

People v George

2014 NY Slip Op 30127(U)

January 8, 2014

Supreme Court, Kings County

Docket Number: 4166/1987,11047/1990

Judge: Thomas J. Carroll

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 24

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THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Thomas J. Carroll

Date: January 8, 2014

-against-

DECISION & ORDER

PATRICK GEORGE,

Indictment No.: 4166/1987,
11047/1990

Defendant.

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Defendant, moving pro se, seeks an order vacating both his judgments of conviction pursuant to CPL § 440.10 on multiple grounds. After filing two separate motions for vacatur, defendant filed a motion for “summary judgment” based upon the alleged failure of the People to timely respond. Defendant then filed a “motion to dismiss” in which he again sought an order vacating both judgments of conviction pursuant to CPL § 440.10. As most of defendant’s motions reiterate similar arguments, his claims are all addressed together here. For the following reasons, each motion is summarily denied.

Background

In the first case defendant was charged under Indictment No. 4166/1987 with, inter alia, rape in the first degree, pertaining to acts committed against Stephanie Stevenson and Camille Moreno. The Supreme Court granted defendant’s motion to sever the counts in the indictment as to the two complainants. The charges involving complainant Moreno went to a jury trial which resulted in a mistrial. The defendant ultimately pleaded guilty to one count of sexual abuse in the first degree relating to Moreno, in full satisfaction of the indictment. On September 13, 1988,

defendant was sentenced to the agreed-upon term of one day in jail and five years probation (Jackson, J., at plea and sentence).

In the second case defendant was charged under Indictment No. 11047/1990 with attempted murder in the second degree (PL §§ 110.00/125.25[1]) and other related charges. On November 4, 1991, defendant pleaded guilty to attempted criminal possession of a weapon in the second degree (PL § 110.00/265.03). On November 25, 1991, defendant was sentenced as a second felony offender to a promised term of imprisonment of three and one quarter to six and one half years (Meyerson, J., at plea and sentence).

Defendant's most recent submissions are preceded by numerous unsuccessful challenges to his two prior convictions. On February 1, 1995, he filed a pro se motion for a writ of habeas corpus relating to Indictment No. 11047/1990 which was granted by the Supreme Court, Bronx County, on May 3, 1995, by releasing him from a parole detainer and restoring him to parole supervision. While his petition was pending in The Bronx, defendant filed in the United States District Court for the Eastern District of New York for two writs of habeas corpus relating to both convictions. In each petition defendant claimed violations of his Constitutional rights. By decision and order dated August 30, 1996, the United States District Court dismissed defendant's petitions (*George v New York State Division of Parole*, 1996 WL 518099). Defendant next moved in Supreme Court, Kings County, to vacate his judgment of conviction under Indictment No. 11047/90. That motion was denied on October 24, 1996 (Vaughn, J.). His application for leave to appeal to the Appellate Division was subsequently denied (Sullivan, J.). Defendant filed a second motion to vacate the judgment of conviction under the same indictment, claiming that the People had never answered his previous motion. By decision and order dated May 9, 2007,

defendant's motion was summarily denied (Guzman, J.). Defendant has also made several attempts to vacate his judgment of conviction under Indictment No. 4166/1987, which were rejected by decisions dated February 19, 1997 (Jackson, J.) and February 29, 2008 (Gerges, J.). Defendant's motion to reargue the 2008 denial of vacatur was denied on October 1, 2008.

In June 2013, defendant moved in the Appellate Division, Second Department, for a writ of mandamus pursuant to Article 78 of the CPLR claiming that this court had failed to reach a decision on the instant motions to vacate the judgments of conviction. That motion was denied on September 18, 2013.

Legal Analysis

Summary judgment under CPLR 3211 lies in civil procedure when the moving party can establish that there is no substantial issue of fact requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). Rather than resolve issues, summary judgment decides whether triable issues exist. For various policy and constitutional reasons however, summary judgment does not lie in a criminal case. Indeed, in all criminal actions and proceedings, the Criminal Procedure Law applies exclusively to "all appeals and other post-judgment proceedings . . ." (CPL § 1.10[1][a]). Although the Second Department has not directly addressed the application of summary judgment in criminal cases, the Appellate Term has found that "[t]he authority of a criminal court to dismiss an information pursuant to a pretrial motion (*see* CPL 170.30) does not include a motion for accelerated judgment available to civil court litigants" (*People v Manupelli*, 22 Misc 3d 67, 68 [App Term, 9th & 10th Jud Dists 2008]). Therefore, as summary judgment is an inappropriate vehicle for the resolution of defendant's claims, that portion of defendant's motion is summarily denied.

With respect to defendant's CPL § 440.10 motion under Indictment No. 4166/1987, defendant now claims, inter alia, that: 1) defense counsel was ineffective in providing advice about the guilty plea; 2) he was wrongly convicted on charges pertaining to Stephanie Stevenson when he was never arrested for or pleaded guilty to crimes against her; 3) the evidence was insufficient to establish that he used force against Camille Moreno; 4) the prosecutor withheld *Brady* and *Rosario* material; and 5) prosecutorial misconduct involving alleged submission of forged documents deprived defendant of his constitutional right to a fair trial.

Defendant's claim that counsel was ineffective is now procedurally barred from review. Several of his allegations of ineffectiveness were either raised and addressed on a prior motion, or could have been raised on a prior motion but were not. As a result, those claims are now barred pursuant to CPL §§ 440.10(3)(b) and (c). In 2008, a similar claim that counsel failed to file a motion to sever the counts in the indictment was rejected (*Gerges, J.*). Moreover, defendant was in a position to raise his additional claims against counsel in either of his prior CPL § 440 motions, yet he neglected to do so. Thus, in the context of defendant's persistent attempt to re-litigate his conviction, this court now rejects his allegation that counsel misadvised him with respect to his decision to plead guilty (CPL § 440.10[3][c]; see *People v Cochrane*, 27 AD3d 659 [2d Dept 2006] [court was not improvident in denying defendant's second CPL § 440.10 motion without a hearing where defendant raised another claim of ineffective assistance of counsel in a prior motion]).

The court also rejects defendant's allegation that he was wrongly convicted for charges pertaining to Stephanie Stevenson. That claim was addressed and found to be without merit in 2008. Again, the record indicates that while defendant was indicted on charges pertaining to

Stevenson, he pleaded guilty to sexual abuse only with respect to Moreno. There is no need to revisit this meritless argument (CPL § 440.10[3][b]).

Defendant forfeited the right to raise the remainder of his issues by pleading guilty. A guilty plea bargained for in negotiation by the parties generally “marks the end of a criminal case, not a gateway to further litigation.” (*People v Taylor*, 65 NY2d 1, 5 [1985]; see also *People v Di Raffaele*, 55 NY2d 234, 240 [1982]). To the extent that defendant is challenging the sufficiency of the evidence before the grand jury, that claim is foreclosed by his guilty plea (*People v Hansen*, 95 NY2d 227, 233 [2000]; *People v Jang*, 17 AD3d 693 [2d Dept. 2005]). By pleading guilty defendant forfeited his right to seek review of any alleged *Rosario* or *Brady* violation (*People v Philips*, 30 AD3d 621 [2d Dept 2006]). Forfeiture also applies to the vague allegation that defendant’s prosecution constituted an “arbitrary and discriminatory enforcement of law” (*People v Rodriguez*, 55 NY2d 776 [1981] [claim of selective prosecution waived by guilty plea]).

In any event, defendant’s last two allegations are self-serving, unsubstantiated and wholly unsupported by the evidence. Defendant fails to elaborate as to what *Brady* and *Rosario* material was allegedly withheld and there is simply no convincing support for the accusation that the People submitted forged documents to the court. Moreover, these allegations could have been previously raised (CPL § 440.10[3][c]).

With respect to his conviction under Indictment No. 11047/1990, defendant alleges that:

- 1) he was denied the effective assistance of counsel;
- 2) a police officer gave impermissible hearsay at the *Wade* hearing;
- 3) he was deprived of his right to due process when the complainants were not compelled to testify at the *Wade* hearing;
- 4) the People’s evidence was

not legally sufficient to establish defendant's identity as the perpetrator; and 5) the court lacked jurisdiction because the ballistics report was not properly certified. All of these claims are either procedurally barred or forfeited by his guilty plea.

Defendant argues that the attorney representing him in his second case gave him incorrect advice that affected his decision to plead guilty. The court now rejects this latest litany of complaints against counsel because defendant was in a position to raise them in any of his previous attempts to vacate the judgment of conviction, yet he failed to do so (CPL § 440.10[3][c]). "In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404 [1995]). Here, where defendant received very favorable treatment at sentencing, there is no indication from the record that defendant received anything less than competent representation by counsel or that he was prejudiced by the alleged deficiencies (*Strickland v Washington*, 466 US 668 [1984]; *People v Caban*, 5 NY2d 143 [2005]; *People v Benevento*, 91 NY2d 708 [1998]; *People v Satterfield*, 66 NY2d 796 [1985]; *People v Baldi*, 54 NY2d 137 [1981]).

The remainder of defendant's claims are forfeited by his guilty plea (*see discussion supra*). As discussed, most claims raised by a defendant that involve issues arising before a plea was entered, whether constitutional, statutory or factual, will be waived as a consequence of the disposition. Along with giving up litigating the question of guilt, in this case defendant's plea necessarily involved the surrender of certain rights including the rights to confrontation, to challenge nonjurisdictional defects in the accusatory instrument and to challenge the sufficiency of the evidence before the grand jury (*Hansen*, 95 NY2d 227; *People v Beattie*, 80 NY2d 840


[1992]; *Taylor*, 65 NY2d 1; *People v Purnell*, 22 AD3d 871 [2d Dept 2005]).

Finally, defendant's record-based claims are mandatorily barred because they could have been raised on appeal. The court must deny a motion to vacate judgment when sufficient facts appear on the record to permit review on appeal, but no such review has occurred owing to the defendant's unjustifiable failure to raise the issue on appeal (CPL § 440.10[2][c]). A motion to vacate the judgment of conviction is not a substitute for an appeal (*People v Cooks*, 67 NY2d 100, 103 [1986]). Such a motion must be denied even if the right to appeal has been voluntarily waived (*id.* at 103, n1).

Accordingly, each of defendant's motions is denied in its entirety.

This decision constitutes the order of the court.

ENTER:



HON. THOMAS J. CARROLL
HON. THOMAS J. CARROLL
J.S.C.

ENTERED

JAN - 8 2014

NANCY T. SUNSHINE
COUNTY CLERK

You are advised that your right to an appeal from the 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.

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