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

THE PEOPLE OF THE STATE OF NEW YORK -against- ELISEO DELEON, Defendant.	DECISION AND ORDER Ind. #8153/95 Date: February 26, 2014 By: Hon. William E. Garnett

The defendant moves to vacate his judgment of conviction, pursuant to Criminal Procedure Law §440.10(1), on the grounds that: (1) the court's refusal to admit his videotaped statement into evidence deprived him of his right to present a defense; (2) the court's voluntariness charge erroneously shifted the burden of proof; (3) counsel was ineffective for failing to object to the voluntariness charge; (4) the prosecution failed to turn over Brady/Rosario material and (5) the verdict was repugnant.

Background

On June 4, 1995, the defendant shot Fausto Cordero in the chest while attempting to rob him. Cordero died of his injuries. Mrs. Cordero, present at the time of the robbery, identified the defendant at a lineup and in court. A woman, on a stoop across the street, also identified the defendant. The defendant made a statement admitting that he had attempted to rob Mr. Cordero but claiming that the shooting was accidental in that the gun had

discharged when Mr. Cordero had grabbed it.

The defendant was charged with Murder in the Second Degree, two counts- intentional and felony murder, Attempted Robbery in the First Degree, two counts, Criminal Possession of a Weapon in the Second Degree and Criminal Possession of a Weapon in the Third Degree.

At the pre-charge conference, the court informed the parties that the first count for the jury's consideration would be Murder in the Second Degree - felony murder. The jury would be instructed that if it found the defendant not guilty of count #1 to consider count #2, Murder in the Second Degree - intentional murder. Transcript, 2/13/96, p. 465-467.

During its charge on voluntariness, the court instructed the jury that it must not give any weight to the defendant's alleged statement in arriving at its verdict unless the jury found, in accordance with the court's instructions, that the statement was voluntarily made and that it was truthful. The court then instructed the jury that the burden of proof was on the People to convince the jury beyond a reasonable doubt that the statement was voluntarily made and also that the statement was truthful.

The court further instructed the jury that:

> "Under an accusatorial system, the guilt of the defendant must be established by the People by evidence freely and voluntarily secured.
>
> In simple terms, that means that the People may not prove the defendant's guilt by the statement out of the

> defendant's own mouth unless such statement was knowingly, freely and willfully- and willingly, rather, given by the defendant.
>
> A statement is voluntarily made by the defendant only if it was in fact knowingly, freely and willingly given by him.
>
> Our law does not specifically define when a statement is voluntarily made. Instead it defines when a statement is involuntarily made.
>
> In general, section 60.45 of our criminal procedure law provides that a statement of the defendant is not (emphasis supplied) involuntarily made when it is obtained from him, A, by any person by the use or threatened use of physical force or by means of any other proper-rather, any improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statement, or , B ...." Jury charge, p. 535-536.

Defense counsel did not object to the court's voluntariness charge or ask the jury to be recharged on voluntariness.

On February 13, 1996, the defendant was convicted of count #1, Murder in the Second Degree - felony murder. On March 13, 1996, the defendant was sentenced to twenty-five (25) years to life.

On direct appeal, the defendant argued that the trial court's failure to permit his videotaped statement into evidence was error.

By decision and order dated June 7, 1999, the defendant's conviction was unanimously affirmed. People v. Deleon, 262 A.D.2d 421 (2d Dept. 1999). The Appellate Division held that the trial court properly refused to admit the videotaped statement, made after the defendant had ample opportunity to reflect, because it

was inadmissible hearsay. The defendant's application for leave to appeal to the Court of Appeals was denied on August 17, 1999. People v. Deleon, 93 N.Y.2d 1017 (1999). Thus, the defendant is procedurally barred from raising this issue pursuant to Article 440. CPL §440.10(2)(a).

The defendant thereafter moved, pursuant to CPL §440.10, to vacate his conviction arguing (1) that his right to a fair trial had been violated by an error in the court's voluntariness charge and (2) that he was denied the effective assistance of counsel for counsel's failure to object to the court's erroneous voluntariness charge.

By decision and order dated July 18, 2007, the court denied the motion to vacate the judgment. The Article 440 court held that the charge on voluntariness was "on the record", could have been raised on appeal and therefore the court was procedurally barred from reviewing it pursuant to CPL §440.10(2)(c). This court did not deal with the counsel issue. Likewise, here, the defendant is procedurally barred from arguing that the "voluntariness" charge was erroneous. CPL §440.10(2)(c).

The defendant next unsuccessfully moved for a writ of error coram nobis claiming that appellate counsel was ineffective for failing to challenge the court's voluntariness charge on direct appeal. People v. Deleon, 46 A.D.3d 911 (2d Dept. 2007).

Conclusions of Law

A judgment of conviction is presumed valid. People v. Sessions, 34 N.Y.2d 254, 255 (1974). On a motion to vacate a judgment, the defendant has the "burden of coming forward with sufficient allegations to create an issue of fact". People v. Sessions, supra at 255-256.

Pursuant to CPL §440.10(2)(a), a motion to vacate a judgment of conviction must be denied when the issue raised upon the motion was previously determined on the merits upon an appeal from the judgment.

Pursuant to CPL §440.10(2)(c), a motion to vacate a judgment of conviction must be denied when, although sufficient facts appear on the record to have permitted adequate review, the defendant unjustifiably failed to raise the issue on direct appeal.

The defendant contends that his judgment of conviction warrants vacatur because the trial court's voluntariness charge erroneously shifted the burden of proof to the defense.

The court's charge on voluntariness was "on the record" and thus sufficient facts appear on the record to have permitted adequate, direct appellate review. CPL §440.10(2)(c).

The only issue which may have survived a procedural bar is the defendant's contention that his trial counsel was ineffective in not objecting to the "voluntariness" charge as this issue was not decided by the previous Article 440 court. This issue necessarily

brings up the overall adequacy of the court's instructions on "voluntariness".

When evaluating a challenged jury instruction, the court should not examine the challenged portion in a vacuum. People v. Simmons, 66 A.D.3d 292 (1st Dept. 2009), aff'd, 15 N.Y.3d 728 (2010). Rather, the court should review the charge as a whole. People v. Medina, 18 N.Y.3d 98 (2011). "[A] charge 'may be sufficient, indeed substantially correct, even though it contains phrases which isolated from their context, seem erroneous'. The test is always whether the jury, hearing the whole charge, would gather from its language the correct rules which should be applied in arriving at [a] decision." People v. Drake, 7 N.Y.3d 28, 33-34 (2006) (internal quotations marks and citations omitted).

Here, the charge as a whole did not communicate to the jury, as the defendant suggests, that the "defendant ... has made a statement, and whether or not that statement with [sic] obtained by the use of threats, violence, or false promises, was nonetheless made voluntarily." Def. Affidavit, p. 13.

Rather, the court twice instructed the jury that a statement is voluntarily made by the defendant only if it was, in fact, knowingly, freely and willingly given by him. In addition, the court quite clearly emphasized that the burden of proof was on the People to show that the statement was voluntary and truthful. Thus, when the court then instructed the jury that "a statement of the

defendant is not (emphasis supplied) involuntarily made when it is obtained from him" by the use or threatened use of physical force or by any improper conduct or undue pressure etc., the jury would have immediately realized that the court had misspoken. The charge when viewed in its entirety conveyed the correct legal principles for the jury to apply in judging the voluntariness of the defendant's alleged statement and did not shift the burden of proof.

In light of these conclusions, trial counsel was not ineffective for failing to object to the court's charge.

The defendant also asserts that trial counsel was ineffective for failing to notify him of his right to testify before the Grand Jury, to canvass the crime scene, to search for other witnesses and to interview several witnesses who the prosecution had interviewed. As the defendant did not raise any of these claims in his first CPL §440.10 motion to vacate the conviction, and he was in a position to do so, they are barred from review. CPL §440.10(3)(c).

The defendant also claims that vacatur is warranted because the prosecution (1) deliberately withheld several statements from witnesses who were interviewed immediately following the incident, (2) failed to turn over Brady/Rosario material and (3) deliberately withheld the exculpatory statements of a "David Rivera".

The defendant's claims are denied pursuant to CPL §440.10(3)(c) as he was in a position to adequately raise these

issues in his first CPL §440.10 motion but failed to do so. These claims are not otherwise meritorious.

These claims are also denied pursuant to CPL §440.30(4)(d). The defendant's self-serving, unsubstantiated claims are unsupported by any other affidavits or evidence and thus there is no reasonable possibility that such allegations are true. The defendant merely speculates that the prosecution had statements by other witnesses including a "David Rivera" which would have been beneficial to his defense.

Finally, the defendant's contention that the verdict was repugnant is denied pursuant to CPL §440.10(2)(c) as it is a record-based claim that the defendant unjustifiably failed to raise on direct appeal. Moreover, this claim is denied pursuant to CPL §440.30(4)(d) as the record shows that the defendant's was convicted of felony murder.

Accordingly, based on the foregoing reasons and analysis, the defendant's motion to vacate the judgment of conviction made pursuant to Criminal Procedure Law §440.10(1) is denied in its entirety.

This opinion shall constitute the decision and order of the court.

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn,

N.Y., 11201, for a certificate granting leave to appeal from this determination. This application must be filed within 30 days of service of this decision. Upon proof of financial inability to retain counsel and to pay the costs and expenses of the appeal, the defendant may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Application for poor person relief will be entertained only if and when permission to appeal or a certificate granting leave to appeal is granted (22 NYCRR 671.5).

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.

Kings County Supreme Court
Criminal Appeals
320 Jay Street
Brooklyn, N.Y. 11201

Kings County District Attorney
Appeals Bureau
350 Jay Street
Brooklyn, N.Y. 11201

Dated: February 26, 2014
Brooklyn, New York

William E. Garnett
A.J.S.C.