

People v Fulmore

2014 NY Slip Op 32574(U)

October 6, 2014

Supreme Court, Kings County

Docket Number: 4066/98

Judge: William E. Garnett

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 11

THE PEOPLE OF THE STATE OF NEW YORK

-against-

HENRY FULMORE,

Defendant.

DECISION AND ORDER

Ind. #4066/98

Date: October 6, 2014

By: Hon. William E. Garnett

The defendant moves to vacate his judgment of conviction, pursuant to CPL §440.10(1)(h), on the ground that he is "actually innocent".

Background

On May 1, 1998, an indictment charging the defendant with intentional murder and "depraved indifference" murder was filed.

On January 20, 1999, a jury acquitted the defendant of intentional murder but convicted him of "depraved indifference" murder.

On February 2, 1999, the defendant was sentenced to twenty-five (25) years to life.

The defendant appealed the judgment of conviction on the sole ground that he was denied a fair trial because the trial court had refused to instruct the jury on justification. On November 27, 2000, the defendant's conviction was affirmed. People v. Fulmore, 277 A.D.2d 465 (2nd Dept. 2000). Leave to appeal to the Court of

Appeals was denied on February 27, 2001. People v. Fulmore, 96 N.Y.2d 759 (2001).

On July 1, 2004, the defendant moved, pursuant to CPL §440.10, to vacate the judgment of conviction on grounds including that there was insufficient evidence to convict him.

By an order, dated February 18, 2005, the court denied this motion. The court found that there was sufficient evidence to support the verdict and that the evidence was sufficient to demonstrate that the defendant had killed the victim with "depraved indifference".

On March 19, 2005, the defendant moved, pursuant to CPL §440.10, to vacate the judgment of conviction on grounds including that he was not guilty of "depraved indifference" murder because he had intentionally killed the victim, that the statute defining "depraved indifference" murder was vague and unconstitutional and that the defense counsel had been ineffective in not raising these issues.

By an order, dated August 8, 2005, the court denied this motion ruling that all of the defendant's claims were procedurally barred.

Subsequently, the defendant again moved, pursuant to CPL §440.10, to vacate the judgment of conviction on the grounds that (1) the indictment was jurisdictionally defective and (2) that trial counsel was ineffective in not raising this issue.

By an order, dated April 3, 2013, the court denied this motion ruling that both claims were procedurally barred. Addressing the merits, the court held that the indictment was not jurisdictionally defective as it properly charged the defendant with intentional and "depraved indifference" murder in the alternative. The Court further held that the defense counsel had not been ineffective.

Contention

The defendant contends that: "[A]bsolutely no evidence was presented [to the jury] that would support a finding that the conduct which resulted in the death of Smith presented a grave risk of death and, also, occurred under circumstances evincing a depraved indifference to human life" and thus he is actually innocent of the crime for which he was convicted.

Discussion

A court must deny a motion to vacate a judgment of conviction when the ground or issue raised "was previously determined on the merits upon an appeal from the judgment" or there were sufficient facts in the record which would have permitted appellate review of the issue on direct appeal but the defendant failed to do so. CPL §§440.10(2)(a), (c).

The defendant did not raise a claim of "actual innocence" in

his direct appeal. As the facts underlying his current claim appeared in the record, his claim of "actual innocence" is procedurally barred. CPL §440.10(2)(c); People v. Ciolek, 67 N.Y.2d 100 (1986).

In any event, the defendant's claim of "actual innocence" is meritless.

To prevail upon a claim of "actual innocence", a defendant must prove by "clear and convincing" evidence that he was actually innocent of the crime for which he was convicted. People v. Hamilton, 115 A.D.3d 12, 27 (2nd Dept. 2014). "[A]ctual innocence" means factual innocence, not mere legal insufficiency of evidence of guilt (citation omitted) and must be based upon reliable evidence which was not presented at trial." People v. Hamilton, supra at 23.

A defendant must make "[a] prima facie showing of actual innocence", i.e., "a sufficient showing of possible merit", to warrant a hearing. People v. Hamilton, supra at 27.

In Hamilton, supra, the court found that the defendant made a prima facie showing of actual innocence "based upon evidence of a credible alibi and manipulation of the witnesses, and the fact that the witness against him ha[d] recanted". People v. Hamilton, supra.

In this case, the defendant is not relying on any evidence that was not presented at trial. The jury heard all of the evidence. The defendant merely disagrees with the jury's determination. He essentially argues, as a matter of law, that on

the facts elicited at trial, he could not have been found guilty of "depraved indifference" murder.

Thus, the defendant has not met his burden of making a prima facie showing of "actual innocence".

Moreover, under the law at the time of this crime, i.e., 1998, a rational jury could have and did find the defendant guilty of "depraved indifference" murder. People v. Register, 60 N.Y.2d 270 (1983).¹ The defendant has not proffered any evidence that remotely points to his actual innocence.

Accordingly, based on the foregoing analysis and discussion, the defendant's motion, pursuant to CPL §440.10(1)(h), to vacate his judgment of conviction on the ground of actual innocence is denied.

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, NY 11201 for a certificate granting leave to appeal from this determination. This application must be made within thirty days of service of this decision. Upon proof of financial inability to

¹ The law of "depraved indifference" murder remained static through the Court of Appeals' decision in People v. Sanchez, 98 N.Y.2d 373 (2002), which reaffirmed Register, supra. After Sanchez, a series of decisions incrementally changed the law culminating in the overruling of Register and Sanchez in People v. Feingold, 7 N.Y.3d 288 (2006).

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 District Attorney
Appeals Bureau
350 Jay Street
Brooklyn, NY 11201

Kings County Supreme Court
Criminal Appeals
320 Jay Street
Brooklyn, NY 11201

Dated: October 6, 2014
Brooklyn, New York



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

ENTERED
OCT 08 2014
NANCY T. SUNSHINE
COUNTY CLERK