

People v Rodriguez

2013 NY Slip Op 32900(U)

July 30, 2013

Supreme Court, Kings County

Docket Number: 07355/1997

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,

Memorandum
Decision

Against

IND. 07355/1997

HECTOR RODRIGUEZ,

JULY 30, 2013

Defendant.

-----X

GREEN, J.

Upon a notice of motion, defendant moves pro se' for an order pursuant to Criminal Procedure Law (CPL) sections 440.20 (1) to have his sentence therewith set aside.

Defendant's claims are procedurally barred and without merit, thus defendant's motion is summarily DENIED in its entirety.

Sentence in this matter was imposed by Hon. Reichbach on February 24, 1999.

The facts found that led to defendant's conviction is that on July 6, 1997, approximately 8:15 am, defendant and an accomplice forced Marvin Fuentes and Maribel Pena into a grocery store at 200 Jamaica Avenue in Kings County. The owner and an employee were inside the store. Defendant took a wallet from Rafael Torres, the employee along with money from two cash registers. Also taken from the office of the owner, Sergio Salcedo, were checks, food stamps, a plastic bag of money and a gold bracelet from Mr. Salcedo's arm that was engraved with his name.

Defendant and the unapprehended accomplice fled the scene in a gray Toyota 4-Runner that was operated by the co-defendant, Gregory Velez. Subsequently, the Police pursued the Toyota with the defendant and his accomplices. A loaded operable handgun was thrown from the gray Toyota and later recovered from the back of a garbage collection truck. When the suspects were apprehended, the bag of money, checks and food stamps were found in the gray Toyota. Mr. Salcedo's gold bracelet was found on defendant's person.

Defendant and his co-defendant were charges with a number of counts of Murder in the Second Degree, Robbery in the First and Second Degree, Kidnapping in the Second Degree, Attempted Assault in the First Degree, Criminal Possession of A Weapon in the Second Degree, Criminal Possession of Stolen Property in the Third Degree and Fifth Degree.

The defendant was tried before a jury where he was acquitted of Robbery in the First Degree, Attempted Murder in the Second Degree and Attempted Assault in the First Degree.

The jury convicted the defendant of two counts of Robbery in the Second Degree, Criminal Possession of a Weapon in the Second Degree, Attempted Assault in the First Degree, Criminal Possession of Stolen Property in the Third and Fifth Degree.

At sentencing, the court adjudicated defendant as a second violent felony offender and sentenced defendant to an aggregate sentence of seventeen years in prison. Defendant received concurrent prison terms of ten years on the robbery and weapon possession counts. He received seven years on the attempted assault count to run consecutively to the ten year terms. Defendant also received five to seven years in prison on the Stolen Property in the Third Degree count and one year on the Stolen Property in the Fifth Degree with those counts to run concurrently with all of the prior sentences imposed.¹

The court explained its sentencing structure and detailed the underlying egregious facts of the crimes committed by this defendant to support its determination. This included attempting to induce witnesses to give false testimony and defendant's own testimony being preposterous and "clearly perjurious alibi."²

Defendant makes, the instant motion, his third CPL 440.20 motion, challenging the lawfulness of his sentence, almost 15 years after he was sentenced in this matter.

Furthermore, the claims defendant raises now are claims that could have been raised in his prior CPL 440.20 motions, but defendant failed to make such claims before now and as such, this court finds that defendant is foreclosed from making such claims at this juncture.

Defendant avers that the prior CPL 440.20 motion, before Hon. Reichbach, only addressed the assault charge being separate and distinct, but defendant believes that the weapon possession charge should not have a sentence consecutive to the assault charge.

These are additional arguments predicated on the same claims defendant made in his prior CPL 440.20 motion. Defendant could have made such claims

¹ Sentencing minutes of February 24, 1999 before Justice Reichbach addended to the People's opposition papers.

² Pg 7-9 of sentencing minutes of February 24, 1999 before Justice Reischbach addended to the People's opposition papers.

previously, but failed to do so and this court declines to hear such claims now as defendant's motion is permissively barred and was previously denied on the merits.

Defendant's aggregate sentence of 17 years was also adjudicated as a legal sentence and defendant has failed to show any good cause or reason in the interest of justice why this court should disturb the court's prior rulings.

Defendant also filed an appeal in this matter and by decision and order dated January 8, 2001, the Appellate Division, Second Department affirmed the judgment of conviction. *People v Rodriguez*, 279 AD 2d 484 (App Div 2nd Dept 2001) Leave to appeal was denied by the Court of Appeals on January 8, 2001. *People v Rodriguez*, 96 NY 2d 797 (2001) (Wesley, J.)

In papers dated July 5, 2001, defendant moved *pro se* to vacate his conviction pursuant to CPL 440.10 claiming ineffective assistance of counsel because he believed his attorney did not preserve certain issues for Appellate Review. Defendant's CPL 440.10 motion was denied August 15, 2001 by Justice Reichbach. Defendant's motion to appeal the 440.10 order was denied by the Appellate Division October 26, 2001. (Crane, J.)

Subsequently, defendant filed a *coram nobis* motion and a federal habeas corpus motion.³

Defendant moved *pro se* for a second time, April 6, 2004, to vacate his judgment of conviction in this matter pursuant to CPL 440.10, this time alleging inadequacy of the Spanish interpreter's translation and that his sentence was cruel and unusual because there was legally insufficient evidence to find that defendant possessed an operable loaded hand gun with the intent to use it unlawfully.

Based on the grounds that both of defendant's claims were procedurally barred and the legal sufficiency claim had no merit, the court denied defendant's second CPL 440.10 motion by decision and order dated December 15, 2004. (Reichbach, J) Defendant's motion for permission to appeal this order was denied by the Appellate Division, December 15, 2004. (Crane, J)

Defendant filed a second *pro se coram nobis* motion dated August 27, 2007, contending his appellate counsel was ineffective for failing to raise certain claims.

³ Defendant's *pro se* motion for a writ of error *coram nobis* dated October 31, 2001, was denied by the Appellate Division, Second Department on February 4, 2002 in *People v Rodriguez*, 291 AD 2d 416 (2nd Dept 2002); Defendant's *pro se* application for a federal writ of habeas corpus dated March 11, 2002 to the United States District Court for the Eastern District of New York was denied March 20, 2003 (Ross, J) and by order dated February 18, 2004, the Second Circuit denied defendant permission to appeal from the March 20, 2003 order.

Defendant's motion was denied by the Appellate Division January 8, 2008.
People v Rodriguez, 47 AD 3d 647 (2nd Dept 2008) (Grafteo, J)

Defendant's Prior CPL 440.20 Motions

Defendant first moved to set aside his sentence by pro se motion dated February 17, 2009 claiming his sentence was unconstitutional. The trial court, by decision and order dated September 2, 2009, denied defendant's motion because it was procedurally barred and without merit. (Reichbach, J)

A second pro se CPL 440.20 motion dated November 24, 2010 was filed by defendant in which he claimed the aggregate sentence of 17 years was unlawful because imposing a consecutive prison term on the attempted assault count was a violation of Penal Law 70.25 (2). Defendant argued this was due to the fact that the first degree assault happened prior to the completion of the robberies.

This is essentially the same grounds defendant makes in his third, current CPL 440.20 motion.

In the 2010 CPL 440.20 motion, the trial court issued a decision and order dated May 25, 2011 holding that the consecutive prison term imposed on the attempted assault count was lawful. The court explained in making its decision, refuting defendant's argument, that "... the robberies had occurred and after they [the robberies] had been completed, shots were fired from the defendant's getaway car at another car being driven by two of the witnesses of the robberies... The robberies and the firing of the handgun were two separate and distinct incidents. PL 70.25 (1)"

The trial court also stated that it has discretion to impose consecutive sentences for distinct criminal acts even if they are committed during the same broader criminal transaction. *People v Laureano*, 87 NY 2d 640 (1996)

Leave to appeal from denial of the second CPL 440.20 order by the trial court was denied by a justice of the Appellate Division by order dated September 19, 2011. (Skelos, J)

Defendant's Current and Third CPL 440.20 Motion

In defendant's third pro se CPL 440.20 motion, dated September 12, 2012, he again claims the aggregate sentence of 17 years imposed in 1999 was unlawful because such imposition of a consecutive prison term on the attempted assault count is a violation of PL 70.25 (2). This is the same foundation on which his prior CPL 440.20 motion is based which was procedurally barred and denied on the merits.

Defendant could have made this argument in his first CPL 440.20 motion and because it involves facts appearing on the record, and such facts were known to him at the time of his conviction, defendant could have brought up the claim on his direct appeal. Defendant did not include the claims in his appeal and such claim is mandatorily barred.

Regarding any new claims defendant makes now, in his third CPL 440.20 motion, made almost 15 years after defendant's conviction in 1999, this court finds that defendant's claims are procedurally barred and without merit.

Also, when a defendant raises an old claim and attempts to add new facts, as here, especially regarding defendant's challenge to his sentencing structure, to the extent that the claim is based on facts in defendant's prior motion before the Appellate Division, the claim is denied. *People v Purcell*, 160 AD 2d 899 (App Div 2nd Dept 1990).

Defendant also cites the Court of Appeals decision in *People v Ledarius Wright*, 19 NY 3d 359 (2012) in support of his position, however, this case is not applicable here as defendant's assertion of the factual time line of the crime, as to whether the robbery was completed prior to the assault, is belied by the record as explained by Justice Reichbach in his 2010 decision denying defendant's second CPL 440.20 motion.

The court in *Wright* applied the *Laureano* framework to assess the legality of consecutive sentencing in the context of an attempted crime. The court, in *Wright*, also noted the "propriety of consecutive sentencing in the context of weapon possession offenses where different framework have been applied that appropriately reflects the heightened level of integration between the possession and the ensuing substantive crime for which the weapon was used."

"In such cases, to determine whether a single act constituted both offenses under prong one of Penal Law section 70.25 (2), we have looked to when the crime of possession--necessarily encompassing both *actus reus* and *mens rea* elements was--completed." *Id.*

Here, the robbery was completed when the defendant and his accomplices got in their getaway car and drove away. With another car containing witnesses in pursuit, shots were fired from defendant's car at the car that was following him and subsequently the gun was thrown from defendant's vehicle into a garbage receptacle where it was later recovered, as a police vehicle was in hot pursuit of the defendant's car.

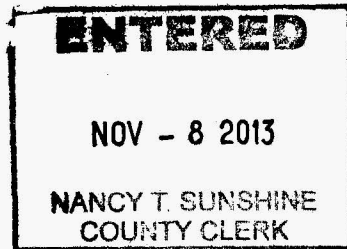
Notwithstanding the framework in *Wright*, defendant's claims here were previously determined and were procedurally barred as well as denied on the merits.

Defendant's instant motion is mandatorily and permissively procedurally barred; and defendant's claims are denied on the merits.

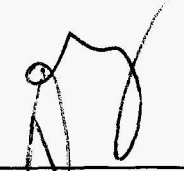
Consequently, defendant's motion herein is denied in its entirety.

Accordingly, based on the foregoing, the defendant's CPL 440.20 (1) motion to set aside his sentence is DENIED.

This constitutes the decision and order of the Court.



ENTER:



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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