

**People v Kirkland**

2022 NY Slip Op 35052(U)

June 1, 2022

Supreme Court, Westchester County

Docket Number: Ind. No. 15-00868

Judge: Robert A. Neary

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**FILED**

**JUN - 1 2022**

TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

**FILED  
AND  
ENTERED  
ON 6 - 1 - 2022  
WESTCHESTER  
COUNTY CLERK**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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

- against -

TARENCE KIRKLAND,

Defendant.

-----X  
NEARY, J.

DECISION AND ORDER

SCI No. S02-01113

Ind. No. 15-00868

The defendant moves for an order, pursuant to CPL Article 440, vacating his judgment of conviction under SCI No. S02-01113 and vacating his sentence under Indictment No. 15-00868. The People oppose the defendant's motion in all respects.

On December 16, 2002, the defendant entered a plea of guilty to Rape in the Second Degree which was then classified as a non-violent felony. Subsequently, the legislature reclassified the crime as a violent felony. The defendant received a sentence of ten (10) years

probation. In his present motion, the defendant claims that the change in the classification of Rape in the Second Degree was improper and is the basis for vacating the judgment against him.

On September 1, 2017, the defendant was convicted, after a jury trial, under Indictment No. 15-00868 of two (2) counts of Criminal Sale of a Controlled Substance in the Third Degree. He received a sentence of six (6) years, as a predicate felon, on each count to run concurrently. The defendant appealed his conviction to the Appellate Division, Second Department. In his appeal, the defendant specifically raised the same issues presented in the instant motion regarding improper sentencing as a predicate felon and the sentencing provisions of Penal Law §70.06 being an ex post facto law as applied to him. The Appellate Division specifically rejected both claims by decision dated March 16, 2022. Moreover, the defendant previously filed a motion pursuant to CPL §440.20 wherein he raised the issue that he was wrongfully sentenced as a violent or second felony offender. By Decision and Order dated June 6, 2019, the court (Minihan, J.) rejected this argument and denied the motion.

Pursuant to CPL §440.10(2)(a), a court may deny a motion to vacate when the ground or issue raised upon the motion was previously determined on the merits upon an appeal from a judgment, unless since the time of such appellate determination there has been a retroactive change in the law controlling such issue. In the present case, the defendant raised the issue that his sentence was improperly enhanced based on his prior Rape conviction and its subsequent reclassification as a violent felony and on the tolling provisions of Penal Law §70.06. The Appellate Division specifically rejected those argument in its decision. As these issues were

*People v. Tarence Kirkland*  
SCI No. S02-01113  
Ind. No. 15-00868

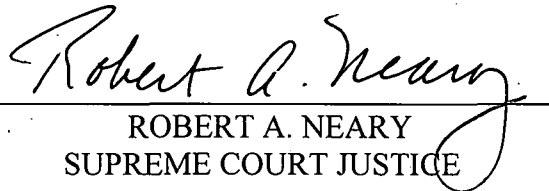
raised and rejected in a prior CPL 440 motion and on appeal, they cannot be relitigated in this motion. The motion is, therefore, denied on that basis.

In addition, the defendant's claim that he was not present at a parole violation hearing and was, therefore, improperly incarcerated for several critical months relating to the tolling period for predicate felony purposes, his claim is conclusively refuted by unquestionable documentary proof in the form of a transcript of the parole hearing in question. [See CPL §440.30(3)(c)]. The defendant's self-serving, unsupported claim that he was not present is insufficient to warrant a hearing or further consideration. The affidavit of an attorney who represented the defendant at the parole hearing in question which states to the effect that he could not remember the hearing, or the defendant does not substantiate or tend to substantiate any essential fact necessary to support the defendant's motion and does not support a claim that he was somehow ineffective in his representation.

Therefore, as the claims raised in this motion have been previously raised on appeal and in previous CPL 440 motions and are without merit, the motion is denied in its entirety.

This constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York  
June 1, 2022

  
ROBERT A. NEARY  
SUPREME COURT JUSTICE

*People v. Tarence Kirkland*  
SCI No. S02-01113  
Ind. No. 15-00868

John Carmody  
Daniel H. Davis  
Assistant District Attorneys  
Westchester County  
Office of the District Attorney  
Richard J. Daronco Courthouse  
111 Martin Luther King Blvd.  
White Plains, New York 10601  
[jcarmody@westchesterda.net](mailto:jcarmody@westchesterda.net)  
[ddavis@westchesterda.net](mailto:ddavis@westchesterda.net)

Brandon T. Riddle  
Rosenbaum & Taylor, P.C.  
Attorneys for Defendant  
707 Westchester Avenue, Suite 409  
White Plains, New York 10604  
[briddle@rosenbaumtaylor.com](mailto:briddle@rosenbaumtaylor.com)