

People v Robinson

2013 NY Slip Op 32901(U)

October 30, 2013

Supreme Court, Kings County

Docket Number: 9130/99

Judge: Deborah A. Dowling

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MEMORANDUM

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: October 30, 2013

Indictment No: 9130/99

EDDIE ROBINSON,

Defendant(s).

-----X

The defendant submitted the instant motion, *pro se*, seeking an Order to vacate his conviction pursuant to Criminal Procedure Law §440.10(1)(h) after a complete Plenary hearing pursuant to Criminal Procedure Law §440.30(5)¹. The defendant also submitted a second motion entitled demand as a matter of law.²

The defendant contends his conviction and sentence are illegal based upon the fact that the original docket number under which he was arraigned was later dismissed. The defendant further argues the instant indictment should be dismissed as he was denied his statutory right to testify before the grand jury.

¹The defendant's request for a hearing is denied pursuant to CPL §440.30(4)(d)(i).

²This motion is denied as adjournments were necessary to allow the parties to submit their respective arguments with the defendant even submitting reply papers on the instant motion on October 15, 2013. The demand for judgment was clearly premature.

PROCEDURAL HISTORY

The underlying facts of the defendant's conviction relate to the theft of a tractor trailer. On November 11, 1999, the defendant stole a 2000 Freightliner Tractor Trailer which contained carbon paper. The vehicle was taken from Grand Street and its intersection with Vandervort Avenue, in Kings County. The defendant drove that stolen tractor trailer to a New Jersey rest stop where he swapped the stolen trailer containing the carbon paper for one containing refrigerators. The defendant stole the tractor trailer containing the refrigerators and drove the vehicle back Brooklyn.

On November 16, 1999, law enforcement personnel observed the defendant trying to turn from Hegeman Street onto Berriman Street in Kings County. The defendant made three unsuccessful attempts to turn the vehicle when law enforcement approached the tractor trailer. The defendant attempted to evade apprehension but was subsequently detained and arrested. On November 17, 1999 the defendant was charged for these acts under Docket Number 1999KN084385. However, on November 24, 1999, the People moved to withdraw the case under the aforementioned docket number due to the unavailability of a witness who was out of state at the time.

The People re-presented the matter to another grand jury and on February 2, 2000 an indictment was issued against the defendant, under indictment # 9130/99. The defendant was charged with a number of theft charges relating to the tractor trailer thefts. On March 31, 2000, the defendant plead guilty under indictment # 9130/99 to Grand Larceny in the Second

Degree before this Court. On April 28, 2000, the defendant was sentenced to a term of incarceration of three (3) to six (6) years. The defendant has submitted other post conviction motions seeking to set aside or recalculate his sentence. The defendant's other motions were denied. Based upon the findings herein, the instant application is also denied.

CONCLUSIONS OF LAW

The question presented is whether there exists a legal basis to vacate the defendant's judgment of conviction and whether a hearing is necessary to determine the merits of the defendant's motion. The answer to both questions is a resounding no. There is no merit to the claims raised herein by the defendant. The Court is empowered to deny the defendant's request for a hearing to determine the merits of the instant motion where there is no evidence to support the defendant's motion. *See Criminal Procedure Law* § 440.30(4)(d)(i). Here, the defendant failed to present evidence establishing his claims and a determination of the claims raised by the defendant is readily discernable by the submissions and record of this case.

There is also no legal basis to grant the defendant's application. Criminal Procedure Law (CPL) §440.10(1) permits the Court, in which a judgment was entered, to vacate such judgment any time after the entry of judgment. However, Criminal Procedure Law §440.10(2)(c) provides that the Court **must** deny a motion to vacate a judgment if :

“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, [and] no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period

...” CPL §440.10(2)(c).

In the instant case, the defendant’s failure to raise the claims in this motion on appeal bars review of those claims. Moreover, the defendant has failed to demonstrate why he failed to take or perfect an appeal. CPL §440.10(2)(c); *People v Murray*, 2 AD2d 1160 (3rd Dept 2003); *People v. Kandekore*, 300 A.D.2d 318 (2nd Dept 2002). The defendant submitted this motion thirteen (13) years after he pled guilty to the charges contained in the indictment. There is no logical explanation for why the defendant failed to appeal this matter within the intervening thirteen (13) years. Accordingly, the defendant’s motion is denied as it is procedurally barred pursuant to CPL §440.10(2)(c).

Further, in reviewing the substantive claims raised by the defendant, those contentions fail to set forth a legal basis to grant the defendant’s application. The defendant contends his sentence and conviction are illegal because they are based upon a docket number which was dismissed. There is no legal credence to this argument. The record reflects that during the course of presenting this matter to the grand jury under docket number 1999KN084385, a witness who was out state was unable to testify at the grand jury proceeding within the proscribed time frame. The People sought leave to withdraw the matter from the grand jury with leave to re-present. On November 24, 1999, the Honorable Matthew J. D’Emic issued an order granting the withdrawal but also granted the People leave to re-submit the above captioned case to a future Grand Jury.

The People were legally permitted to seek to withdraw the matter with leave to re-

present. The Court granted the People's application to re-submit the matter and the People in fact re-submitted the matter. The defendant was duly indicted in accord with the law. The manner in which the case was handled did not violate and constitutional protections afforded to the defendant. The original withdrawal of the initial docket number in no way impacted the People's ability to re-submit the matter to another grand jury.

The defendant also argues the People were required to submit the commitment forms and other transcripts in support of its opposition. However, it appears the defendant is under the mistaken belief that in order to re-submit this case to the grand jury that the People were required to obtain a new indictment number in 2000. There is no such obligation. The People submitted a Court Order signed by Justice D'Emic which provided that the People could withdraw the matter from the current grand jury with leave to re-present the matter at a later time. The Order allowed the People to re-submit the charges to the grand jury under the indictment 9130-99. While the defendant may believe he was maliciously and deliberately prosecuted there is no basis to that claim. The evidence submitted clearly shows that docket #99K084385 was not dismissed in the defendant's favor but rather dismissed with the ability for the People to re-submit the indictment for consideration at a later date.

Further, the defendant's contention that he was denied his statutory right to testify before the grand jury is equally without merit. There is no credibility to the claims raised by the defendant. Moreover, during the course of the defendant's plea, the defendant admitted to the underlying facts of this case and also waived his right to appeal as a condition to the

plea agreement. There is no evidence the defendant's rights were abridged at any stage of this matter. The defendant had a fair and full opportunity to mount a defense to the claims lodged in the indictment but, instead decided to plead guilty to the charges therein presumably, because he was guilty. The defendant's claim of malicious prosecution is diametrically opposed to the actual facts of this case. The defendant is not entitled to the proverbial second bite at the apple. The defendant's claims are foreclosed by the record. Accordingly, the defendant's motion is denied in its entirety. It is hereby,

ORDERED, the defendant's motion is denied. It is further,

ORDERED, the defendant's right to appeal from this order 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. It is further,

ORDERED, 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 following parties;

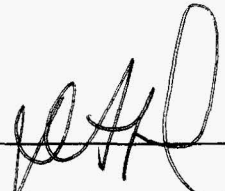
APPELLATE DIVISION, 2ND Department
45 Monroe Place

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

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