SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY, CRIMINAL TERM, PART 24

PEOPLE OF THE STATE OF NEW YORK

against

KIRK EDWARDS,
Defendant

Indictment No.: 8276/05

By: Hon. Thomas J. Carroll

Dated: September 7, 2012

Defendant moves pro se pursuant to CPL § 440.10 (b) and (h) to vacate his conviction on the grounds of the trial court's bias and prejudice and, also, on the grounds of ineffective assistance of counsel.

In deciding this motion the court has considered the motion papers, the affirmation in opposition and the court file.

Defendant asserts that the trial court demonstrated its bias and prejudice when it failed to "apply the dictates of CPL § 70.10/70.20 . . ." (standards of proof); improperly instructed the jury as seen on the verdict sheet; and failed to instruct the jury concerning the definition contained in PL § 140.00(5) ("Enter or remain unlawfully").

Defendant also claims the trial court should have charged lesser included offenses and also appears in particular to claim that he was entitled to a charge of the lesser included count of criminal trespass in the second degree. Since this count was indeed charged, defendant must be claiming it was subject to misleading instructions which were referred to above.

Defendant's claim of ineffective assistance of counsel is premised on his trial attorney's: failure to request that the lesser included offenses be submitted to the jury; failure to object to the verdict sheet; and failure to object to the court's bias and prejudice.

On November 4, 2005, at approximately 8:40 a.m., the defendant gained entry to 361

Fifth Avenue, in Brooklyn, pushing past a resident when he entered. The resident noticed that at the time, the defendant was carrying something long wrapped in blue fabric. After noticing damage to the entry door, the resident called 911 to report the incident. The defendant was confronted inside in the vestibule area of the building by police responding to that 911 call. One of the officers recovered a blue pillowcase nearby. The pillowcase was found to contain bolt cutters, two screwdrivers, and a wrench. The defendant was indicted for burglary in the second degree; burglary in the third degree; criminal trespass in the second degree; criminal trespass in the third degree; criminal mischief in the fourth degree and possession of burglar's tools. Following a jury trial, the defendant was convicted of burglary in the second degree, criminal mischief in the fourth degree and possession of burglar's tools. On June 29, 2006, the defendant was sentenced as a second felony offender to ten years incarceration plus five years post release supervision on the burglary count, and one year incarceration on the criminal mischief count and one year incarceration on the possession of burglar's tools count. The sentences were to run concurrently (Konviser, J., at trial and sentence).

On appeal, the defendant argued that: (1) the People failed to provide legally sufficient evidence that defendant "knowingly" entered or remained; and (2) defendant was denied a fair trial by the trial court's failure to instruct the jury that mere entry into the unlocked vestibule without any posted signs and with a second locked door beyond it did not constitute an unlawful entry, a required element of burglary in the second degree.

The appellate division affirmed the defendant's conviction writing "[t]he defendant's contention that the evidence was legally insufficient to support his conviction of burglary in the second degree is unpreserved for appellate review . . . . In any event, the evidence "was legally sufficient to establish the defendant's guilt beyond a reasonable doubt." The Court further found

that "defendant's remaining contentions, regarding the jury charge, are without merit." *People v Edwards*, 54 AD3d 1055 [2008]. The Court of Appeals denied the defendant leave to appeal. *People v Edwards*, 11 NY3d 897 [2008].

Sufficient facts related to defendant's assertions regarding CPL §§ 70.10 and 70.20 were on the record and thus this assertion is mandatorily procedurally barred. CPL § 440.10(2)(c). Moreover, defendant raised the issue of "legally sufficient evidence" regarding "entered or remained" on appeal and it was decided against him. Thus, to this extent it is again mandatorily procedurally barred. CPL § 440.10(2)(a).

Defendant's assertion regarding PL § 140.00 (5) was decided on appeal (*People v Edwards*, 54 AD3d 1055) and thus is manditorily procedurally barred. CPL § 440.10(2)(a).

Sufficient facts related to defendant's assertion about the jury charge as seen on the verdict sheet were on the record and thus this assertion is manditorily procedurally barred. CPL § 440.10(2)(c).

Sufficient facts related to the court's instructions as related to criminal trespass in the second degree were on the record and thus this assertion is manditorily procedurally barred. CPL § 440.10(2)(c).

Sufficient facts related to defendant's assertions that trial counsel was ineffective because he failed to request lesser included charges and failed to object to the instructions related to the verdict sheet are apparent from the record and thus are manditorily procedurally barred. CPL § 440.10(2)(c).

Sufficient facts related to defendant's assertion that trial counsel was ineffective because he failed to object to the alleged bias and prejudice of the trial court are apparent from the record and thus manditorily procedurally barred. CPL § 440.10(2)(c). Furthermore, defendant has

failed to either demonstrate the absence of strategic or legitimate explanations for counsel's failure to object to the court's alleged bias. Thus, counsel's failure to object in the manner suggested by the defendant does not amount to a denial of effective counsel. *People v Taylor*, 1 NY3d 174, 177 [2003].

Accordingly, the motion is denied in its entirety.

This decision shall constitute the order of the court.

ENTER:

THOMAS J. CARROLL
J.S.C.
HON. THOMAS J. CARROLL

ENTERED
SEP 10 2012
NANCY T. SUNSHINE
COUNTY CLERK

You are advised that your right to an appeal from the order determining your 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, you 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.

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