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State of New York
Court of Appeals

BEFORE: HON. EUGENE M. FAHEY, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ROBERT MALOY,

Appellant.

ORDER DISMISSING LEAVE

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: JAN 22 2019

Associate Judge

*Description of Order: Order of a Justice of the Appellate Division, Third Department, entered November 15, 2018, denying permission to appeal to the Appellate Division from an order of County Court, Sullivan County, dated September 5, 2018.

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: November 15, 2018 110614

THE PEOPLE OF THE STATE OF NEW YORK
v

ROBERT MALOY,
Defendant.

DECISION AND ORDER ON MOTION

Application, pursuant to CPL 460.15, for permission to appeal to this Court from order of County Court, Sullivan County, dated September 5, 2018.

Upon the papers filed in support of the application and the papers filed in opposition thereto, it is

ORDERED that the application is denied.

ENTER:

Hon. John C. Egan Jr.
Associate Justice

STATE OF NEW YORK
COUNTY COURT: COUNTY OF SULLIVAN
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THE PEOPLE OF THE STATE OF NEW YORK,

DECISION and ORDER
Indictment #170-2004

-against-

ROBERT MALOY,

CPL §440 Motion

Defendant.
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APPEARANCES:

Robert Maloy, #05-A-1190
Clinton Correctional Facility
PO Box 2001
Dannemora, NY 12929
Defendant, *pro se*

Hon. James R. Farrell
Sullivan County District Attorney
414 Broadway
Monticello, NY 12701
By: Kristin L. Hackett, ADA, of counsel
Attorney for the People

LaBuda, J.

This matter comes before the Court on Defendant's motion seeking to vacate his sentence pursuant to **CPL §440.20** on the grounds that his sentence was illegally imposed, is in violation of his First Amendment and due process rights, amounts to cruel and inhuman punishment, and that his counsel was ineffective at Defendant's sentencing and resentencing hearing. The People have submitted an Affirmation in Opposition. Defendant submitted a Reply.

Factual and Procedural Background

Defendant, along with three (3) Co-Defendants, traveled to Sullivan County on June 12, 2004 for the purpose of confronting Brian Oshinsky, the uncle of the mother of Defendant's child, and Michael Williams, whom the mother of Defendant's child dated subsequent to the dissolution of her relationship with Defendant. The Defendant and his three (3) Co-Defendants armed themselves with a loaded gun, knives, golf clubs, and a Molotov cocktail. Despite being unable to find Mr. Oshinsky, the Defendant and his three (3) Co-Defendants attacked Mr. Williams, Martin Acosta, Jose Martinez, and Mitchell Pomales.

Mr. Acosta died as a result of the attack after being stabbed in the right ventricle of his heart. Mr. Williams received cuts to his neck and ear, though the Defendant initially shot the loaded gun at Mr. Williams but it malfunctioned and failed to fire. Mr. Martinez suffered three (3) wounds to his chest and abdomen, a collapsed lung, a liver injury, and internal bleeding. Mr. Pomales suffered a head laceration, a fractured skull, and brain bleeding.

During the course of the investigation into the attack, the Defendant was interviewed by law enforcement. The Defendant admitted to having a verbal confrontation with Mr. Oshinksy earlier in the day on June 12, 2004, which led to the Defendant and his three (3) Co-Defendants intending to engage in a fight with Mr. Oshinsky. The Defendant admitted to law enforcement several times that he intended to kill someone as part of the attack, and Mr. Williams became the intended target when the Defendant could not locate Mr. Oshinsky.[1] All of the weapons except for the loaded gun were recovered at the crime scene. The Defendant later led law enforcement to where the loaded gun

[1] Following a *Huntley* hearing on December 20, 2004, this Court ruled that these statements made by the Defendant to law enforcement would be admissible against him at trial.

was located. There were numerous other items of evidence of the attack obtained by law enforcement including a grey sweatshirt with a blood stain and other clothing. Several witnesses were identified, including the mother of the Defendant's child who stated that the Defendant confessed to her regarding the attack.

The Defendant was convicted after jury trial in Sullivan County Court on January 27, 2005 of Murder in the Second Degree[2], three (3) counts of Gang Assault in the First Degree, Attempted Murder in the Second Degree, Attempted Gang Assault in the First Degree, two (2) counts of Assault in the First Degree, two (2) counts of Criminal Use of a Firearm in the First Degree, Criminal Possession of a Weapon in the Second Degree, and two (2) counts of Criminal Possession of a Weapon in the Fourth Degree.

Defendant then brought a motion pursuant to Article 330 of the Criminal Procedure Law seeking to set aside the jury's verdict prior to sentencing, which was denied in its entirety.

On March 10, 2005, Defendant was sentenced to a determinate term of twenty-five (25) years to life on his conviction for Murder in the Second Degree, with a concurrent determinate term of twenty-five (25) years on one (1) of his convictions for Gang Assault in the First Degree, and determinate terms of twenty-five (25) years upon his other two (2) convictions for Gang Assault in the First Degree to run consecutively to each other and to his convictions for Murder in the Second Degree and Gang Assault in the First Degree. Defendant was also sentenced to a determinate term of twenty-five (25) years on his conviction for Attempted Murder in the Second Degree to be served consecutively to the aforementioned sentences, with concurrent terms of twenty-five (25) years for

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[2] Defendant was convicted of depraved indifference murder and acquitted of intentional murder.

his conviction of Assault in the First Degree and fifteen (15) years on his conviction of Attempted Gang Assault in the First Degree. Defendant was further sentenced to determinate terms of twenty-five (25) years plus five (5) years for his convictions of Criminal Use of a Firearm in the First Degree to be served concurrently to each other but consecutively to the aforementioned sentences, fifteen (15) years for his conviction of Criminal Possession of a Weapon in the Second Degree to be served concurrently with his other sentences, and one (1) year terms for both convictions of Criminal Possession of a Weapon in the Fourth Degree. The Defendant's resulting aggregate sentence received was one hundred thirty (130) years of incarceration in state prison.

Defendant timely appealed his convictions to the Appellate Division, Third Department, arguing that: (a) the evidence against him was legally insufficient to support his conviction for depraved indifference murder; (b) the jury's verdicts were inconsistent, in that he was convicted of depraved indifference murder and intentional assault; (c) the trial was unfair due to the admission into evidence of purportedly irrelevant and prejudicial evidence; (d) the People were improperly permitted to reopen their case to establish the operability of the actual bullet in the loaded gun with which the Defendant attempted to shoot Mr. Williams; (e) the Defendant's trial counsel was ineffective; (f) the People committed prosecutorial misconduct; (g) a portion of the sentence imposed was illegal; (h) the trial court improperly imposed consecutive sentences upon some of his convictions; and (i) the sentences imposed upon the Defendant were harsh and excessive.

The Appellate Division, Third Department affirmed the verdicts and sentences, except that the consecutive five (5) year sentence for Criminal Use of a Firearm in the First Degree was vacated and the sentences for the two (2) counts of Criminal Use of a Firearm in the First Degree would run concurrently to the Defendant's sentence for Attempted Murder in the Second Degree, thus reducing

the Defendant's aggregate sentence to one hundred twenty-five (125) years of incarceration in state prison. **People v. Maloy, 36 AD3d 1017 (3d Dept. 2007)**. Thereafter, he sought leave to appeal to the Court of Appeals, which was denied. **People v. Maloy, 8 NY3d 987 (Ct App 2007).**

The Defendant subsequently filed a Petition for a Writ of Habeas Corpus in the United States District Court, Southern District of New York, arguing that the evidence presented at trial was legally insufficient to support the verdict for depraved indifference murder, as the evidence showed that his actions were intentional and not reckless, therefore the verdict could not stand as a matter of law for lack of the appropriate mens rea. Defendant's request for habeas relief was denied in its entirety. **Maloy v. Fischer, 2011 WL 8182963 (SDNY February 9, 2011) [Report and Recommendation]; *adopted by* Maloy v. Fischer, 2012 WL 2478473 (SDNY June 28, 2012) [Order Adopting Report and Recommendation].**

On or about February 21, 2017, the Defendant filed a writ of error coram nobis with the Appellate Division, Third Department, seeking to vacate its prior decision and Order, ***supra***, wherein the Defendant argued that his appellate counsel was ineffective for failing to raise several arguments. The arguments that the Defendant claims should have been raised are: (a) trial counsel's purported failure to object to "unsworn jurors"; (b) trial counsel's purported failure to challenge the jury's verdicts on Murder in the Second Degree and Gang Assault in the First Degree as against the weight of the evidence; and (c) trial counsel's purported failure to object to the sufficiency of the evidence on the Defendant's conviction for Murder in the Second Degree. The Appellate Division, Third Department denied the Defendant's motion in its entirety. **People v. Maloy, 2017 WL 1966832 (3d Dept 2017), *leave to appeal denied* People v. Maloy, 30 NY3d 1062 (Ct App 2017).**

It is important to note that Defendant was represented by counsel throughout the proceedings.

Discussion and Analysis

A court may set aside a sentence if the sentence "was unauthorized, illegally imposed or otherwise invalid as a matter of law." **CPL §440.20(1)**. Generally, a claim of harsh, excessive or unlawful sentence must be raised on direct appeal. **People v. Boyce, 12 AD3d 728, 730 [3rd Dept. 2004]; *See also*, People v. Cunningham, 305 AD2d 516 [2d Dept. 2003]**. A court must deny a motion to vacate a sentence if "the ground or issue raised thereupon was previously determined on the merits upon an appeal from the judgment or sentence...." **CPL §440.20(2)**. Pursuant to CPL §440.20(2), this Court must deny Defendant's motion where the grounds or issues of error raised in the motion were argued on direct appeal and were previously determined on the merits. **CPL §440.20(2)**. If a ground or issue raised in the motion was previously determined on the merits upon a prior motion or proceeding at the trial court level, a court may deny the motion. **CPL §440.20(3). *See also*, Sweet v. Bennett, 353 F3d 135 [2d Cir. 2003]; James v. Mazzuca, 387 FSupp2d 351 [SDNY 2005]; People v. Cuadrado, 9 NY3d 362 (Ct App 2007)** [holding "There are obvious good reasons for the Legislature's choice to require that jurisdictional, as well as other, defects that can be raised on direct appeal be raised that way or not at all."]; **People v. Carter, 105 AD3d 1149 (3d Dept 2013)**. It is wholly within the Court's discretion whether to summarily dismiss a motion to vacate, order a hearing, or order a new trial. **People v. Perez, 18 Misc3d 752 (Sup. Ct. New York Co. 2007)**.

Defendant timely appealed his conviction and sentencing, and there were sufficient facts on the record of the proceedings that permitted adequate review of Defendant's claims on his direct appeal. Defendant previously made arguments regarding his alleged harsh and excessive sentencing

on his direct appeal. Defendant further alleged ineffective assistance of counsel on his direct appeal and as part of his writ of error coram nobis. The Appellate Division, Third Department dismissed these claims as without merit and denied Defendant's requests for relief, and the Court of Appeals did not grant leave to appeal. Any arguments made in Defendant's underlying motion have either previously been decided on the merits or should have been argued and were not, with no justifiable excuse given for the failure to argue same.

The remainder of Defendant's contentions and arguments have been considered, are without merit, and will not be addressed.

Pursuant to **CPL §440.30(4)(b)**, this Court is denying the within motion without first conducting a hearing, as there are no sworn allegations substantiating or even tending to substantiate all of the essential facts in the case. Further, the motion is fully reviewable upon the trial record and submissions. ***See,* People v. Orcutt, 49 AD3d 1082 [3rd Dept. 2008]**. Defendant has failed to show that any non-record facts would entitle him to relief. **Id., at 1088**.

Based upon the above, it is

ORDERED that Defendant's CPL §440 motion is denied in its entirety, with prejudice.

This shall constitute the Decision and Order of this Court.

DATED: July 31, 2018
Monticello, New York

HON. FRANK J. LABUDA
Sullivan County Court Judge and Surrogate

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

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THE PEOPLE OF THE STATE OF NEW YORK,

DECISION and ORDER
IND. 170-2004

Motion to Renew/Reargue

ROBERT MALOY,

Defendant

----------X

APPEARANCES:

Robert Maloy, #05-A-1190
Clinton Correctional Facility
PO Box 2001
Dannemora, NY 12929
Defendant, *pro se*

Hon. James R. Farrell
Sullivan County District Attorney
414 Broadway
Monticello, NY 12701
By: Kristin L. Hackett, ADA, of counsel
Attorney for the People

LaBUDA, J.:

The Defendant has submitted a motion to reargue this Court's previous decision denying Defendant's application to vacate his sentence pursuant to **CPL §440.20**. The People have submitted an affirmation in opposition.

The Defendant contends that this Court "unfairly denied" the Defendant's underlying **CPL §440.20** motion based upon "the misinterpretation of Defendant's cruel and unusual punishment claims... as harsh and excessive claims," "the misunderstanding that, Defendant has already addressed Defendant's cruel and unusual punishment and ineffective assistance of counsel claims... to the Appellate Division on direct appeal," and "inapplicable Criminal Procedure Law of Sections 440.10 and 440.20."

First, the Defendant alleges that this Court confused his claims of cruel and unusual punishment claims as claims of harsh and excessive sentences. The Defendant admits that he did not raise a claim of harsh and excessive sentences on his direct appeal, but did raise three (3) separate cruel and unusual punishment claims. As such, the Defendant contends that this Court did not conduct a proper review of the Defendant's claims of cruel and unusual punishment as set forth in his **CPL §440.20** motion.

Second, the Defendant claims that this Court did not properly address his claims of ineffective assistance of counsel because this Court falsely believed that the Defendant had raised such claims on his direct appeal. The Defendant again admits "that Defendant's claims of cruel and usual punishment and ineffective assistance of counsel are claims presented for the first time ever" in his **CPL §440.20** motion, and were not presented on his direct appeal. The Defendant therefore states that this Court did not provide a "fair and just review of these claims."

Lastly, the Defendant contends that this Court misapplied provisions of **CPL §440.20** in denying the Defendant's underlying motion. This allegation extends from the Defendant's belief that this Court did not consider the Defendant's claims of cruel and unusual punishment and ineffective assistance of counsel because of the incorrect notion that these claims had been raised on Defendant's direct appeal. The Defendant then rehashes the same allegations made in his underlying **CPL §440.20** motion to vacate his sentence.

A motion to reargue must be based on "matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion...." **CPLR §2221(d)(2); Mazinov v. Rella, 79 AD3d 979 (2d Dept. 2010); State of N.Y. Higher Educ. Servs. Corp. v. Sparozic, 35 AD3d 1069, 1070 (3d Dept. 2006); Loris v. S & W Realty Corp., 16 AD3d 729 (3d Dept. 2005); Grassel v. Albany Medical Center, 223 AD2d 803 (3d Dept. 1996), *lv denied* 88 NY2d 842 (1996).** Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided. **Foley v. Roche, 68 AD2d 558 (1st Dept.1979), *appeal dismissed* 56 NY2d 507 (1982).** Nor is a motion for reargument an appropriate vehicle for raising new questions. **Simpson v. Loehmann, 21 NY2d 773 (Ct App 1967).**

Defendant's motion to reargue must be denied. Once again, after a thorough review of the record and Defendant's within submissions, the Court finds it did not overlook any facts or legal arguments that would change this Court's prior determination. This Court did not overlook or misapprehend certain matters of fact or law in previously determining this issue. **Mazinov, *supra*; Sparozic, *supra*.** Contrary to Defendants' assertions, this Court did not "misunderstand" or "misinterpret" the Defendant's claims of cruel and unusual punishment or ineffective assistance of counsel. Indeed, this Court fully reviewed the Defendant's submissions, as well as the Court's file and all of the Decisions and Orders rendered by the Appellate Division, Third Department as set forth in this Court's underlying Decision and Order denying the Defendant's **CPL §440.20** motion.

It is well settled that it is wholly proper for this Court to deny a post-conviction motion to vacate the judgment *or* set aside the sentence where all of the allegations raised in the **CPL §440.20** motion "appear on the record and *could have and/or have been raised on direct appeal.*" **People v. Pham, 287 AD2d 789 (3d Dept 2001) [emphasis added]**; **People v. O'Hanlon, 13 AD3d 718 (3d Dept 2004)** ["Moreover, although defendant did not specifically challenge the restitution ordered as part of his direct appeal of the sentence, he certainly had the opportunity to do so... (g)iven the omission, County Court properly denied his postconviction motion to set aside the sentence"; **People v. Boyce, 12 AD3d 728 (3d Dept 2004), *quoting* People v. Cunningham, 305 AD2d 517 (2d Dept 2003)** ["CPL 440.20 'does not encompass excessive sentence claims, which must be raised on direct appeal'"]; **People v. Pratt, 23 AD3d 770 (3d Dept 2005)** ["Initially, given defendant's opportunity to challenge the legality of his sentence on his direct appeal and the availability of the facts and information relevant to this issue at that time, County Court's denial of defendant's motion was not improper"].

Despite the Defendant's claims to the contrary, the Defendant raised on his direct appeal that he was denied effective assistance of counsel, that this Court improperly imposed an illegal sentence, that this Court properly imposed consecutive sentences, and that the sentences imposed were harsh and excessive. ***See*, People v. Maloy, 36 AD3d 1017 (3d Dept 2007)**. The Defendant had the information and opportunity to challenge the legality of his sentence- and indeed challenged same- on his direct appeal. As such, the Defendant had the opportunity to claim that his sentence amounted to cruel and unusual punishment on his direct appeal and unjustifiably failed to do so. Regardless, a sentence of imprisonment that is within the valid statutory limits is ordinarily not a cruel and unusual punishment, and there are no extenuating circumstances herein that would justify an exception to this rule. ***See*, People v. Jones, 39 NY2d 694 (Ct App 1976)**. As such, the Defendant failed to convince this Court that it overlooked or misapprehended any facts or laws that would change the Court's prior determination. **Mazinov, *supra*; Sparozic, *supra***.

Based on the foregoing, it is hereby

ORDERED, that Defendant's motion to reargue is denied.

This shall constitute the Decision and Order of this Court.

DATED: September 5, 2018
Monticello, New York

HON. FRANK J. LaBUDA
Sullivan County Court Judge and Surrogate

Additional material from this filing is available in the Clerk's Office.