

People v As-Sakaf

2013 NY Slip Op 31903(U)

July 25, 2013

Supreme Court, Kings County

Docket Number: 12980/1988

Judge: Desmond A. Green

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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,

Decision

Against

BY: GREEN, J.

JULY 25, 2013

YAHYA AS-SAKAF,

INDICT#: 12980/1988

Defendant.
-----X

Defendant moves pro se for an order to vacate his judgment of conviction pursuant to CPL article 440.10 (1)(h).

Based on a review of defendant's motion papers dated October 15, 2012, with supplemental papers dated, February 12, 2013 and such other papers, including the People's opposition dated January 31, 2013, on file with the Court; the decision and order of the Court on defendant's motion is summarily denied in its entirety.

This is defendant's fourth CPL 440 motion in which he raises substantially the same claims of ineffective assistance of counsel that he has raised in his prior three CPL 440 motions all of which were mandatorily and permissively precluded. The prior CPL 440 motions were all denied on procedural grounds and on the merits.

Defendant primarily argues that his trial attorney failed to obtain a more favorable plea offer than the one that was made of fifteen years to life.

Defendant was convicted at trial of two counts of murder in the second degree, two counts of attempted murder in the second degree and one count each of weapon possession in the second and third degree. Defendant was sentenced to 25 years to life on each of the four murder counts to run consecutively with 8 1/3 to 15 years and 2 1/3 to 7 years on the weapons charges also to run consecutively to each other and to the murder charges.

Defendant claims he is serving what amounts to 68 years to life which is four times the punishment of the plea offer and such term is itself is illegal as it's evidence of prejudice. However, defendant provides no legal basis for such assertions other than his comparison with the plea of 15 years to life that he rejected prior to going to trial.

Defendant's appeal in this matter was also denied on September 26, 1994 and several federal motions were denied. Defendant's claims are also barred because they are claims that are a part of the record, known to the defendant at the time he filed his appeal yet he failed to include such claims in the appeal. Leave to appeal to the Court of Appeals was denied. *People v As-Sakaf*, 207 AD 2d 899 (2nd Dept 1994)

And defendant's motion to reargue and reconsider such appeal was denied December 29, 1994. Leave to appeal to the Court of Appeal from the

Appellate Division's affirmance of the judgment of conviction was denied February 9, 1995. *People v As-Sakaf*, 85 NY 2d 859 (1995) (Levine, J.)

Leave to appeal each denied federal and state motion was also denied.

The new claims of ineffective assistance of counsel in the current motion is denied on procedural grounds pursuant to CPL 440.10 (3) © because defendant could have raised these issues in his 1997 440 motion which was incorporated into the one his court appointed counsel filed in 1998, and in his 2003 440 motion and in his 2005 440 motion. At each instance, defendant could have raised such claims, but failed to do so and offers no justification for such failure to raise the claims in his previous 440 motions. ¹

Defendant posits the theory that the procedural bar should not apply to him because of subsequent case law noting *Lafler v Cooper*, 132 S. Ct 1376 (2012) that was not available at the time he filed the prior CPL 440 motions.

However, defendant is misguided in his assertions as federal and state case law has always provided constitutional protections regarding the right to effective assistance of counsel encompassing the defendant's right to be

¹ The procedural history and dates of defendant's prior appeal including the state and federal motions are outlined in the People's opposition papers dated January 31, 2013.

informed of the relative merits and alternatives in pleading guilty and going to trial. *Roccisano v Menifee*, 293 F 3d 51 (US Ct of App 2nd Cir 2002)

“Principle that defense counsel in a criminal case must advise client of merits of government's case, of what plea counsel recommended, and of likely results of trial, was established long before movant was even prosecuted, and thus, movant failed to show cause for failing to raise in earlier motion to vacate claim that counsel refused to allow him to plead guilty and failed to give him adequate information as to strength of government's case against him and sentence he would likely receive if he were convicted, as required to raise claim in successive motion to vacate”. 28 U.S.C.A. § 2255

Further, as the People point out in their opposition papers, this right of the accused is hardly novel having been, long ago, clearly articulated by the United States Supreme Court in *Von Moltke v Gilles*, 332 US 708 (1948) and progeny. The *Gilles* case dealt with facts in which a government agent gave the defendant lawyerly advice and the court stated, that such advice was insufficient and that the accused is “still entitled to that counsel before her life or her liberty can be taken from her.”

This court notes the particular egregious, psychological circumstances of the underlying matter represented by defendant based on his assertion that he was protecting his daughter who he thought was in harm's way and that the four

individuals, two of whom, were killed by defendant were thought to have taken part in his daughter's disappearance.

The plea that was offered, as the People point out, was conveyed in part because of the nature of the circumstances, that defendant had no prior record, including evidence that the defendant had also been shot and may have been acting to protect himself.

It bears repeating, the specific undisputed facts here, that the defendant, on December 10, 1988 at approximately 5 pm, shot and killed John Adam and Glen Adam, two brothers. He shot John twice and Glen six times.

Defendant also shot Christine Livathinos, the girlfriend of John and he pistol whipped John and Glen's mother, Geraldine. Both Ms. Livathinos and Ms. Adams, who survived, sustained serious and possibly life threatening injuries.

All were occupants of apartment 6 L at 6801 19th Avenue in Kings County where the defendant had ostensibly gone to look for his daughter and believed that the Adam brothers were dangerous drug dealers who were involved in his daughter's disappearance. Subsequent to a discussion with the individuals, the shooting ensued.

Defendant had told a police officer that he started shooting in defense after the four people in the apartment had “jumped” on him.

Later that day, the defendant surrendered to the Police with a gunshot wound to his hand and with the gun he had used still in his possession. Defendant states that he had a limited permit for the weapon.

However, the record belies defendant’s continued assertions as he refused the plea offer, refused psychiatric examination and insisted on going to trial, despite defendant’s attorney telling him he could be incarcerated for the rest of his life. ²

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

Defendant’s claim to set aside his sentence is procedurally barred because defendant could have but failed to raise the claim in his prior appeal or prior motion.

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

² From excerpt of defendant’s 1998 440 motion quoted on pg 18 of the People’s opposition papers.

Consequently, defendant's motion herein must be denied in its entirety for procedural reasons and on the merits.

Accordingly, based on the foregoing, and for other reasons enunciated in the People's opposition papers, the defendant's CPL 440 motion to set aside his conviction and overturn his sentence is **SUMMARILY DENIED**.

This shall constitute the Decision, Opinion and Order of the Court.



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

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.

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