People v Brown
2014 NY Slip Op 33040(U)
November 24, 2014
Supreme Court, Kings County
Docket Number: 6349/83
Judge: Thomas J. Carroll
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 24
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THE PEOPLE OF THE STATE OF NEW YORK

-against-

CARLTON BROWN

Hon. Thomas J. Carroll

Date: November 24, 2014

DECISION & ORDER

Indictment No. 6349/83

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Defendant moves, pro se, to set aside his sentence pursuant to CPL § 440.20 on the ground that he was illegally sentenced. Defendant contends that the court imposed sentence without having a current presentence report before it as required by CPL § 390.20(1). Defendant claims that the court instead relied on an outdated presentence report that had been prepared in connection with an earlier conviction in a different county. For the following reasons defendant's motion is denied.

Background

On October 1, 1984, defendant, along with a co-defendant, was convicted upon a jury verdict of two counts of murder in the second degree (PL § 125.25[1],[3]) and one count of burglary in the first degree (PL § 140.30[2]). Defendant and co-defendant had pushed their way into the apartment of Anne Mary Pfreundschuh at 196 Clinton Avenue in Brooklyn before binding her wrists and ankles to her neck and drowning her in her bathtub with a mixture of water, ink, chlorine bleach and shampoo. They left the apartment with a television set, a hair dryer, a telephone answering machine and a duffel bag.

On October 23, 1984, defendant was sentenced as a second felony offender to concurrent terms of imprisonment of twenty-five years to life on the murder counts and also to a term of

imprisonment of twelve and one-half to twenty-five years on the burglary count to be served consecutively to the intentional murder count (Feldman, J., at trial and sentence).

On November 13, 1989, the Appellate Division affirmed defendant's judgment of conviction (*People v Brown,* 155 AD2d 547 [2d Dept 1989]). In rejecting defendant's claim that the consecutive sentences imposed on the intentional murder and burglary convictions were illegal, the Court held "[t]hese crimes consist of separate acts, and concurrent terms of incarceration are not mandated by Penal Law § 70.25 (2)" (*id.*). Leave to appeal to the Court of Appeals was denied (*People v Brown,* 75 NY2d 811 [1990]).

On April 10, 1995, defendant's federal petition for a writ of habeas corpus was denied by the United States District Court for the Eastern District of New York (*Brown v Senkowski,* No. CV 94-3860 [E.D.N.Y. April 10, 1995][Nickerson, J.]).

On November 9, 1998, defendant's motion to vacate the judgment of conviction pursuant to CPL § 440.10 was denied (Feldman, J.). The court rejected defendant's claim that he was denied the effective assistance of counsel.

On March 3, 2008, defendant's motion to set aside his sentence on the ground that the imposition of consecutive sentences was illegal was denied (Guzman, J.). The court held that defendant's motion was procedurally barred because the same issue had been previously determined on the merits on direct appeal (CPL § 440.20[2]). Defendant's application for leave to appeal to the Appellate Division was denied on June 5, 2008.

On June 27, 2008, defendant's second motion to vacate the judgment of conviction was denied (Guzman, J.). The court held that defendant's claim that he was deprived of a fair trial as a result of judicial bias was procedurally barred because although sufficient facts appeared on the

record to have permitted adequate review of the issue on direct appeal, defendant failed to raise the issue before the Appellate Division (CPL § 440.10[2][c]).

On October 28, 2008, defendant's motion for a writ of error coram nobis contending that he was denied the effective assistance of appellate counsel was denied (*People v Brown,* 55 AD3d 920 [2d Dept 2008]). Leave to appeal to the Court of Appeals was denied (*People v Brown,* 12 NY3d 756 [2009]).

On August 26, 2009, defendant's second motion to set aside his sentence was denied (Chun, J.).

On June 22, 2010, defendant's third motion to set aside his sentence was denied (Tomei, J.). The court rejected defendant's claim that he was incorrectly adjudicated a second felony offender. Leave to appeal to the Appellate Division was denied.

On September 23, 2014, this court denied defendant's fourth motion to set aside his sentence because the ground or issue that concurrent sentences were mandated by law was previously raised and decided on the merits on direct appeal (CPL § 440.20[2]).

Procedural Bar

CPL § 440.30(4)(d) provides:

> Upon considering the merits of the motion, the court may deny it without conducting a hearing 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 other circumstances attending the case, there is no reasonable possibility that such allegation is true.

Defendant contends that when he was sentenced on October 23, 1984, the court was not in receipt of a current presentence report as prescribed by CPL § 390.20(1). Defendant further

alleges that the sentencing court that had presided over his jury trial conviction in Kings County instead relied on a presentence report bearing a signature page date of June 7, 1982, that had been prepared in connection with his guilty plea conviction for a less serious crime before a different court under Indictment Number 2392/1982 in New York County. He now makes this claim for the first time, almost thirty years after the judgment of conviction was entered, and submits the previous presentence report and a portion of the sentencing transcript without any explanation for the delay. Finally, defendant maintains that, "Had the sentencing Judge followed the law according to CPL § 390.20, and had a (*sic*) opportunity to review the updated pre-sentencing report rather than a two year old one, defendant's sentence would have been different".

The People respond that defendant's allegations are false and argue that his bald assertions are belied by the record and point to instances in the sentencing transcript that refute defendant's argument.

This court finds that while the actual presentence report is unavailable for review, there are several instances in the transcript that indeed refute defendant's argument. In the first instance, defendant's attorney stated that "We have attached to the probation report, your honor, a previous probation report that dates back to May of 1982. . . ." This refers to defendant's previous 1982 report that is attached to what can only be the current report. Thus, the current report existed. The second reference to the current presentence report arises in the context of the sentencing judge trying to understand "Why would anyone commit this horrendous crime?" The court proceeds to state that "The probation department reports, which tell me something about each of your backgrounds, do not supply any answers to this question". The fact the court was hoping to find some explanation for defendants' behavior in the presentence reports reflects the

court's focus on the instant case and suggests the court was reading a current probation report. The final instance in the record refers to co-counsel's reference to having read the probation report of the co-defendant who was also being sentenced at the same court appearance. Under the circumstances of this case there is no reasonable possibility that defendant's allegations are true (CPL § 440.30[4][d][ii]).

Moreover, defendant's delay in raising this issue makes him all the more unbelievable. In *People v Nixon*, 21 NY2d 338, 352 (1967), the Court of Appeals held that a delay of more than a decade was an important factor to be considered in evaluating the seriousness of the defendant's claim. The Court stated, "revelatory of the seriousness of defendant's present claims, is that defendant waited over a decade before asserting them. In stale cases, defendants have all to gain by reopening old convictions, retrial being so often an impossibility. These are factors to consider in determining how valid the assertions are... ." Thus, a lengthy delay can be considered in evaluating the validity and legitimacy of a post-judgement claim (*People v Melio*, 304 AD2d 247, 252 [2d Dept 2003]; *People v Hanley*, 255 AD2d 837, 838 [3d Dept 1998]). The weakness of defendant's position is compounded by his failure to offer a reason for the extremely long delay after having submitted a number of other post-judgement motions. In light of the absence of any explanation and given that the relevant facts should have been long known to defendant, the delay is unjustifiable (*see People v Degondea*, 3 AD3d 148, 160 [1st Dept 2003]).

In addition, CPL § 440.30(1) provides that "[u]pon the motion, a defendant who is in a position adequately to raise more than one ground should raise every such ground upon which he

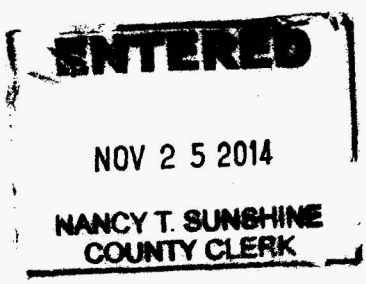
intends to challenge the judgment or sentence." Clearly, defendant has not complied with this provision.

Accordingly, defendant's motion to set aside his sentence is denied.

This decision shall constitute the order of the court.

ENTER:

HON. THOMAS J. CARROLL
THOMAS J. CARROLL
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 you motion.

The application must contain you 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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