

**People v Clark**

2015 NY Slip Op 31389(U)

July 6, 2015

Supreme Court, Kings County

Docket Number: 5161-2011

Judge: Michael A. Gary

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM PART 12

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THE PEOPLE OF THE STATE OF NEW YORK :

-against- : DECISION AND ORDER  
 : *Pro Se* CPL 440 Motion  
JAMEL CLARK :  
 :  
 : IND. NO. 5161-2011  
Defendant :

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MICHAEL A. GARY, J.

Defendant moves *pro se* by way of this written motion to vacate the judgment of conviction pursuant to CPL § 440.10. The People have opposed this motion in a written response, and Mr. Clark filed several supplemental papers. The People responded to those supplemental papers, prompting further responses and papers from Mr. Clark.

This case arose when defendant was observed inside the premises of 774 Lincoln Avenue, at approximately 6:30 AM (outside his curfew) by his parole officer, who, acting on a tip that there were weapons and drugs inside the apartment, was accompanied by several police officers. After a search of the apartment, to which the defendant's wife consented, the police recovered a loaded pistol, 130 glassines of heroin, 3 twists of cocaine and a bag of oxycodone. Defendant was arrested and charged with possession of the above-listed contraband and eventually indicted by a grand jury under Kings County Ind. No. 5161-2011. After pre-trial motion practice, this court conducted a *Huntley/Mapp/Dunaway* hearing. The court denied the motion to suppress, and adjourned the case for trial.

On February 4 , 2014 with a jury panel outside the door, the defendant represented by his attorney plead guilty to one count of Criminal possession of a controlled substance in the

third degree (Penal Law § 220.16, a Class B felony) in satisfaction of the above-mentioned indictment. Mr. Clark did not waive his right to appeal his conviction, including the issue of the court's suppression ruling. He was adjudicated a second felony offender, and sentenced as promised on February 25, 2014, to 6 years of incarceration to be followed by 1½ years of Post Release Supervision. All mandatory surcharges and fees were imposed.<sup>1</sup>

A Notice of Appeal was filed with the Second Department on February 25, 2014. Subsequently, on May 28, 2014, an order for assignment of counsel was granted. As of the date of this decision, defendant's appeal for the Docket No. 2014-2091 has not been perfected.

He now challenges the conviction pursuant to CPL § 440.10(1)(b) and (h) alleging that the judgment was procured in violation of his constitutional rights and procured as a result of fraud on the part of the prosecutor. He specifically points to several errors regarding the suppression hearing, including the failure of his attorney to call the owner of the apartment where he was arrested, the People's failure on their direct case to call one of the parole officers involved in his supervision, and the failure of the People to produce the source of the tip alerting the police and parole to defendant's presence in the apartment. Further, the defendant alleges that the People committed fraud when during their presentation of the evidence to the grand jury, the People knew that the underlying parole violation had been dismissed, the warrant lifted, and thus, there was no basis for the police presence at the apartment.

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Defendant was advised to challenge the imposition of a DNA databank collection fee, as he indicated that he already had that attended to as a result of a previous conviction.

The People oppose the motion in its entirety. They point out that the People pursued the case against the defendant based on the arrest by the police when they recovered a weapon and drugs, found in the apartment where he was arrested. They further point out that he and his attorney had ample opportunity to challenge the probable cause for that arrest at a suppression hearing, that counsel's performance was constitutionally sound, that counsel afforded the defendant meaningful assistance, and in denying suppression, the trial court found that the People satisfied their burden at the *Huntley/Mapp/Dunaway* hearing. Most importantly, the People point out that all of the issues Mr. Clark raised are barred from consideration by the statutory mandate of CPL §440.10(2) (b)and (c), as most of the claims should have been raised in an appeal as the matters are on the record.

As the People note in their response, CPL § 440.10 governs the court's decision making capacity in regards to the motion to vacate the judgment of conviction. Upon examination of the record and all the previously filed motion papers, the court MUST deny the motion to vacate if : . . . The relevant sections state. . .

2.(a) the ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, . . .

(b) 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 an appeal; or

(c) although sufficient facts appear on the record of the proceeding underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion , . . . no such appellate review or determination occurred owing to the defendant's unjustifiable failure to . . . raise such ground or issue upon an appeal actually perfected by him;

In each of the several filings by the defendant, he wishes to re-litigate the salient issue of whether there was probable cause to arrest the defendant independent of the probable cause needed for the parole violation. His position, as he has maintained

throughout, is that since the parole violation was found not to have been supported by probable cause (attachment, Exhibit C in Defendant's papers November 12, 2014, entitled NYS Parole status inquiry) this criminal case could not proceed. However, in determining the *Dunaway* aspect of the pretrial hearing (and specifically allowing the defendant NOT to waive his right to appeal, because of this very issue), the court already ruled that there was sufficient probable cause for the arrest. Thus, as a practical matter, the defendant cannot raise this very issue in the instant motion for the court to consider. On this basis alone, the motion to vacate the judgment of conviction must be denied. *See People v. Cuadrado*, 9 NY3d 362 (2007)

Further, the People argue, and the court agrees, that even if it were to consider the issue on the merits, it would fail. As stated above, the court found that the police were properly responding to an anonymous tip that a weapon could be found in the apartment, and defendant's violation of his curfew as imparted to the police by his parole officer and defendant's own post- *Miranda* statements admitting that the contraband belonged to him. A court reviewed the People's presentation of the case to the grand jury deeming it legally sufficient and proper. (Notably, this is a record-based argument as well!)<sup>2</sup>

Allegations of ineffective assistance of counsel, however, encompass both record-based allegations and those outside of the record, and thus, might be properly considered under CPL § 440. Defendant specifically contends that defense counsel failed in his

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This court notes that the defendant argues that the court failed to grant him a preliminary hearing where he could have challenged the probable cause for his arrest. However, a review of the court file indicates that after arraignment where bail was set, defendant was held for the action of the grand jury which voted an indictment in a timely manner. Thus, defendant is simply wrong as to his position herein.

representation by neglecting to call a particular witness (defendant's wife) at the suppression hearing, who allegedly would have disavowed both the consent-to search form she had signed along with a statement that defendant stayed at her residence several nights a week. However, because she had previously testified unsuccessfully at the bail source hearing (at which the People prevailed, and the bail bond was disapproved), it was reasonable that the attorney did not wish to have her credibility impeached. Further, it is reasonable to infer that defense counsel may have been saving her as a witness for the trial itself. Insofar as an allegation of the effectiveness of counsel is concerned, the court is mandated to view the representation defendant received in the totality of the circumstances to determine whether the defendant received meaningful representation *People v. Baldi*, 54 NY2d 137. In this case, as a convicted felon the defendant was facing much heavier upstate prison time than what he received in a favorably negotiated plea deal. In the totality of the circumstances of Mr. Clark's case, this court finds that defendant received effective assistance of his attorney.

After consideration of the defendant's allegations, this court finds no basis to grant the defendant's motion to vacate the judgment of conviction. Therefore, the motion is hereby denied on both substantive and procedural grounds.

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York  
July 6, 2015

  
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MICHAEL A. GARY, J. S. C.

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