

People v Lassiter

2013 NY Slip Op 32385(U)

October 4, 2013

Sup Ct, Kings County

Docket Number: 752/2007

Judge: Danny K. Chun

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 50

-----X
THE PEOPLE OF THE STATE OF NEW YORK :
 :
 -against- :
 :
 DONNELL LASSITER, :
 :
 Defendant :
-----X

MOTION TO VACATE
JUDGMENT
DECISION AND ORDER

IND. NO. 752/2007

DANNY K. CHUN, J.

The defendant moves, *pro se*, to vacate the judgment of conviction against him claiming that he received ineffective assistance of counsel. The People oppose the defendant's motion.

The defendant was charged under Kings County Indictment Number 752/2007, with one count of Attempted Murder in the Second Degree, one count each of Assault in the First, Second and Third Degrees, two counts of Criminal Possession of a Weapon in the Second Degree, one count of Criminal Possession of a Weapon in the Fourth Degree, and Menacing in the Second Degree. Following a jury trial, on September 6, 2007, the defendant was convicted of one count of Assault in the First Degree and two counts of Criminal Possession of a Weapon in the Second Degree. The jury was deadlocked on the attempted murder charge, and the People thereafter moved to dismiss that charge.

On September 27, 2007, this Court sentenced the defendant to a prison sentence of twenty years followed by a five-year-term of post-release supervision for the assault count and to a concurrent determinate prison terms of seven years followed by a five-year-term of post-release supervision for each of the weapon possession counts. The defendant is currently serving his time.

The defendant appealed the judgment of conviction to the Appellate Division, Second Department, arguing that he was denied a fair trial because of the People's improper and excessive cross-examination of an alibi witness regarding that witness' criminal record, and that the defendant was denied his right to confrontation by the admission of inferential bolstering. The defendant also claimed that he was denied the effective assistance of counsel.

On June 15, 2010, the Appellate Division affirmed the judgment of conviction, holding that the defendant's claims of error were not preserved for appellate review. People v. Lassiter, 74 A.D.3d 1094 (2d Dep't 2010). In any event, the Appellate Division held that the defendant's bolstering claim was without merit as the detective's testimony did not refer to the witness' identification of the defendant. Id. at 1094. In addition, the Appellate Division found that the defendant was not deprived of the effective assistance of counsel. Id. at 1095. Finally, the Appellate Division held that the defendant's remaining contentions were unpreserved and without merit. Id.

The defendant's application for leave to appeal to the Court of Appeals was denied on August 20, 2010 (People v. Lassiter, 15 N.Y.3d 806 [2010]).

In his current *pro se* motion to vacate the judgment of conviction, the defendant argues that his trial attorney was ineffective as he failed to discuss and advise him regarding the plea offered before the trial. The People oppose arguing that the defendant's claim is procedurally barred from the court's review, and in any event, the defendant's claim of ineffective representation fails on its merits.

The court denies the defendant's motion as procedurally barred pursuant to CPL 440.10(2)(c). Section 440.10(2)(c) of Criminal Procedure Law provides that a court must deny a motion to vacate a judgment when, although 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, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him.

The issues brought up by the defendant are matters that appear on the record, and could have been argued on his direct appeal. Having failed to do so, CPL 440.10(2)(c) states that the court must deny the motion to vacate the judgment brought after the final affirmance on appeal (CPL 440.10(2)(c); *People v Cooks*, 67 N.Y. 2d 100, 103-04 [1986]; *People v Byrdsong*, 234 A.D. 2d 468, 469 [2d Dept 1996]; *People v Skinner*, 154 A.D. 2d 216, 221 [1990]).

Even if this motion was not procedurally barred, the court finds the defendant's claims without merit. Criminal Procedure Law section 440.3(4)(d) provides that the court may deny a defendant's 440 motion if "[a]n allegation of fact essential to support the motion (i) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true."

Here, the record shows that on August 28, 2007, after a bench conference, this court informed the defendant, on the record, that they were about to begin picking a jury. The court told the defendant that because he was a violent predicate felon, and because the top charge against the defendant was a B violent felony, the defendant was facing a minimum of ten years and a maximum of twenty-five years in jail if convicted after trial (Trial Transcript at 2). The court further informed the defendant that before jury selection began, the People may consider less than ten years in jail, and that if the defendant is interested, he should let his attorney know

(Trial Transcript at 2). The defense counsel advised the court that the defendant wanted a jury, and that he rejects the offer (Trial Transcript at 2-3).

In addition, the court noted, for the record, that the offer of seven years incarceration with five years of post-release supervision was the legal minimum that could be offered to the defendant (Trial Transcript at 3). The defense counsel requested to keep the offer open even after a jury was selected which the court refused (Trial Transcript at 3). The defense counsel again informed the court that the defendant wanted to continue to trial, and the court stated that there would be no more discussions of dispositions or offers (Trial Transcript at 3-4).

The record also shows that on September 27, 2007 at his sentencing, the defendant stated that while he appreciated the court's offer, he felt he should not take it because he felt he was "wrongfully accused." (Sentencing Minutes at 9). The defendant further states that he did not commit a crime. (Sentencing Minutes at 9).

As such, the court record clearly shows that the defendant was informed of the offer being made to him, as well as the minimum and maximum sentences if he were to be found guilty of the top count. The defendant's own statements made during his sentencing clearly shows that the defendant did understand the offer being made, but he rejected it because he believed he was wrongfully accused. The record shows that the defendant and the defense counsel communicated regarding the plea offer. The defendant cannot now turn around and argue that he received ineffective assistance of counsel because his attorney did not advise him to take the plea especially in light of the fact that the defendant was denying his guilt. This court finds that the allegations in the defendant's motion is contradicted by the court record, and there is no reasonable possibility that such allegation is true.

Wherefore, the defendant's motion to vacate his judgment is denied. The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York
October 4, 2013

A handwritten signature in black ink, appearing to read 'DKC', written over a horizontal line.

DANNY K. CHUN, J. S.C.

You are advised that your right to an appeal from the order determining your 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, 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.

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.

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