

People v Lee

2014 NY Slip Op 32576(U)

October 6, 2014

Supreme Court, Kings County

Docket Number: 06244/1990

Judge: Ruth E. Shillingford

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 27

-----X
THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Ruth Shillingford
Date: October 6, 2014

-against-

DECISION AND ORDER
INDICTMENT NO.: 06244/1990

JAMES LEE,

Defendant.

-----X

By *Pro Se* motion, defendant, an inmate at the Eastern NY Correctional Facility, moves pursuant to CPL §§ 440.10(f-g)(h), to vacate his judgment of conviction (Douglas, J.), entered on or about July 9, 1992, convicting him, after a jury trial, of three counts of Robbery in the First Degree (PL § 160.15), and sentencing him, as a second violent felony offender, to concurrent terms of twelve and one-half to twenty-five years imprisonment. He also seeks a hearing pursuant to CPL § 440.30(5). For the reasons that follow, this Court denies defendant's motion.

PRIOR PROCEEDINGS

This case arises out of allegations that on three separate occasions, defendant forcibly stole property from three different women, while displaying a weapon. On or about May 14, 1990, defendant forcibly stole a sum of United States currency and jewelry from Gloria Ruiz, while displaying a razor blade (Indictment 06354/1990). On or about May 18, 1990, defendant forcibly stole a sum of United States currency and jewelry from Venalesa Hicks, while displaying a razor blade (Indictment 06244/1990). On or about May 24, 1990, defendant forcibly stole jewelry from Tracy Simpson, while displaying a knife (Indictment 09819/1990).

On June 18, 1992, defendant was found guilty on one count of Robbery in the First Degree as to each complainant.¹ On July 9, 1992, he was sentenced as noted above.

On direct appeal, defendant unsuccessfully challenged various pre-trial rulings including the consolidation of his indictments, the denial of his motion to suppress identification testimony and the denial of his CPL § 30.30 motion (*People v. Lee*, 217 AD2d 637 [2nd Dept. 1995]).

DISCUSSION

Defendant now contends that the judgment should be vacated on the grounds that at the time of his sentence, neither he “nor defense counsel [had] any knowledge that penal law §70.04 subdivision one subparagraph (v) of (c) was missing or absent or that it had not been in this matter applied by the court in adjudicating the defendant a second - violent felony offender” (Defendant’s Affidavit ¶ 1). Specifically, he argues that his constitutional rights were violated because “this court did not comply with the mandates of law at the time of its consideration because these provisions’s and section’s of law were missing and because the court substituted its own opinion to compensate for the lost provisions’s and section’s of law” (*id.* ¶ 3).

The People argue that defendant’s arguments concerning a statutory “typographical error ... relates solely to the validity of defendant’s sentence ... and is not reviewable” under CPL § 440.10 (People’s Memorandum at 1). Furthermore, they counter that even if his motion was properly considered under CPL § 440.20, defendant would still not be entitled to relief because a “typographical error in Criminal Procedure Law § 400.15(2) does not render defendant’s sentence unauthorized, illegally imposed, or invalid as a matter of law” (*id.* at 2). Specifically, they contend that, *inter alia*, “under the rules of statutory construction, Criminal Procedure Law

¹ Following a mistrial on Indictment Number 06244/1990, all three indictments were subsequently consolidated into and under that indictment.

§ 400.15(2) should be construed to refer to an actual section of the Penal Law – Penal Law § 70.04(1)(b)(v) – and not to the nonexistent Penal Law § 70.04(1)(c)(v);” and that “even if the second sentence of Criminal Procedure Law § 400.15(2) is read literally, it does not render [his] sentence unlawful” (People’s Memorandum at 3, 7). This Court agrees.

Preliminarily, defendant is not entitled to relief under the statutory sections cited in his motion as there are no allegations of improper and prejudicial conduct not appearing in the record which would have required a reversal (*see* CPL § 440.10[1][f]); no new evidence presented to this Court (*see* CPL § 440.10[1][g]); and no forensic DNA evidence that has come to light (*see* CPL §§ 440.10[1][g-1]). Although he claims a violation of his rights under the Due Process and Equal Protection clauses of the Constitution, as well as violations of his state constitutional rights, defendant’s argument is more properly considered under CPL § 440.20(1). The latter provision states that a court may “upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law” (CPL § 440.20[1]). Setting aside his sentence pursuant to this section, however, “does not affect the validity or status of the underlying conviction” (CPL § 440.20[4]).

Defendant contends that he was improperly adjudicated a second violent felony offender because the statute that provides the basis for such a determination cites to a section of the Penal Law that does not exist and therefore “made any such finding’s under a nullity” (Defendant’s Affidavit ¶ 4).

The version of CPL § 400.15(2), in effect at the time of defendant’s sentence reads as follows:

2. Statement to be filed. When information available to the court or to the people prior to sentencing for a violent felony offense indicates that the defendant may have previously been subjected to a predicate

violent felony conviction, a statement must be filed by the prosecutor before sentence is imposed setting forth the date and place of each alleged predicate violent felony conviction. *Where the provisions of subparagraph (v) of paragraph (c) of subdivision one of section 70.04 of the penal law apply*, such statement also shall set forth the date of commencement and the date of termination as well as the place of imprisonment for each period of incarceration to be used for tolling of the ten year limitation set forth in subparagraph (iv) of paragraph (b) of such subdivision (emphasis added).

(*id.*).

Similarly, the 1992 version of PL § 70.04(1)(b)(v), provides as follows:

(b) For the purpose of determining whether a prior conviction is a predicate violent felony conviction the following criteria shall apply:

(v) In calculating the ten year period under subparagraph (iv), any period of time during which the person who incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration ...

(*id.*).

“[T]he governing rule of statutory construction is that courts are obliged to interpret a statute to effectuate the intent of the Legislature, and when the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words used” (*People v. Williams*, 19 NY3d 100, 103 [2012], *citing People v. Finnegan*, 85 NY2d 53, 58 [1995]). “Generally, a court may not assume the existence of legislative error and change the plain meaning of a statute to make it conform to an alleged intent. However, a court may apply a statute by disregarding a clerical error in legislation so as to make the corrected statute conform

to the Legislature's true intent ... " (*Branford House, Inc. et al., v. Michetti*, 81 NY2d 681, 686 [1993]).

As contained in CPL § 400.15(2), the purpose of the purported PL § 70.04(1)(c)(v), is to provide the method by which the ten year tolling period is to be calculated in ascertaining whether or not a prior conviction constitutes a predicate violent felony conviction. A review of the 1992 version of PL § 70.04(1) reflects that, in fact, paragraph "c" does not exist in either the 1992 version of PL § 70.04, or any subsequent version, including the current 2014 version of the statute.

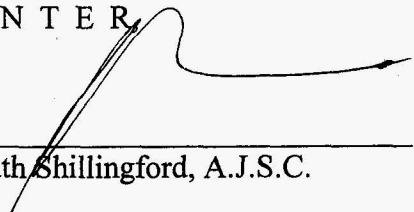
CPL § 400.15(2) sets forth the information required when a predicate felony statement is filed in order to assess whether a defendant is a violent felony offender. The last sentence of the subdivision specifically relates to the tolling of the ten-year limitation period. The error here lies in the reference to subdivision "(1)(c)(v)" of PL § 70.04, rather than subdivision "(1)(b)(v)." This latter subdivision, however, is the only provision that specifically correlates to the tolling requirements. Accordingly, this Court finds that the typographical error here does not provide a basis upon which to vacate defendant's sentence. Furthermore, defendant does not presently claim that he was not the subject of the convictions contained in the predicate statement that served as the basis for his adjudication as a second violent felony offender, and the Court notes that he did not challenge the contents of the predicate statement on the date of sentence (*see* 7/9/92 Sentence: 2).

CONCLUSION

Based upon the foregoing reasons, the Court denies defendant's motion to vacate the judgment and his request for a hearing.

This Decision shall constitute the Order of the court.

E N T E R,



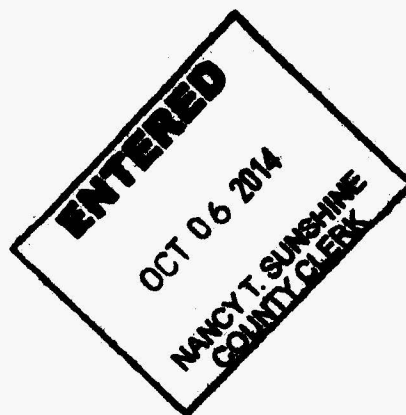
Ruth Shillingford, A.J.S.C.

The defendant is hereby advised pursuant to 22 NYCRR §671.5 of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York 11201, for a certificate granting leave to appeal from this determination. This application must be made within 30 days of service of this decision. Upon proof of his 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 certification granting leave to appeal is granted.²

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



² 22 NYCRR § 671.5