999, defendant was adjudicated a persistent violent felony offender based upon a predicate felony statement submitted by the People that stated that defendant had been convicted of two prior violent felonies. According to the statement, defendant had been convicted under Indictment No. 13883/90 of attempted robbery in the second degree, a class D violent felony, and under Indictment No. 13475/94 of attempted criminal possession of a weapon in the third degree, a class E violent felony. The minutes of the plea allocution indicate that defendant received a copy of predicate statement from the People and that he reviewed it with his attorney. Defendant also admitted that he was the person convicted of the prior violent felonies and stated that he did not wish to challenge the constitutionality of the prior convictions. Defendant was then sentenced as a persistent violent felony offender to concurrent prison terms of twenty-five years

to life on two of the first-degree robbery counts, to run consecutive to prison terms of twenty-five years to life on each of the remaining robbery counts, and to run consecutive to prison terms of fifteen years on each of the weapons counts, plus five years post release supervision.

In March of 2001, defendant appealed from his judgment of conviction, claiming that the consecutive sentencing was harsh and excessive. The Appellate Division modified defendant's judgment of conviction and ordered that all of the imposed sentences run concurrent to each other (*People v Smith*, 288 AD2d 244 [2d Dept 2001]).

On April 22, 2013, defendant's first CPL § 440.20 motion to vacate his sentence under Indictment No. 13475/1994 was denied (Firetog, J.). Relying on an outdated printout from the Division of Criminal Justice Services that listed his conviction under former PL § 265.02(1), defendant argued that his 1995 conviction was for a non-violent felony offense. Defendant claimed that he was improperly adjudicated a second violent felony offender when that non-violent felony was used as a predicate at sentencing. After reviewing the court file along with an updated rap sheet provided by the People, the court determined that, although defendant may have originally been charged in the felony complaint under PL § 265.02(1), defendant was actually indicted under PL § 265.02(4), a violent felony. Defendant later pleaded guilty to attempted criminal possession of a weapon under PL § 265.02(4), which is reflected in the updated rap sheet. Accordingly, the court found that defendant was properly adjudicated and sentenced as a second violent felony offender. Defendant's CPLR § 2221 motion for reargument of the court's order was subsequently denied on September 11, 2013 because defendant's continued reliance on "what is clearly an error on his DCJS printout" was "misplaced" (Firetog, J.).

Defendant now argues again that his 1995 conviction was for a non-violent felony offense, this time claiming that it should not have been deemed a predicate when he was sentenced as a persistent violent felony offender in 1999. As he did in his previous motion to vacate his sentence, defendant alleges that he was convicted of attempted criminal possession of a weapon in the third degree under PL § 265.02(1) and that such provision of the Penal Law constituted a non-violent felony. This claim relies solely on his old, inaccurate rap sheet, which has since been corrected to reflect the actual plea made pursuant to PL § 265.02(4). He provides no new information to supplement his prior claims.

In this instance, defendant's motion is procedurally barred. Pursuant to CPL § 440.20(3), a court may deny a motion to vacate a sentence when the "ground or issue raised thereupon was previously determined on the merits upon a prior motion or proceeding in a court of this state." On two prior motions before a court of this state, defendant has argued that he was convicted of a non-violent felony pursuant to PL § 265.02(1) and in each instance his claim was found to be factually inaccurate and without merit. In the present motion defendant simply reiterates the same argument. This court sees no reason to exercise its discretion to grant the motion in the interest of justice.

In any event, defendant was properly sentenced as a persistent violent felony offender pursuant to the law in effect at the time of his 1998 crime (*see* General Construction Law §§ 93, 94; *People v Behlog*, 74 NY2d 237, 240–241 [1989]; *People v Overton*, 86 AD3d 4 [2d Dept 2011]). In 1998, criminal possession of a weapon in the third degree (PL § 265.02) was classified as a D violent felony offense. The crime of attempted criminal possession of a weapon in the third degree (as defined in PL §§ 265.02[4], [5], [6], [7] or [8]) constituted a class E

violent felony offense under PL § 70.02(1)(d) in those cases when the defendant was convicted of such charge as a lesser included offense as defined in CPL § 220.20. CPL § 220.20(1) defined a lesser included offense as one where the defendant pleads "to an offense of lesser grade than one charged in a count of an indictment." "Thus, according to the plain statutory language, a class E violent felony offense [was] reserved for accuseds who plead[ed] guilty to attempted criminal possession of a weapon in the third degree as a lesser included offense under an indictment charging a greater offense" (*People v Caraballo*, 79 AD3d 902, 903 [2d Dept 2010], quoting *People v Dickerson*, 85 NY2d 870, 872 [1995]). Where defendant pleaded guilty to attempted criminal possession of a weapon in the third degree (PL §§ 110/265.02[4]) as a lesser included offense of the greater crime charged in the indictment (PL § 265.02[4]), defendant was in fact convicted of an E violent felony. Therefore, defendant's conviction for attempted criminal possession of a weapon in the third degree properly constituted a predicate violent felony for sentencing purposes (PL §§ 70.04[1][b], 70.08[1][a][2]).

Accordingly, the motion is denied in its entirety.

This decision constitutes the order of the court.

ENTER:

DESMOND A. GREEN, J.S.C.