SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 38

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THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

Against

CALVIN LEE

Defendant.

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Memorandum Decision

GREEN, J.
IND. 2183/86

JULY 27, 2012

Upon the notice of motion filed May 2012, as well as defendant's responsive papers dated June 27, 2012, to the People's opposition received June 20,2012, defendant moves pro se for an order pursuant to Criminal Procedure Law (CPL) section 440 to vacate the within conviction and to have his sentence therewith set aside.

Based on a review of the motion papers, such other papers on file with the Court, and the proceedings had prior thereto, the decision and order of the Court on defendant's motion is SUMMARILY DENIED in its entirety.

This is defendant's fourth such motion to vacate the within conviction and his second motion to have his sentence set aside based on substantially the same claims as his prior motions.

Defendant also filed an appeal in this matter among numerous other post conviction motions. The Appellate Division 2nd Department affirmed the judgment of conviction on November 13, 1989. Leave to appeal to the Court of Appeals was denied.

Defendant makes this motion 25 years after he was convicted on September 14, 1987, pursuant to a jury trial, of Murder in the Second Degree and two counts of Possession of a Weapon. For these crimes defendant received a prison term of 25 years to life on the Murder charge with imprisonment terms on the weapons possession to run concurrently. He is presently incarcerated in the Green Haven Correctional Facility in Stormville, New York.

Defendant avers that his current motion differs, however defendant's bare unsubstantiated assertions, fail to raise any meritorious claims.

Further, the claims raised in the instant motion could have been raised in prior motions and defendant's excuse that he was not able to obtain the court transcripts until February 28, 2012 are unpersuasive. Furthermore, the transcript does not substantiate defendant's claims that his attorney did not communicate a plea offer to him. Rather, copies of pages of the court transcript dated September 3, 1987 before Honorable Francis X. Egitto contradict the assertions of defendant as well as the statement of Mr. Steven Greene.

Mr. Greene is indicated to be a cousin of the defendant's who was sitting behind defendant's table in the courtroom on September 3, 1987. In support of defendant's claims, Mr. Greene states "I never heard his lawyer, Mr. Giannini provide Calvin with any advice about the plea bargain offered by the District Attorney of Kings County through the Court." Mr. Greene states he had copies of the transcripts "and for the first time since 1990, provided Calvin Lee with a copy of the transcripts today" in a notarized statement dated February 28, 2012.

However, the transcript dated September 3, 1987 reveals on page 19 line 14 to 25, the court states: "Mr. Lee, your lawyer was talking to you for the better part of an hour down in the pens, right?" Defendant Lee stated "yes". The court continued: "And he told you that the district attorney was willing to accept an offer of manslaughter in the first degree from you with a sentence of 7 to 21 years? " Defendant Lee stated "yes". Continuing on page 20, the court stated: "And your lawyer told me that you decided you didn't want to accept it; is that right?" Defendant Lee stated, "yes". The court said, "In other words, you want to go to trial?" Defendant Lee stated "Yes". The court further elaborates: "Okay. I'm only asking you because I don't want it later said if the jury does find you guilty that no one gave you the opportunity of copping out or taking a plea, that's the only reason I'm asking. I just want it on the record, because once we pick a jury, I don't stop, I don't dispose of cases, we go right through. You understand that?" Defendant Lee stated, "yes". The court asked the defendant again, "that's what you want?" Defendant Lee stated again, "yes". Whereupon the court requested that the jurors be brought in and jury selection commenced.

According to the transcript, defendant discussed the plea offer with his attorney in the pens. Mr. Greene may be correct that he did not hear anything that the attorney may have stated to defendant, since the conversation took place in the pens and Mr. Greene was not in the pens. Further, even if defendant's counsel did discuss terms of the plea agreement with the defendant in court it would not be implausible to conclude that no one outside the ear shot of the defendant would have been privy to what his counsel stated to him because considerable care is taken to protect the privilege of attorney client conversations from third parties. As such, while the court has considered Mr. Greene's statement, it has no bearing on the claims made by defendant in this matter.

Defendant has made bare conclusory assertions of ineffective assistance of counsel, contradicted by the court record, that do not hold water either under the New York State standard or the federal standard pursuant to *Strickland v Washington*.

The transcript provided by defendant attached to his own motion papers glaringly undermine his argument that his defense counsel did not communicate plea offers to him.

If he did not understand or required further explanation from his attorney, defendant had every opportunity during the proceedings of September 3, 1987 or at anytime prior to trial to question, make commentary or even answer no to the court's questions. The transcript reveals that defendant answered knowingly, intelligently and fully indicated that he was aware of the ramifications of refusing the plea bargain when he answered all of the courts questions on that day.

Even if there were any merit to defendant's argument, it is one that was known to defendant at the time of the underlying proceedings and certainly defendant could have included such claims in his appeal or in any of his previous motions. Defendant does not put forth any justifiable reason why he could not have presented such arguments in his appeal.

Rather, defendant includes in his motion papers his statement of innocence that he made to his attorney as the basis for him going to trial. A defense attorney's ethical obligation prevents him or her from accepting a plea bargain from a defendant who maintains his innocence. The attorney has an ethical duty not to assist in the presentation of perjured testimony to the court. *(See, Code of Professional Responsibility, EC 7-26; DR 7-102), People v Appel,* 120 AD 2d 319 (App Div 3rd Dept 1986)

Further even if there were sufficient facts here, pursuant to *Criminal Procedure Law section 440.10 (2) (c),* "notwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment when: (c)*Although sufficient facts appear on the record of the proceedings underlying 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 take or perfect an appeal during the prescribed period…*

Based on *CPL section 440.30* (4), Upon considering the merits of the motion, the court may deny it without conducting a hearing if: (b) the motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn

allegations substantiating or tending to substantiate all the essential facts as required by subdivision one and (d) an allegation of fact essential to support the motion (i)....is made solely by the defendant and is unsupported by any other affidavit or evidence and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true.

Defendant makes the instant motion more than 20 years after his conviction and sentence. Pursuant to CPL section 440.10, a court may consider defendant's delay in bringing the motion when determining whether to exercise the court's discretion to deny such motion based on CPL section 440.30. See, People v Degondea, 3 AD 3d 148 (1st Dept 2003); People v Perez, 11 Misc 3d 1093A (Sup Ct Kings Cty 2006)

As such, defendant's claim regarding the plea offer is procedurally barred for failure to raise such claim in his appeal or prior motions and there being no justifiable reason for his failure to do so.

Defendant's claim to set aside his sentence is procedurally barred because defendant raised the claim in his prior motion and the claim was decided on the merits. CPL 440.20(3)

Further, defendant provides no good cause or justifiable reason in the interest of justice why this court should consider defendant's claims.

Defendant's motion is denied based on the aforementioned and for failure to timely appeal such matters known to him at the time of his conviction and sentence; and because defendant has not put forth any meritorious claims pursuant to CPL 440 sufficient for review by this court.

This court adheres to the prior decisions in this matter.

Consequently, defendant's motion herein must be denied in its entirety.

Accordingly, based on the foregoing, and for other reasons asserted in the People's opposition papers, the defendant's CPL 440.10 motion to set aside his conviction and overturn his sentence is SUMMARILY DENIED.

This constitutes the decision and order of the Court.

The clerk of the court is directed to mail copies of this decision and order to the defendant at his place of incarceration and to the District Attorney.

Notice of Right to Appeal for a Certificate Granting Leave to Appeal

Defendant is informed that his right to appeal from this order determining the within motion is not automatic except in the single instance where the motion was made under CPL 440.30 (1-a) for forensic DNA testing of evidence. For all other motions under article 440, defendant must apply to a Justice of the Appellate Division for a certificate granting leave to appeal. This application must be filed within 30 days after your being served by the District Attorney or the court with the court order denying your motion.

The application must contain your name and address, indictment number, the questions of law or fact which you believe ought to be reviewed and a statement that no prior application for such certificate has been made. You must include a copy of the court order and a copy of any opinion of the court. In addition, you must serve a copy of your application on the District Attorney.

Dated: July 27, 2012
Kings County, NY

Hon. Desmond A. Green, J.S.C.