

People v Fowle

2012 NY Slip Op 32583(U)

October 5, 2012

Supreme Court, Kings County

Docket Number: 1644-2005

Judge: Michael A. Gary

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM: MISCELLANEOUS MOTIONS

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THE PEOPLE OF THE STATE OF NEW YORK :

-against- : DECISION AND ORDER
440 MOTION

JAHBIR FOWLE :
: IND. NO. 1644-2005
Defendant :

-----X

MICHAEL A. GARY, J.¹

Defendant moves *pro se*, pursuant to CPL § 440.10, to vacate his judgment of conviction and the imposed sentence. The People have filed a response opposing the motion. Defendant argues, pursuant to subdivision (1)(g and h) that the judgment was obtained in violation of his rights under the state and federal constitutions, inasmuch as his right to effective assistance of counsel was violated and therefore the conviction must be overturned. He further asserts that he is actually innocent of the charges In the alternative, he moves for a hearing on the issues presented herein.

The defendant's convictions arose from the following incident. As found by the jury, on November 17, 2003, defendant and his brother Alfonso Fowle, argued with three individuals (Michael Walker, Jarrell Perry and Lawrence Mallik) about selling marijuana on Hendrix Street, the Fowles' territory for selling the drug. After the argument, the three left the scene and went home to arm themselves with weapons. When they returned to the nearby

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This motion was transferred to this court via the Miscellaneous Motion rotation. Justice Plummer Lott is no longer presiding in Supreme Court.

grocery store, a verbal confrontation with defendant and his brother occurred. Defendant then produced a .22 caliber rifle and shot Michael Walker. As he started to turn away from the defendant, Walker fired his gun and Mallik and Perry² drew their guns and shot at the defendant as they ran away. During this exchange of fire, an 8 year old bystander, named Deasean Hill was shot and died before he reached the hospital. Defendant fled to Atlanta and was arrested there in March, 2005. In a statement given later to the NYPD, defendant acknowledged shooting his weapon first.

The defendant was charged in Kings County Indictment 1644-2005 with the crimes of Murder in the second degree (Penal Law § 125.25[1][2]), and Reckless endangerment in the first degree (Penal Law § 120.25).

At defendant's trial, he claimed that he shot at Walker in self-defense when he saw Walker and his cohort, Perry, gesture as if to draw a gun. Defendant was convicted on December 5, 2005, of Manslaughter in the second degree for the death of Daesean Hill, as a lesser included offense of the Murder, and acquitted of all counts pertaining to the death of Michael Walker. Defense counsel filed a motion to set aside the verdict which was denied, and on March 8, 2006 defendant was sentenced as a predicated felony offender to an indeterminate term of imprisonment of a minimum of 7½ years and a maximum of 15 years imprisonment.

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Jarrell Perry and Lawrence Mallik each were indicted and plead guilty under Kings County Indictment No. 8282-2003.

Defendant filed an appeal with the Appellate Division Second Department, in June, 2008 in which his attorney claimed that the charge to the jury regarding the justification defense was defective and trial counsel was ineffective for failing to object to the court's charge to the jury.

The Appellate Division, Second Department affirmed the judgment in a unanimous decision in March, 2009, in *People v. Fowle*, 60 AD3d 691 (2d Dept), finding that the claim was unpreserved. It nevertheless reviewed the merits of the claim, concluding that any potential error was harmless due to the overwhelming evidence of defendant's guilt. Further, the Appellate Division denied the defendant's claim for ineffective assistance of counsel, specifically finding that Mr. Fowle had been afforded meaningful representation.

Leave to the Court of Appeals was denied on May 12, 2009 in *People v. Fowle*, 12 NY 2d 853 (Table).

Defendant now moves this court pursuant to CPL § 440 to vacate the judgment of conviction. He alleges that: 1) he is actually innocent; 2) his constitutional rights were violated inasmuch as the verdict sheet was erroneous; and 3) his attorney was ineffective for failing to challenge the verdict sheet as it was submitted to the jury (specifically, how the jury was to consider the counts in relation to the justification charge.)

CPL 440.10 subdivision 3, states in relevant part:

..... the court may deny a motion to vacate a judgment when:

(a) Although facts in support of the ground or issue raised upon the motion could

with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the ground or issue in question was not subsequently determined on appeal; or

(b) the ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state other than an appeal from the judgment, or upon a motion or proceeding in a federal court . . .

(c) upon a previous motion made pursuant to this section , the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.

A court should deny a motion to vacate a judgment of conviction when the issues raised therein could have been or were already raised in previously filed post- verdict/post-conviction proceedings. The People assert that the defendant should have made the claim of any error in the verdict sheet as part of the claim on his appeal in 2009, since it was part of the record, and thus, the issue is not now properly before the court. Similarly, the appellate court considered a claim of ineffective assistance of counsel, and the alleged failure to object to the verdict sheet comprised part of the trial record and should have been raised during the appeal. This claim is therefore barred from consideration. Except for the claim of defendant's actual innocence, this court agrees that the two issues are procedurally barred pursuant to CPL §440.10 (2) (c), above.

As to defendant's third claim, New York Court of Appeals has not clearly decided whether to recognize a free-standing claim of actual innocence. See e.g. *People v. Tankleff*, 49 AD3d160 (2d Dept., 2007). Nevertheless, if the court were to consider the defendant's claim, he asserts in his papers only that the verdict sheet was unclear about its instructions to the juror in evaluating his claim of justification, and thus, because they failed to consider his claim of self defense properly, he must therefore be innocent of the charges.

The People have asserted that not only did the verdict sheet conform to the

requirements of CPL § 310.20, in its instructions and annotations, but since the defendant only asserted a justification defense, any claimed error in the verdict sheet itself hardly supports a claim that the defendant was innocent of the crime charged. Defendant really claims that the court's alleged error in the verdict sheet eviscerated his defense of justification, which defendant wishes the court to equate with his actual innocence of the crimes charged. The Appellate Division, however, already reviewed the evidence and found that the evidence of guilt was "overwhelming"; defendant has not put forth any new evidence that could demonstrate to a court that "no reasonable juror could convict defendant of the crimes for which he was found guilty". *See, People v. Cole*, 1 Misc 3d. 531 (Kings County Supreme Court, 2003 (Leventhal , J)).

For all the reasons outlined above, the defendant's motion to set aside the judgment of conviction is denied in all respects. As the defendant has not proffered a cognizable ground under CPL § 440.10 to convince the court that any violation of his rights under the constitution occurred, the court hereby denies this motion to vacate the judgment in its entirety.

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York
 October 5, 2012

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 MICHAEL A. GARY, J. S. C.

ENTERED
 OCT 9 2012
 NANCY T. SUNSHINE
 COUNTY CLERK