State of New York
Court of Appeals

BEFORE: HON. PAUL G. FEINMAN, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

FRANK PRUITT,

Appellant.

ORDER DISMISSING LEAVE

Ind. No. 3169/89

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law (CPL) § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is

ORDERED that the application is dismissed because the order sought to be appealed from is not appealable under CPL 450.90 (1).

Dated: September 17, 2018

Paul G. Feinman

Associate Judge

*Description of Order: Order of a Justice of the Appellate Division, Second Department, dated July 25, 2018, denying leave to appeal to the Appellate Division from an order of Supreme Court, Queens County, dated February 6, 2018.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM PART K-15
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THE PEOPLE OF THE STATE OF NEW YORK

-against-

FRANK PRUITT,

Defendant.
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DECISION AND ORDER

MOTION TO VACATE JUDGMENT

Indictment # 3169/89

DEBORAH STEVENS MODICA, J.

Defendant, Frank Pruitt, has filed a motion, dated October 10, 2017, to vacate his guilty plea and sentence on Indictment 3169/1989 pursuant to CPL 440.10(1)(h). The People have filed an Affirmation in Opposition, dated November 3, 2017, in which they oppose the requested relief. The defendant then filed a Reply Brief to Respondent's Affirmation in Opposition, which is dated November 17, 2017. The Court decides the motion as follows.

FACTUAL AND LEGAL HISTORY

Incident, Indictment, Trial and Sentence

On April 21, 1989, at approximately 11:00 P.M., in the lobby of an apartment building at 51-32 Beach Channel Drive in Queens County, the defendant

shot and killed Jahar Bellamy and Tyrone Lee. Bellamy and Lee were already in the lobby when the defendant and Jerome Cordoba walked in and stood by the elevator. Bellamy, who was intoxicated, challenged Cordoba to a fight. The defendant and Bellamy then became involved in a shoving match, at which time Bellamy pushed the defendant. The defendant pulled a shotgun out of a bag that he was carrying, and fired four shots at Bellamy, striking him in the back, chest, arm, and elbow. The defendant then turned his shotgun on Lee, who was not involved in the shoving match, and fired three shots into Lee's back – killing him instantly. Bellamy died a short time later at a hospital.

The defendant was subsequently charged, under Queens County Indictment Number 3169/89 with two counts of Murder in the Second Degree (PL 125.25[1]), and one count of Criminal Possession of a Weapon in the Second Degree (PL 265.03).

In October 1990, the defendant's case proceeded to a jury trial presided over by the Honorable Seymour Lakritz, and he was convicted of all charges. On February 21, 1991, the defendant was sentenced to consecutive prison terms of twenty-five years to life on each count of Murder in the Second Degree and five to fifteen years incarceration to run concurrently on the count of Criminal Possession of a Weapon in the Second Degree.

The Defendant's Direct Appeal

On May 1, 1992, the defendant perfected his appeal in the Appellate Division, Second Department, and raised five claims: 1) that the trial court erred when it declined to submit Manslaughter in the First and Second degrees to the jury as lesser included offenses; 2) that the trial court erred when it declined to instruct the jury on a justification defense; 3) that the trial court erred when it declined to allow the defendant to offer testimony about the victims' reputation in the community; 4) that the trial court failed to adequately respond to a note from the jury regarding the element of intent; and 5) that the defendant's sentence was excessive. The People filed a brief in opposition.

In a decision dated February 1, 1993, the Appellate Division, Second Department unanimously affirmed the defendant's conviction and sentence. (*People v. Pruitt*, 190 AD2d 692 [2nd Dept 1993]). In a certificate dated April 20, 1993, the Court of Appeals denied the defendant's application for leave to appeal. (*People v. Pruitt*, 81 NY2d 975 [1993]). The defendant's petition for a writ of certiorari to the Supreme Court of the United States was denied on October 4, 1993. (*Pruitt v. New York*, 510 US 880 [1993]).

Defendant's Federal Petition for a Writ of *Habeas Corpus*

On December 18, 1996, the defendant filed a *pro se* petition for a writ of *habeas corpus* in the United States District Court for the Eastern District of New York. The People filed a response, and the District Court denied the defendant's petition for a writ of *habeas corpus* on April 19, 1999. On January 27, 2000, the United States Court of Appeals for the Second Circuit denied the defendant's *pro se* motion for a certificate of appealability.

The Defendant's Subsequent Motions

On December 27, 1995, defendant filed a *pro se* motion to vacate judgment pursuant to CPL 440.10. Justice Eng denied the defendant's motion in a decision and order dated March 13, 1996.

On July 17, 2000, the defendant filed a motion of a writ of error *coram nobis* in the Appellate Division. In a decision and order dated November 20, 2000, the Appellate Division, Second Department denied the defendant's motion. (*People v. Pruitt*, 277 AD2d 402 [2nd Dept 2000]).

On July 11, 2001, the defendant filed a *pro se* motion to set aside his sentence pursuant to CPL 440.20. On December 3, 2001, Justice Eng denied the defendant's motion.

On April 4, 2002, the defendant filed his second motion pursuant to CPL 440.10 In a decision dated June 4, 2002, Justice Eng denied the defendant's motion. On September 26, 2003, the Appellate Division, Second Department denied the defendant's application for leave to appeal.

In February 2003, the defendant filed his third *pro se* motion pursuant to CPL 440.10. On April 15, 2003, Justice Eng denied the defendant's motion. On September 26, 2003, the Appellate Division, Second Department denied the defendant's application for leave to appeal.

On September 15, 2003, the defendant filed a *pro se* petition for a writ of *habeas corpus* in Supreme Court, Erie County. On December 12, 2003, the Supreme Court, Erie County, dismissed the defendant's petition. On July 7, 2006, the Appellate Division, Fourth Department affirmed the Erie County Supreme Court's dismissal. (*People ex rel. Pruitt v. Zon*, 31 AD3d 1207 [4th Dept 2006]) On May 1, 2007, the Court of Appeals denied defendant's motion for leave to appeal. (*People ex rel. Pruitt v. Zon*, 8 NY3d 811 [2007]).

On March 25, 2004, defendant filed a *pro se* petition for a writ of *habeas corpus*. On May 4, 2004, Justice Eng denied the defendant's petition finding that the defendant's claims were meritless and had already been determined to be meritless in an earlier motion.

On June 24, 2003, defendant filed for leave to file a successive federal *habeas corpus* petition. On July 30, 2004, the Second Circuit Court of Appeals denied the defendant's motion to file a successive petition.

On October 3, 2004, the defendant filed a *pro se* motion to reduce his sentence in the interest of justice. On November 30, 2004, Justice Eng denied the defendant's motion.

On September 18, 2005, the defendant filed his second *pro se* motion pursuant to CPL 440.20. On November 9, 2005, Justice Eng denied the defendant's motion. On September 8, 2006, the Appellate Division, Second Department denied the defendant's application for leave to appeal.

On May 12, 2007, the defendant filed his third *pro se* motion pursuant to CPL 440.20. On June 23, 2007, Justice Eng denied the defendant's motion.

On September 17, 2007, the defendant filed his fourth *pro se* motion pursuant to CPL 440.10 and his fourth *pro se* motion pursuant to CPL 440.20. In November 2007, the Supreme Court of Queens County denied the defendant's motions. On February 5, 2008, the Appellate Division, Second Department denied the defendant's request for leave to appeal. On March 31, 2008, the Court of Appeals dismissed the defendant's request for leave to appeal.

On April 24, 2008, the defendant filed a second *pro se* federal petition for a writ of *habeas corpus* in the District Court, Eastern District. On July 7, 2008, the

Eastern District Court, *sua sponte*, transferred the case to the Second Circuit Court of Appeals as a successive petition. On August 29, 2008, the Court of Appeals for the Second Circuit denied the defendant's request to file a successive federal petition.

On October 14, 2008, the defendant filed a second application for a writ of error *coram nobis* in the Appellate Division, Second Department. On February 3, 2009, the Appellate Division denied the defendant's application. On May 13, 2009, the Court of Appeals denied the defendant's request for leave to appeal.

In July 2009, the defendant filed his fifth *pro se* motion pursuant to CPL 440.10 and fifth *pro se* motion pursuant to CPL 440.20. On November 2, 2009, Justice Erlbaum denied the defendant's motion.

On January 20, 2010, the defendant filed another *pro se* motion pursuant to CPL 440.10. On February 26, 2010, the Supreme Court, Queens County denied the defendant's motion. On July 16, 2010, the Appellate Division, Second Department denied defendant's application for leave to appeal.

In December 2010, defendant made a motion to reargue his January 28, 2003 post-judgment motion. On February 23, 2011, Justice Paynter denied the defendant's motion. The defendant's application for leave to appeal was denied on August 18, 2011.

In August 2012, the defendant made a motion to reargue his April 2002 post-judgment motion. On December 7, 2011, Justice Aloise denied the defendant's motion.

On January 31, 2012, the defendant moved to vacate his conviction pursuant to CPL 440.10. On March 28, 2012, Justice Margulis denied the defendant's motion. The Appellate Division, Second Department denied the defendant's application for leave to appeal on September 5, 2012.

On September 11, 2012, the defendant moved to vacate his conviction pursuant to CPL 440.10. Defendant attached an affidavit purportedly signed by the defendant's trial attorney, Joseph Sulik, Esq. However, the People discovered, upon interview of Mr. Sulik, that Mr. Sulik did not prepare or sign the affidavit which the defendant submitted along with his motion. On April 9, 2013, the defendant withdrew his motion to vacate. Based upon this fraudulent affidavit, the defendant was charged with Forgery in the Second Degree (PL 170.10[2]), Criminal Possession of a Forged Instrument in the Second Degree (PL 170.25), and Offering a False Instrument for Filing in the First Degree (PL 170.35). On May 29, 2013, the defendant pleaded guilty to Forgery in the Third Degree (PL 170.05) and was sentenced to time served.

In a motion dated June 29, 2013, the defendant moved pursuant to CPL 440.20 to set aside his sentence. On August 13, 2013, the Supreme Court, Queens

County denied the defendant's motion. The Appellate Division, Second Department denied the defendant's application for leave to appeal on April 24, 2014.

On September 10, 2015, the defendant moved to vacate his conviction pursuant to CPL 440.10. In a decision dated October 30, 2015, the Supreme Court, Queens County denied the defendant's motion. The defendant's application for leave to appeal to the Appellate Division, Second Department was denied on March 4, 2016.

On March 19, 2016, the defendant, for the third time, moved for *pro se coram nobis* relief. On December 21, 2016, the Appellate Division, Second Department denied the defendant's motion. (*People v. Pruitt*, 145 AD3d 918 [2nd Dept 2016]). The defendant's application for leave to appeal to the Court of Appeals was denied on April 4, 2017. (*People v. Pruitt*, 29 NY3d 1000 [2017]).

On June 14, 2017, the defendant filed his seventh *pro se* motion to set aside his sentence pursuant to CPL 440.20. On July 31, 2017, the Supreme Court, Queens County denied the defendant's motion. On December 7, 2017, the defendant's request for permission to appeal was denied by the Appellate Division, Second Department.

DEFENDANT'S CURRENT MOTION

In a *pro se* motion dated October 10, 2017, the defendant moves this Court to vacate his judgment of conviction, pursuant to CPL 440.10(1)(h), arguing that he was denied his Sixth Amendment right to a public trial and that he received ineffective assistance of trial counsel. The defendant argues that when the trial court barred his three-year-old daughter from the courtroom prior to the defendant's testimony, he was denied a public trial. Furthermore, the defendant contends that the child's mother, Cassandra Hawthorne, had to leave the courtroom with the child and alleges that Ms. Hawthorne believed that she was also banned. Finally, the defendant argues that his trial counsel was ineffective for not objecting to the removal of his child from the courtroom.

In their response, the People urge the Court to deny the defendant's motion in all respects because the defendant's claims are record based and could have been raised on appeal. Additionally, the defendant could have raised these claims on one of his prior nine CPL 440.10 motions.

LEGAL ANALYSIS

The Criminal Procedure Law mandates that a court must deny a motion to vacate a judgment of conviction when there are sufficient facts on the record which would have permitted appellate review of the issue but no such review occurred

because the defendant failed to raise such ground on appeal. (CPL 440.10[2][c]; *People v. Tyrell*, 22 NY3d 359 [2013]). Here, the defendant filed an appeal but failed to make his argument regarding the denial of a public trial. This claim is entirely record based, as evidenced by the stenographic minutes which defendant has submitted as an attachment to his motion. The defendant's arguments rely, in their entirety, on the minutes of his trial which certainly were available at the time of appellate review. Therefore, the defendant's motion is procedurally barred pursuant to CPL 440.10(2)(c).

Even if the Court were to ignore the procedural bar to the defendant's motion and consider the underlying merits, it would still be denied. Criminal Procedure Law Section 440.10(1)(h) provides that:

> At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that ...[t]he judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

Therefore, for the defendant to succeed on his motion, he must demonstrate that his conviction was obtained in a violation of his constitutional rights. The defendant alleges that his rights under the Sixth Amendment of the United States Constitution were violated because he was denied a public trial and received ineffective assistance of counsel as a result of his attorney failing to object to the removal of his child and the child's mother.

The right to a public trial is "neither absolute nor inflexible." (*People v. Jones*, 96 NY2d 213 [2000]). The trial court has discretion to close or regulate a courtroom to "preserve order and decorum in the courtroom, protect the rights of the parties and witnesses, and generally to further the administration of justice." (*People v. Hinton*, 31 NY2d 71 [1972], *cert denied* 410 US 911 [1973]). Courts have held that where there is a "substantial reason" to justify the partial closure of the courtroom, there is no violation of the defendant's constitutional rights. (*Covington v. Lord*, 275 F.Supp.2d 352 [EDNY 2003], *affirmed* 111 Fed Appx 647 [2004]); *People v. Daniels*, 237 AD2d 529 [2nd Dept 1997]).

The exclusion of one young child from the courtroom does not amount to an unconstitutional closure. (*People v. Covington*, 154 AD2d 385 [2nd Dept 1989]; *Covington v. Lord*, *supra*). In Covington, the trial court excluded the defendant's six-year-old son from the courtroom during her trial for murder. The trial court reasoned that it would not be in the best interest of the child to see his mother on trial for murder. The Second Circuit Court of Appeals upheld the child's exclusion, finding that the trial court articulated a "substantial reason" for the exclusion, that the closure was narrowly tailored to exclude only one child, and that there were no other reasonable alternatives. (*Id.*).

The facts of this case are analogous to *Covington*. Here, Justice Lakritz excluded only the defendant's child after finding, on the record, "[t]he reason I

want her out, I don't want her to see her father cross-examined in (sic) these crimes. I think it could serve – a very traumatic age upon her. At the age of three, she has enough trauma upon her without that additional trauma." This Court finds that Judge Lakritz articulated a "substantial reason" for his exclusion, that the closure was narrowly tailored to exclude the child, and that there were no other reasonable alternatives to the limited order of exclusion. Accordingly, the exclusion of the defendant's child did not violate the defendant's Sixth Amendment rights.

The defendant has submitted an affidavit which purports to be from Cassandra Hawthorne. The defendant's contention that his child's mother, Ms. Hawthorne, was also excluded from the courtroom is dehors the record. The transcript clearly demonstrated that only the child was excluded. While Ms. Hawthorne may have left with the child that day, there was no order that she could not return. Any assumption on her part that she was also banned from the courtroom was mistaken. Furthermore, because the defendant has been previously convicted of submitting an affidavit which he forged, the Court gives little to no weight to the defendant's attached affidavits.

In *Strickland v. Washington*, 466 US 668 (1984), the Supreme Court of the United States held that, to find that a defendant's counsel was ineffective, the defendant must show that counsel's representation fell below an objective standard

of reasonableness. Later judicial scrutiny must be highly deferential to prior counsel and a fair assessment of attorney performance should eliminate the distorting effects of hindsight. Finally, the Court must adhere to a strong presumption that prior counsel's conduct falls within the wide range of reasonable professional assistance. (*Id.; see People v. McDonald*, 1 NY3d 109 [2003]; *People v. Baldi*, 54 NY2d 137 [1981]).

Here, the Court finds that the defendant's counsel was not ineffective for failing to object to the trial court's exclusion of the defendant's child from the courtroom. Because there was no error in removing the child, counsel was not ineffective in failing to object.

For all of the above-stated reasons, defendant's motion to vacate his guilty plea and sentence pursuant to CPL 440.10 is denied.

This constitutes the decision and order of the Court.

Dated: Queens, New York
February 6, 2018

Deborah Stevens Modica, J.S.C.