

People v Clay

2014 NY Slip Op 33273(U)

December 15, 2014

Supreme Court, Kings County

Docket Number: 10361/06

Judge: Deborah A. Dowling

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MEMORANDUM

SUPREME COURT: KINGS COUNTY
(Criminal Term, Part 1)

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PEOPLE OF THE STATE OF NEW YORK,

DECISION AND ORDER

By: Justice Deborah A. Dowling

Dated: December 15, 2104

Indictment No: 10361/06

-against-

THOMAS CLAY,

Defendant(s).

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The defendant submitted the instant motion, *pro se*, seeking an Order to vacate his conviction pursuant to Criminal Procedure Law §440(1)(b). The defendant also requests that the court conduct a hearing to adjudicate the merits of the instant motion. The People submitted opposing papers to the defendant's motion. For the reasons stated herein the defendant's motion is denied in its entirety.

PROCEDURAL HISTORY

The defendant was charged in the instant indictment with Murder in the Second Degree (PL §125.25(1)), Criminal Possession of a Weapon in the Second Degree (P.L. §265.03(2)) and Criminal Possession of a Weapon in the Third Degree (P.L. §265.02(4)). The charges arose out of a shooting incident, on August 11, 2006, at approximately 9:00 pm, in front of the premises located at Bristol Street in Kings County.

The defendant was convicted of Murder in the Second Degree, on November of 2007, after a trial by jury. The defendant was tried jointly with Sidor Fulcher, who was also convicted of Murder in the Second Degree. The defendant and Sidor Fulcher were subsequently sentenced to twenty-five (25) years to life incarceration, on November 21, 2007.

After the defendant's conviction, the defendant filed a motion seeking an Order vacating the judgment of conviction, on October 21, 2008, pursuant to Criminal Procedure Law §440.10. The defendant alleged trial counsel provided ineffective assistance of counsel. The defendant's motion was denied by this Court on February 20, 2009. The defendant appealed the Court's decision and leave to appeal was denied by the Appellate Division, Second Department on June 4, 2009.

The defendant appealed the judgement of conviction with the Appellate Division Second Department. The Appellate Division, Second Department affirmed the defendant's conviction on June 28, 2011. *See People v. Clay*, 88 A.D.3d 14 (2nd Dept). Leave to appeal was denied by the Court of Appeal on November 28, 2011. *See People v. Clay*, 17 N.Y.3d 952 (2011). The defendant applied for a writ of certiorari before the United States Supreme Court. However, due to incomplete filing the matter was returned to the defendant's appellate counsel to make amendments. The defendant failed to cure the defect in the papers submitted before the United States Supreme Court.

On January 23, 2012, the defendant filed another motion pursuant Criminal Procedure Law §440.10, in which he again contended he was subjected to ineffective assistance of

counsel. The claims raised therein were virtually identical to the claims raised in the previous motion. The Court denied the defendant's motion by decision and Order dated April 30, 2012.

The defendant, unsatisfied with the court's decision, submitted a motion to reargue/renew the court's decision, on May 27, 2012. The defendant's application was denied on August 16, 2012. On September 12, 2012, the defendant filed for leave to appeal the court decision denying his motion to reargue/renew his application. The Appellate Division denied the defendant leave to appeal on January 29, 2013.

The defendant filed yet another motion pursuant Criminal Procedure Law §440.10, dated September 6, 2012. The People opposed the motion. This Court denied the defendant's motion by decision and order dated November 21, 2012. The defendant sought leave to appeal but the application was denied by the Court on January 29, 2013. The defendant now moves seeking to renew his previous motion and for an order vacating his conviction.

On November 12, 2013, the defendant filed a writ of habeas corpus with United States District Court for the Eastern District Court of New York. The defendant subsequently sought to withdraw that petition so that he could exhaust all remedies available to him at the state level. The defendant then submitted a motion to this court, dated December 17, 2013, seeking to vacate his conviction. The defendant alleged there was newly discovered evidence, prosecutorial misconduct and a freestanding claim of actual innocence which

provided a basis to vacate his conviction. The Court denied the defendant's motion by decision and Order dated March 31, 2014.

The defendant now contends that his conviction should be dismissed because the guilty verdict was rendered by a jury panel consisting of only eleven (11) jury members. The defendant further alleges the official transcript of his trial proceedings were altered to hide this alleged violation.

CONCLUSIONS OF LAW

The question presented is whether there exists a legal basis to vacate the defendant's conviction under the facts of this case. The answer remains the same as in all the previous motions submitted by the defendant. There is simply no legal basis to vacate the defendant's conviction. The application is procedurally barred as well as substantively without merit. Criminal Procedure Law §440.10(2)(c) also provides that the Court **must** deny a motion to vacate a judgment if :

“sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, [and] no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period . . .” *CPL* §440.10(2)(c).”

Here, the defendant instigated numerous motions to vacate his conviction as well as multiple appeals before the Appellate Division. The defendant could have but did not raise these claims prior to now. There is no reason why the defendant did not raise the alleged

claims prior to this motion. Further, there is no merit to the substance of the claim raised by the defendant.

The defendant alleges the Court allowed the duly selected jury foreperson to retire from the jury just as the verdict was to be read and the Court participated in substituting another juror as the foreperson. The defendant further alleges the Court permitted the reading of the verdict by a substituted foreperson and with only a total of eleven (11) sworn jurors present. The defendant also contends the official transcript of the trial were forged in order to remove these alleged transgressions from the record. Moreover, in the defendant's purported version of events the jury found him not guilty of the charge of Murder in the First and Second Degree, as well as the other charges.

The defendant weaves a tale of fantasy which defies imagination. There is no truth to the allegations raised by the defendant. His claims simply did not happen. The defendant has been engaged in motion practice for the majority of the time since his conviction, filing at least two motions a year. It would stand to reason, if the egregious conduct had occurred, the defendant would have raised them in his first, second or third motion to vacate his conviction or in his first or second application seeking appellate review. There is no substance to the claims raised by the defendant.

The defendant has submitted numerous post-conviction motions. Each application by the defendant has been reviewed in depth and the conclusion has remained the same. There is no basis to vacate the defendant's conviction. The credible, believable evidence

convinced a duly sworn panel of jurors that the defendant was guilty of each and every charge for which he was found guilty. This is a fact which remains true despite the multitude of motions filed by the defendant. It appears the defendant may be laboring under the mistaken assumption that if he inundates this Court with duplicative motions seeking to vacate his conviction pursuant to CPL §440(1)(b), eventually the resulting determination will be a finding that his conviction should be vacated. The defendant's assumption is wholly misplaced. There is no evidence supporting the defendant's contentions and no basis to grant the requested relief. Accordingly, the defendant's motion is denied in its entirety.

It is hereby,

ORDERED, the defendant's motion is denied. It is further,

ORDERED, the defendant's right to appeal from this order 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. It is further,

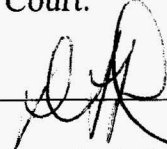
ORDERED, the application must contain your name and address, indictment number, the questions of law or fact which you believe ought to be reviewed and a statement that no prior application for such certificate has been made. You must include a copy of the court order and a copy of any opinion of the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

APPELLATE DIVISION, 2ND Department
45 Monroe Place
Brooklyn, NY 11201

Kings County Supreme Court
Criminal Appeals
320 Jay Street
Brooklyn, NY 11201

Kings County District Attorney
Appeals Bureau
350 Jay Street
Brooklyn, NY 11201

This shall constitute the decision and order of this Court.



Deborah A. Dowling, J.S.C
HON. DEBORAH A. DOWLING
JUSTICE SUPREME COURT

ENTERED
DEC 17 2014
NANCY T. SUNSHINE
COUNTY CLERK