People v Van Praag
2014 NY Slip Op 32107(U)
August 6, 2014
Sup Ct, Kings County
Docket Number: 4194/2012
Judge: William M. Harrington

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART 18

----------x

THE PEOPLE OF THE STATE OF NEW YORK — Decision and Order

– against –

DAVID VAN PRAAG, — Indictment No. 4194/2012

Defendant.

----------x

William M. Harrington, A.J.S.C.:

Following a jury trial, the defendant was found guilty of Burglary in the Second Degree (P.L. § 140.25[2]), Robbery in the Third Degree (P.L. § 160.05), and Assault in the Third Degree (P.L. § 120.00[1]). The defendant, pro se, filed a motion pursuant to Criminal Procedure Law sections 440.10(1)(b) and (h), requesting that this court vacate the judgment of conviction. The People opposed the defendant's motion.

The court has considered the defendant's motion, the People's response opposing the requested relief, as well as the trial record. For the reasons set forth below, the defendant's motion to vacate the judgment of conviction is denied.

Relevant Procedural History

On February 12, 2013, a Grand Jury returned an indictment against the defendant, David Van Praag. The defendant was charged with Burglary in the First Degree (P.L. § 140.30[2]), Burglary in the Second Degree (P.L. § 140.25[2]), Burglary in the Third Degree (P.L. § 140.20), Robbery in the Second Degree (P.L. § 160.10[1]), Robbery in the Third Degree (P.L. § 160.05), Assault in the Third Degree (P.L. § 120.00[1]), and Criminal Trespass in the Second Degree (P.L. § 140.15[1]). The above-mentioned indictment was subsequently consolidated with that of co-defendant, Catherine O'Neill, under Kings County Indictment Number 4194/2012.

According to the People, on April 12, 2013, a certified letter was mailed to counsels for the defendant and co-defendant. The letter detailed that Assistant District Attorney Chow Yun Xie had learned that the complainant, Daniel Lucio, had attempted to present co-defendant O'Neill with a check that was written on a closed account.

Acting Justice Joseph Gubbay inspected the Grand Jury minutes and issued a written decision on June 10, 2013. The court found that the evidence adduced before the Grand Jury was legally sufficient to establish the offenses charged and that the defendant was the person who committed said offenses. Justice Gubbay also reviewed the instructions on the law given to the Grand Jury and found the instructions to be adequate and legally sufficient. Moreover, no procedural flaws or errors supporting dismissal or reduction of any count or of the indictment were found. Thus, the defendant's motion to dismiss or reduce the indictment was denied.

Prior to the commencement of trial, the defendant's retained counsel, Verena Powell, Esq., made a motion to be recused from the case because the defendant was unable to pay additional monies for her services to take the case to trial. Effective July 17, 2013, the court assigned Ms. Powell to represent the defendant pursuant to County Law § 18B.

At trial, the defendant was tried jointly with co-defendant Catherine O'Neill and, on August 9, 2013, the jury returned a verdict of guilty as to both defendants: co-defendant O'Neill was found guilty of a single count of Robbery in the Third Degree (P.L. § 160.05); the defendant was found guilty of Burglary in the Second Degree (P.L. § 140.25[2]), Robbery in the Third Degree (P.L. § 160.06), and Assault in the Third Degree (P.L. § 120.00[1]).

On August 16, 2013, pursuant to C.P.L. § 390.40, Assistant District Attorney Chow Yun Xie submitted a pre-sentence memorandum setting forth information pertinent to the question of sentence. A copy of the pre-sentence memorandum was served on the defendant's attorney, as well as co-defendant O'Neill's attorney.

On August 28, 2013, the defendant was sentenced to concurrent terms of imprisonment totaling five years – the minimum permissible sentence under the circumstances – and to a term of post-release supervision of five years.

The defendant subsequently, but prior to the filing of this motion, informed the Appellate Division, Second Department, that he intended to appeal his conviction. A file has been opened and the defendant's docket number is: 2013-09239. On June 9, 2014, the Appellate Division, Second Department granted the defendant's motion to proceed as a poor person and have assigned counsel. The defendant was instructed to file his brief upon the court. Among other things, the defendant's time to perfect an appeal has been enlarged.

Conclusions of Law

According to Criminal Procedure Law sections 440.10(1)(b) and (h), at any time after the entry of a judgment, the defendant may upon motion move the court to vacate the judgment upon the ground that "the judgment was procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for or in behalf of a court or a prosecutor." C.P.L. § 440.10(1)(b). A defendant may also petition the court to vacate the judgment if it was obtained in violation of a right of the defendant under the United States Constitution or New York Constitution. C.P.L. § 440.10(1)(h). Such motion must be denied when "the judgment is, at the time of the motion, appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such appeal." C.P.L. § 440.10(2)(b).

Here, the defendant moves to vacate his judgment of conviction, claiming: 1) ineffective assistance of counsel; 2) prosecutorial misconduct; and 3) repugnant verdict.

Ineffective Assistance of Counsel

According to the defendant, his attorney, Verena Powell, Esq. deprived him of effective assistance of counsel. Because this claim is based on facts appearing in the record and may be reviewed on appeal, it is procedurally barred. *See* C.P.L. § 440.10(2)(b)*; People v. Smith*, 36 A.D.3d 633 (2d Dep't 2007); *People v. Cochrane*, 27 A.D.3d 659 (2d Dep't 2006); *People v. Hall*, 28 A.D.3d 678 (2d Dep't 2006). In any event, the defendant's claim is without merit.

Prior to the commencement of trial, Ms. Powell, who was then-retained by the defendant, asked to be relieved because the defendant was unable to compensate her for further representation. Relieving Ms. Powell at that juncture would have resulted in the assignment of an attorney who would have been unfamiliar with the case and would have delayed the resolution of the case while the defendant remained incarcerated. Rather than relieve Ms. Powell, the court allowed Ms. Powell to continue to represent the defendant and to receive remuneration for her services pursuant to County Law section 18b.

The defendant contends that Ms. Powell did not provide him with effective assistance of counsel because, he claims, she "chose economics over ethics and could not have had the defendant's best interests at heart to pose a strategical defense." *See* Defendant's Motion at 2. Bereft of facts, the defendant's wholly unsupported allegation that counsel failed to provide a robust defense because she was not sufficiently motivated by money may be characterized as conspiratorial thinking. A review of the record proves that counsel provided effective representation. She offered a cogent defense, cross-examined the People's witnesses, made appropriate motions and objections, and forcefully argued for the defendant's acquittal in summation. In sum, apart from fevered speculation, there is nothing to support the defendant's contention.

The defendant also argues that his counsel failed to challenge the legal sufficiency of the indictment and integrity of the Grand Jury proceedings. The defendant's claim is belied by the record. The defendant's counsel made a request to review the Grand Jury minutes and a decision was issued by this court regarding the testimony and instructions given to the Grand Jury.

Lastly, the defendant argues that his counsel was ineffective because, he claims, at trial Ms. Powell failed to argue there was no larceny because there was no proof as to the value of the check that was taken. The defendant appears to be under the mistaken belief that Robbery in the Third Degree requires proof that the property that was taken had a particular value. However, such is not the case. The People need only have proved beyond a reasonable doubt that the defendant, acting in concert with the co-defendant, forcibly stole property; the value of said property is not an element of the crime. *See* P.L. 160.05. Consequently, there is no merit to the defendant's claim.

Prosecutorial Misconduct

The defendant also concludes that Assistant District Attorney Xie committed prosecutorial misconduct because, he claims, ADA Xie permitted the complainant to supply false information and perjured testimony before the Grand Jury. The defendant bases his claim on the fact that the complainant provided different information regarding the dollar amount written on the stolen check. According to the defendant's claims, the complainant signed a police report stating that the amount of the check was $413, testified before the Grand Jury that the amount was $600, and at trial testified that the amount was $497. The defendant also claims that the sentencing memorandum provided for co-defendant Catherine O'Neill further substantiates his claim.

Notwithstanding the defendant's attempt to label these discrepancies as prosecutorial misconduct, there is no support for the conclusion that the prosecutor intentionally misled the court or the defendant in regard to the value of the check or that the defendant thereby suffered any prejudice. In any event, inasmuch as the defendant's claim is based on facts appearing in the record, the claim is procedurally barred. Thus, this issue can be raised on appeal. *People v. Johnson*, 6 A.D.3d 226, 227 (1st Dep't 2004).

Repugnant Verdict/Legally insufficient evidence

Though the defendant's claim is labeled "repugnant verdict," it is apparent from the defendant's discussion of the facts and his legal arguments that he means to challenge the legal sufficiency of the evidence underlying his conviction. The defendant asserts that the verdict was repugnant because he was convicted of robbery and not larceny, which is an element of robbery. However, the defendant neglects to mention that he was not *acquitted* of larceny. In the absence of a finding that defendant was not guilty of larceny, the verdict cannot be said to be repugnant.[1]

---

[1]No larceny charge was submitted to the jury for its consideration.

Because this issue is based on facts appearing in the record and may be raised on appeal, it is procedurally barred. *See* C.P.L. § 440.10(2)(b).

Nor may it be said that the evidence supporting the robbery conviction was not legally sufficient.

Robbery is defined as forcible stealing. *See* P.L. § 160.00(1). P.L. § 160.00 provides, in pertinent part, that a person forcibly steals property and commits robbery when, in the course of committing a larceny, such person uses or threatens the immediate use of physical force upon another person for the purpose of compelling the owner of such property to deliver up the property or for the purpose of preventing or overcoming resistance to the taking of the property. *See* P.L. §§ 160.00(1), (2). A person steals property and commits larceny when, with the intent to deprive another of property or to appropriate the property to himself or herself or to a third person, such person wrongfully takes, obtains, or withholds property from the owner of the property. *See* P.L. 155.05(1).

The defendant claims that there was no evidence of the larceny element of robbery because, he claims, the property alleged to have been wrongfully taken, i.e., the check, was not the property of the victim. Rather, the defendant claims that the check was the property of his co-defendant. The defendant's argument runs thusly: because the co-defendant was entitled to reimbursement of her security deposit, and the check at issue was meant to convey that money to her, the check cannot be said to have been the property of the victim even though it was taken from the victim's person.

This argument is spurious. Assuming arguendo that the co-defendant had a legal right to the return of her security deposit, that does not mean that she has the legal right to compel the return of the deposit by force. If the victim was unwilling to return her deposit, her remedy was to be found in the courts, and not by resort to forcible taking. The fact that the co-defendant may have been entitled to reimbursement of the amount represented by the check did not authorize her or her accomplice, the defendant, to use any mans, including robbery, to secure her right.[2]

---

[2]Moreover, it is of no consequence that the check was drawn on a closed account. The property that was forcibly taken was the negotiable instrument itself, not the actual money. Under our law, "property" is defined in pertinent part as "any money, personal property, real property, computer data, computer program, thing in action, evidence of debt or contract, or any article, substance, or thing of value . . ." *See* P.L. § 155.00(1). Under that definition, the check itself may be considered property, whether it was backed by sufficient cash or not.

Therefore, and for the foregoing reasons, the defendant's motion to set aside the conviction is denied.

This is the decision and order of the court.

So Ordered.

Enter

Dated: August 6, 2014
Brooklyn, New York

William M. Harrington, A.J.S.C.