

People v Barresi

2011 NY Slip Op 32583(U)

July 27, 2011

Supreme Court, Kings County

Docket Number: 5571/2007

Judge: Wayne M. Ozzi

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 17

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

Indictment No. 5571/2007

JACK BARRESI,

Decision & Order

Defendant.

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Ozzi, J.

Charles Hynes, Esq., District Attorney, Kings County (Shulamit Rosenbloom Nemec, Esq., Of Counsel) for the People of the State of New York
Jack Barresi, Pro Se.

Defendant Jack Barresi, pro se, filed a motion dated March 18, 2011 for an Order dismissing the within Indictment pursuant to Criminal Procedure Law Section 440.20 on grounds that his guilt was not proven by a reasonable doubt and the verdict was against the weight of the evidence. The defendant also claimed that his sentence was unduly harsh and excessive.

The People submitted an affirmation in opposition to the motion dated May 25, 2011. The court has examined Defendant's moving papers, the People's opposition, the court file, and the court records in this matter from which the following findings are made.

In June 2007, Defendant was living with his girlfriend, Marcia Palmiotti, and his brother Santos Duarte. On June 9, 2007, Ms. Palmotti was in her bedroom when the defendant argued with her about the mail. As the argument escalated, the defendant pinned Mr. Palmiotti to the bed and pressed a kitchen knife to her chest. The defendant then put the knife blade to Ms.

Palmiotti's throat and repeatedly threatened to kill her. Ms. Palmiotti attempted to block her throat with her arm and the defendant began sawing the knife into her wrist. The defendant continued to cut Mrs. Palmiotti while she screamed for her life.

Ms. Palmiotti suffered a large wound on her wrist as a result of the defendant's attack, which exposed tendons, muscle, and bones. She received medical treatment at Coney Island Hospital. On or about March 24, 2009, a jury found the defendant guilty of Assault in the Second Degree and Menacing in the Second Degree. Defendant was subsequently sentenced to a prison term of 6 ½ years, followed by three years of post-release supervision for the assault in the second degree conviction and a one-year term to be served concurrently for the Menacing conviction.

In his motion, Defendant claims that he is entitled to vacatur of his conviction because the People failed to establish that the victim suffered serious physical injury in that the victim testified that she caused the injury to herself. Consequently, he argues, the People failed to prove the defendant's guilt beyond a reasonable doubt and the verdict was against the weight of the evidence.

The defendant previously appealed his conviction to the Appellate Division, Second Department. In his appeal, the defendant attacked the sufficiency of the evidence on grounds that the evidence at trial was legally insufficient to convict him of assault. In particular, Defendant claimed the People failed to prove that he intended to cause physical injury to Ms. Palmiotti and that his intoxication at the time of the incident negated any intent to injure her. The Appellate Division held that the evidence was legally sufficient to support the conviction, reasoning that

“an intoxicated person can form the requisite criminal intent to commit a crime, and it is for the

trier of fact to decide if the extent of the intoxication acted to negate the element of intent.”

People v. Barresi, 80 A.D.3d 709, 710 (2nd Dep’t 2011). The Appellate Division further stated that intent to cause physical injury may be inferred from conduct and surrounding circumstances.

Id.

At the outset, it is noted that Defendant’s initial claims are procedurally barred as they are matters of record that the Appellate Division either determined on direct appeal or matters that could have been raised on direct appeal but were not. See C.P.L. 440.10(2)(a), (c). As such, the court must deny the defendant’s motion. C.P.L. 440.10(2)(a),(c); see also People v. Hall, 28 A.D.3d 678(2nd Dep’t 2006); People v. Watson, 284 A.D.2d 212 (1st Dep’t 2001).

Defendant further claims that his sentence was unduly harsh and excessive. Specifically, he states that his sentence is “unfair and illegal” and “over the guidelines of the Penal Law” in that he was sentenced to a determinate term of imprisonment of six and one-half years followed by three years’ post release supervision. For the following reasons, Defendants’ claims are wholly without merit.

A motion to set aside a sentence by a criminal defendant may be granted on the ground that the sentence was unauthorized, illegally imposed, or otherwise invalid as a matter of law. See C.P.L. §440.20(1). A court cannot amend a sentence that is not defective. People v. Minaya, 54 N.Y.2d 360 (1981). Grounds for vacating a sentence include the trial court’s failure to engage in the required sentencing allocution (see e.g., People ex rel. Boddingham v. La Vallee, 50 A.D.2d 692 (3rd Dep’t 1975)), sentencing on counts which were removed for the jury’s consideration (see People v. Del Valle, 91 A.D.2d 513 (1st Dep’t 1982)), ineffective assistance of counsel at sentencing (People v. Hyun Chu Nho, 137 Misc. 2d 978 (Sup. Ct. 1987)), and

deficiencies in the pre-sentence report (People v. Breaux, 24 A.D.3d 261 (1st Dep't 2005)).

However, the statute does not encompass excessive sentence claims. Such claims must be raised on direct appeal. See People v. Cunningham, 305 A.D.2d 516 (2nd Dep't 2003); see also People v. Bronxky, 21 A.D.2d 981 (2nd Dep't 1963). Defendant fails to raise any grounds that would entitle him to relief under C.P.L. §440.20(1) and his claim is therefore rejected.

Defendant's claim that his sentence constitutes cruel and unusual punishment is also without merit. Defendant was convicted of Assault in the Second Degree, a Class D Violent Felony. Pursuant to Penal Law §70.02(3)(c), a defendant convicted of a Class D Violent felony must be sentenced by the court to a determinate term of imprisonment between two years and seven years. The sentencing court is further mandated by statute to sentence the defendant to a period of post-release supervision of between one and one-half years and three years. See New York Penal Law §§70.00(6), 70.45(2).

"Regardless of its severity, a sentence of imprisonment which is within the limits of a valid statute ordinarily is not cruel and unusual punishment in the constitutional sense." People v. Jones, 39 N.Y.2d 694, 697 (1976), citing United States v. Martell, 335 F.2d 764, 766. Here, the sentencing court sentenced the defendant to term of imprisonment of six and one-half years to be followed by a period of three years of post-release supervision. This was clearly within the statutory sentencing limits. Further, Defendant has failed to establish any facts which would demonstrate the existence of exceptional circumstances that would render his sentence cruel and usual punishment. See e.g., People v. Jones, 39 N.Y.2d at 697; People v. Brathwaite, 263 A.D.2d 89, 92 (2nd Dep't 2000). Thus, Defendant's claims that his sentence is illegal and constitutes cruel and unusual punishment are wholly without merit and therefore rejected.

For the foregoing reasons, Defendant's motion is denied.

This constitutes the decision and order of the Court.

Dated: July 27, 2011



HON. WAYNE M. OZZI, J.S.C.

ENTERED
JUL 29 2011
NANCY T. SUNSHINE
COUNTY CLERK