

**People v Green**

2013 NY Slip Op 32126(U)

September 6, 2013

Supreme Court, Kings County

Docket Number: 3580/96

Judge: William Garnett

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

THE PEOPLE OF THE STATE OF NEW YORK  
  
-against-  
  
SHAWN GREEN,  
  
Defendant.

DECISION AND ORDER  
  
Ind. #3580/96  
  
Date: September 6, 2013  
  
By: Hon. William E. Garnett

The defendant was charged under Indictment #3580/96 with Robbery in the First Degree, et al.

On November 6, 1996, following a jury trial, the defendant was convicted of Robbery in the First Degree. The defendant was sentenced on January 15, 1997, as a second violent felony offender, to a term of twenty-five (25) years in prison.

The defendant has made four prior applications for relief under CPL §440.10 and three prior motions pursuant to CPL §440.20. In addition to his appeal from his judgment of conviction to the Appellate Division of the Supreme Court, he has also unsuccessfully petitioned the Appellate Division of the Supreme Court for a writ of coram nobis and the United States District Court for the Eastern District of New York for a writ of habeas corpus.

The defendant now moves to vacate his judgment of conviction, pursuant to CPL §§440.10(1)(b), (d) and (h), on the grounds of prosecutorial misconduct including the eliciting of false testimony. The defendant also moves to set aside his sentence,

pursuant to CPL §440.20(1), on the grounds that his sentence was invalid and vindictive.

Motion to Vacate the Judgment of Conviction

CPL §440.10(2)(c) provides that a court must deny the motion to vacate a judgment when:

"Although sufficient facts appear on the record of the proceeding underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to ... raise such ground or issue upon an appeal actually perfected by him."

The defendant's present claims of prosecutorial misconduct involving alleged false testimony were matters of record which could have been raised on his direct appeal. CPL §440.10(2)(c). Thus, the defendant's present claims are procedurally barred from collateral review.

CPL §440.10(3)(c) permits a court to deny a subsequent §440.10 motion where the defendant was in a position to raise the ground or issue in an earlier motion, but failed to do so. People Cochrane, 27 A.D.3d 659 (2d Dept. 2006); People v. Jossiah, 2 A.D.3d 877 (2d Dept. 2003).

Clearly, the defendant was in a position to raise this ground in his earlier CPL §440.10 motions. Thus, this claim is procedurally barred. CPL §440.10(3)(c).

As noted above, the defendant now argues that, prior to trial,

the prosecutor failed to inform the defense that the money recovered from him had been released to the complainant. The defendant further contends that the prosecutor elicited false testimony regarding the vouchering and release of the money. The defendant asserts that this testimony allowed for the introduction of a photocopy of the money without evidence of a letter from the NYPD or a property release form with the complainant's signature. The defendant maintains that the police fabricated the evidence of the money. He asserts that the 75<sup>th</sup> Precinct Property Index Sheet does not show that a voucher for money was prepared in this case. From this fact, he argues that the money was not recovered from him.

The defendant's argument fails on the merits. Police Officer Johnson photocopied the money recovered from the defendant before it was returned to the complainant. No objection was made at the time the photocopy was offered into evidence that PL \$450.10 had been violated. Under the circumstances of this case, the photocopy was properly admitted into evidence.

The defendant's argument regarding the 75<sup>th</sup> Precinct Property Index Sheet is also without merit. The Property Index Sheet for March 19, 1996 contains an entry for Voucher G305280 and its related security envelope, #A879758. The Property Index sheet lists the property contained in the security envelope as N.Y.S. lotto tickets, a lotto card and a photocopy. Voucher G305280 identifies

the photocopy as "money on vouchere [sic] #G305275". Vouchers G305275 and G305280 show that the money was photocopied on the same day.

Despite the fact that the Property Index Sheet does not contain an entry for Voucher G305275; it nevertheless clearly and unequivocally demonstrates that the money had been photocopied before its return to the complainant. Thus, contrary to the defendant's contention, the Property Index Sheet supports the trial evidence.

#### Motion to Set Aside the Sentence

The defendant's contention that his sentence is invalid because the sentencing court failed to consider his potential for rehabilitation is summarily denied. CPL §440.20(2).

CPL §440.20(2) provides that a court: "must deny such a motion when the ground or issue raised thereupon was previously determined on the merits upon an appeal from the judgment or sentence ..."

In arguing on appeal that his sentence was excessive, the defendant clearly maintained that his potential for rehabilitation justified a reduction of his sentence. Thus, the Appellate Division's rejection of the defendant's argument on the merits bars this Court's review of this issue.

At sentencing, the defense attorney referenced a presentence memorandum that he had submitted to the court. The defense memorandum included information detailing the defendant's life. The

defendant's potential for rehabilitation was addressed at his sentencing.

In arguing that the court should sentence the defendant to a ten (10) year term, the defense attorney argued that the defendant could be rehabilitated. The defense counsel told the court that, even though the defendant had had difficulties and obstacles in his life, he had earned his GED, successfully completed parole on a sentence of one to three years, enrolled in Westchester Community College and worked two jobs while attending college. Counsel further contended that the defendant "is the type of young man who, if given direction and given an opportunity, could become a positive, contributing member of society."

After hearing these arguments of the defendant's attorney, the court sentenced the defendant to twenty-five (25) years.

The defendant's contention that the sentencing court was vindictive is without any basis. The defendant argues that the court penalized him for exercising his right to trial by imposing a sentence of imprisonment of twenty-five (25) years after he had rejected a plea offer of ten (10) years. People v. Melendez, 71 A.D.3d 1166 (2d Dept. 2010) (defendant rejected plea offer of five years subsequently sentenced to fifteen (15) years after trial); People v. Ramos, 74 A.D.3d 991, 992 (2d Dept. 2010).

Moreover, the sentencing minutes do not disclose any vindictiveness on the part of the sentencing court in imposing the

sentence. People v. Ramos, supra.

Finally, a defendant should anticipate a sentence imposed after trial may be more severe than the sentence offered in a plea bargain. People v. Pena, 50 N.Y.2d 400, 411-412 (1980).


Accordingly, the defendant's motion, pursuant to CPL §440.10 to vacate his judgment of conviction and his motion to set aside his sentence, pursuant to CPL §440.20, are denied in their entirety.

This opinion shall constitute the decision and order of the court.

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, NY 11201 for a certificate granting leave to appeal from this determination. This application must be made within thirty days of service of this decision. Upon proof of financial inability to retain counsel and to pay the costs and expenses of the appeal, the defendant may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Application for poor person relief will be entertained only if and when permission to appeal or a certificate granting leave to appeal is granted [22 NYCRR 671.5].

Dated: September 6, 2013  
Brooklyn, New York

**ENTERED**  
  
SEP 10 2013  
  
NANCY T. SUNSHINE  
COUNTY CLERK

  
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William E. Garnett  
A.J.S.C.