

People v Flocker

2015 NY Slip Op 30286(U)

February 26, 2015

Supreme Court, Kings County

Docket Number: 5059/2005

Judge: William M. Harrington

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

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The People of the State of New York

Decision and Order

– against –

Indictment Nos. 5059/2005
7748/2005

Dekal Flocker,

Defendants.

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

On September 29, 2014, the defendant, pro se, filed a motion to vacate his judgment of conviction pursuant to Criminal Procedure Law section 440.10. The defendant contends that he was denied the right to have the charges against him preferred by the Grand Jury rather than the prosecutor. The defendant also contends that his counsel’s assistance was ineffective because counsel allowed the defendant to plead guilty to a charge that was legally insufficient in its factual allegations. Lastly, the defendant argues that the People failed to secure an indictment by legally sufficient evidence because the People failed to produce two witnesses before the Grand Jury.

On December 24, 2014, the People filed a motion in opposition to the relief requested by the defendant. The People argue that the defendant’s request for relief should be denied because his claim is procedurally barred. Moreover, the People contend that his claim should be summarily denied because it is contradicted by the record before the court.

Relevant Background

On July 12, 2005, at approximately 6:30 p.m., at the corner of Stone and Sutter Avenues, in Kings County, Police Officer Thelusma Wilkens observed the defendant, holding a handgun, running down the street after two males. Officer Wilkens also observed the defendant run into a store and throw the gun behind the counter. Officer Richard Roman recovered the gun, which was loaded, from behind the counter. A ballistics examination concluded that the gun was operable.

The People presented the case to a Grand Jury. On July 18, 2005, the People certified that the Grand Jury voted to indict the defendant pursuant to Indictment 5059/2005. On August 3, 2005, the indictment was filed with the court and the defendant was charged with one count each of Criminal Possession of a Weapon in the Second, Third and Fourth Degrees (P.L. §§ 265.03[2], 265.02[4], and 265.01[1]).

On October 14, 2005, a judge of this the court issued a decision regarding the People's Grand Jury presentment, finding that the evidence presented was legally sufficient to support each and every count of the indictment, but that the Assistant District Attorney did not correctly charge the Grand Jury as to the applicable law because the knowledge element was not charged for any of the counts. The indictment was dismissed and the People were granted leave to re-present the matter within 45 days of the issuance of the order.

On October 19 and 21, 2005, the People presented the case to a new Grand Jury. On October 21, 2005, the Grand Jury voted to indict the defendant. On November 23, 2005, the People filed Indictment No. 7748/2005 with the court. The defendant was charged with one count each of Criminal Possession of a Weapon in the Second, Third and Fourth Degrees (P.L. §§ 265.03[2], 265.02[4], and 265.01[1]).

A judge of this court inspected the new Grand Jury minutes. On January 27, 2006, an opinion issued finding that the evidence before the Grand Jury was legally sufficient to support each and every count in the indictment, the proceedings were properly conducted, and that there was no reason to dismiss or reduce any of the charged counts.

On April 6, 2006, the defendant pleaded guilty to one count of Criminal Possession of a Weapon in the Second Degree (P.L. §§ 265.03[2]) and waived his right to appeal. On April 26, 2006, the defendant was sentenced to a term of imprisonment of three and one-half years with a term of post-release supervision of five years. The defendant did not file a notice of appeal.

Conclusions of Law

Preferment Claim

The defendant argues that the court should vacate his judgment of conviction because, after the initial indictment was dismissed, the People violated his rights by failing to re-present the dismissed charges to a new Grand Jury (Defendant's Notice of Motion to Vacate Judgment, pages 4-5, paragraphs 4-5). According to the defendant, the People simply filed a "superceding indictment" containing the same charges from the previous indictment.

The defendant's claim is procedurally barred. The court must deny a motion to vacate judgment when sufficient facts appear on the record to permit review on appeal. C.P.L. § 440.10(2)(c). Here, the defendant's claim is based on matters appearing on the record. Thus, the defendant had a full opportunity to raise them on appeal and his failure to do so is unjustified. A motion to vacate the judgment of conviction is not a substitute for an appeal (*People v. Cooks*, 67 N.Y.2d 100, 102-104 [1986]), nor may a defendant who has waived his right to appeal use a motion

to vacate the judgment as a substitute for a direct appeal (*People v. Alexander*, 256 A.D.2d 349 [2d Dep't 1998]). Consequently, the defendant's claim must be denied.

In any event, the defendant's claim is meritless. The defendant apparently is of the mistaken belief that, after the initial indictment was dismissed, the People did not represent the case to the Grand Jury as instructed by the court. In fact, after the court dismissed Indictment 5059/2005, the People presented evidence to a new Grand Jury. On October 19 and 21, 2005, the People presented witnesses and the Grand Jury chose to file an indictment against the defendant. The court reviewed the People's presentation and found that the evidence presented to the second Grand Jury was legally sufficient to sustain each and every count charged (Hon. Robert Holdman, January 27, 2006). Therefore, the defendant's claim is unsubstantiated and meritless.

Ineffective Assistance of Counsel

The defendant contends that he received the ineffective assistance of counsel because his attorney allowed him to plead guilty to a count that was found to be legally insufficient (Defendant's Notice of Motion to Vacate Judgment, page 5, paragraph 6). This claim must be summarily denied because, as detailed above, the defendant's allegation of a fact essential to support his motion is contradicted by the record. C.P.L. §440.30(4)(d)(i). Moreover, the defendant's claim is unsupported by any other evidence. *Id.*

Insufficiency Claim

According to the defendant, the People were unable to establish the intent element in the Grand Jury because, he claims, his abandonment of the gun demonstrated that he lacked the requisite intent. Also, he contends that his intent could not have been established before the Grand Jury because the People failed to produce the two males that he was allegedly chasing with the gun. (Defendant's Notice of Motion to Vacate Judgment, Statement of Case, pages 6-7).

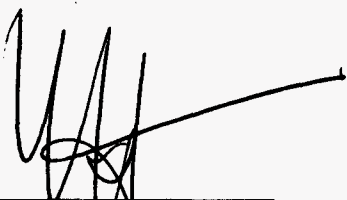
Because sufficient facts appear on the record to have permitted review on appeal, the defendant's claim must be denied. C.P.L § 440.10(2)(c); *People v. Alexander*, 256 A.D.2d at 349.

Therefore, and for the foregoing reasons, the defendant's motion to set aside his judgment of conviction is denied in all respects.

So Ordered.

Enter

Dated: February 26, 2015
Brooklyn, New York



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

Hon. William M. Harrington

ENTERED
MAR - 2 2015
NANCY T. SUNSHINE
COUNTY CLERK