

**People v Mack**

2006 NY Slip Op 30692(U)

June 23, 2006

Sup Ct, New York County

Docket Number: 2210/03

Judge: Lewis Bart Stone

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 39

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THE PEOPLE OF THE STATE OF NEW YORK	:	
	:	
- against	:	INDICTMENT NO.
	:	2210/03
ROOSEVELT MACK,	:	
	:	DECISION
Defendant.	:	

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Hon. Lewis Bart Stone

Defendant Roosevelt Mack ("Mack") moves pro se pursuant to CPL §440.10(1)(h) to vacate his judgment of conviction on the grounds that it was obtained in violation of his constitutional rights, specifically, that he was denied ineffective assistance of counsel. The People oppose the motion.

Mack was convicted after jury trial of Criminal Sale of Controlled Substance in the First Degree. The evidence at trial showed that Mack sold crack/cocaine to an undercover police officer in exchange for pre-recorded buy-money, which was recovered from Mack. On or about July 22, 2004, Mack was sentenced to an indeterminate sentence of seven to fourteen years. His conviction was affirmed. People v. Mack, 23 AD3d 220(1<sup>st</sup> Dept. 2005); app denied, 6 NY3d 777 (2006).

CPL §440.10 provides a remedy for errors not reflected in the record and not known at the time of judgment that would, as a matter of law, undermine the

conviction. However, the provision was not designed as a substitute for a direct appeal. People v. Harris, 109 AD2d 351 (2d Dept. 1985), app denied, 66 NY2d 919 (1986); See CPL §440.10(2). Moreover, the court must deny a motion to vacate judgment when "...sufficient facts appear on the records...to have permitted upon appeal from such judgment, adequate review of the ground or issue raised upon the motion," but no such determination occurred owing to the defendant's...unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him. Thus, claims of ineffective assistance of counsel which rest on the record are properly reviewed on direct appeal. See People v. Brown, 45 NY2d 852 (1978); People v. Jones, 55 NY2d 771 (1981); See People v. Orr, 240 AD2d 213 (1<sup>st</sup> Dept. 1997), app denied 90 NY2d 942.

CPL §440.10(3)(a) permits a court to deny a motion to vacate a judgment without a hearing if a defendant could have readily, with due diligence, placed on the record before sentencing sufficient facts to provide an adequate basis for appellate review. People v. Friedgood, 58 NY2d 467 (1983); People v. Berezansky, 229 AD2d 768 (3<sup>rd</sup> Dept. 1996).

Mack's claim of ineffective assistance of counsel is based upon his claim that his attorney, without Mack's permission, withdrew the cross grand jury notice. Specifically, Mack states that he was in "detox" on the day he was supposed to appear before the grand jury and that he had a caseworker notify defense counsel to that fact.

Mack states that counsel withdrew the notice without defendant's "prior knowledge".

The People oppose Mack's motion on procedural grounds and submit an affidavit from Mack's defense counsel at the time of the Grand Jury proceeding which states:

As to his cross grand jury notice, I informed Mr. Mack of the date, location and time that he would need to appear in order to testify in the grand jury. I appeared and waited for Mr. Mack on the correct date, but I never saw him that day. Neither Mr. Mack nor anyone else told me that Mr. Mack could not appear on the date scheduled for the grand jury presentation.

The People assert that such affidavit supports their contention that Mack's assertions are untrue.

As Mack's grounds alleged to support his claim of ineffective assistance of counsel appear on the record, and could have been raised on appeal, the Court must deny Mack's motion even if his assertions were truthful. CPL §440.10(2)(c). Mack, who was represented at trial by different counsel, could also have, with due diligence, placed such grounds on the record prior to sentencing but failed to do so. On his appeal, with yet another different counsel, where Mack raised claims regarding suppression of evidence, substitution of counsel, and excessive sentence, Mack also failed to raise the instant claim regarding the grand jury proceedings. There is no showing why he did not or could not have raised such issue before sentencing or on appeal.

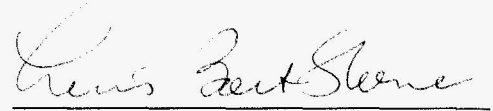
The affidavit of Mack's initial counsel who represented Mack through the grand jury proceeding supports the People's position that Mack's allegations are untrue. Mack provides no affidavit of his caseworker or anyone else to corroborate his self-serving claim of his inability to attend the grand jury proceedings. Thus, even if Mack were not foreclosed from raising his claim by reason of failing to raise it in a timely manner, this Court would find his assertions to be unsupported.

Finally, Mack's claim that his counsel's failure to advance or facilitate his desire to testify before the grand jury is not, even if true and raisable at this time, in any event, grounds to set aside a verdict due to ineffective assistance of counsel. People v. Wiggins, 89 NY2d 872 (1996); People v. Senior, 15 AD3d 302 (1st Dept. 2005). Generally, the question of effective representation "is satisfied when the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal the attorney provided meaningful representation." People v. Baldi, 54 NY2d 137 (1981). Mack has the burden to show that the representation was less than meaningful or that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 US 668 (1984). He has also failed to satisfy this burden.

Accordingly, Mack's motion is denied.

This opinion constitutes the decision and order of the Court.

DATED: JUNE 23, 2006  
NEW YORK, NEW YORK

A handwritten signature in cursive script, reading "Lewis Bart Stone", written in black ink. The signature is positioned above a horizontal line.

Hon. Lewis Bart Stone  
Justice of the Supreme Court