

Short Form Order

SUPREME COURT - STATE OF NEW YORK
CRIMINAL TERM - PART K-23 - QUEENS COUNTY
125-01 QUEENS BLVD. KEW GARDENS, NY 11415

P R E S E N T:

HON. ROBERT CHARLES KOHM
Justice

_____	:
THE PEOPLE OF THE STATE OF NEW YORK	:
_____	: Ind. Nos.: <u>3794/94 & 4841/94</u>
-against-	:
JULIO BORRELL,	: Motions: <u>Vacate Judgment;</u>
	:
	: <u>Transfer to Rikers Island</u>
	:
Defendant.	:
_____	:

The following papers numbered
1 to 3 submitted in this motion.

JULIO BORRELL, PRO SE
For The Motion

HON. RICHARD A. BROWN, D.A.
BY: USHIR PANDIT, ADA
Opposed

	<u>Papers Numbered</u>
Notices of Motion/Affidavits/Exhibits _____	<u>1-2</u>
Answering & Reply Affidavits/Exhibits _____	<u>3</u>
Hearing Minutes _____	_____

Upon the foregoing papers, and in the opinion of the Court,
the defendant's motions to vacate judgment, and for related relief,
are denied in accordance with the accompanying memorandum decision.

GLORIA D'AMICO
Clerk

Date: August 3, 2005 _____

ROBERT CHARLES KOHM, J.S.C.

M E M O R A N D U M

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: K-23

THE PEOPLE OF THE STATE OF NEW YORK	:
	:
- against -	:
	:
JULIO BORRELL,	:
	:
Defendant.	:

Under Indictment No. 3794/94, the defendant was convicted, upon a jury verdict, of robbery in the first degree (3 counts), burglary in the second degree, criminal possession of a weapon in the third degree (3 counts), criminal possession of a controlled substance in the third degree, and criminal possession of a weapon in the fourth degree (two counts).

Under Indictment No. 4841/94, the defendant was convicted, again upon a jury verdict, of robbery in the first degree (six counts), assault in the first degree, and criminal possession of a weapon in the second and third degrees.

The defendant appealed both convictions. By decision and order dated June 21, 2004, the Appellate Division, with respect to Indictment No. 3794/94, dismissed one count of criminal possession of a weapon in the third degree and two counts of criminal possession of a weapon in the fourth degree, vacated the four robbery and burglary counts, ordering a new trial as to them,

and, as so modified, affirmed the judgment; the judgment rendered under Indictment No. 4841/94 was affirmed in its entirety.

Upon subsequent motion of the People, the four counts upon which the Appellate Division had ordered a new trial were dismissed (People v Borelli, Sup Ct., Queens County, January 26, 2004, Eng, J., Indictment No. 3794/94).

The defendant now moves pursuant to CPL 440.10 to vacate the remaining convictions upon the weapon possession and controlled substance counts under Indictment No. 3794/94, and for appointment of counsel to represent him. He also moves, ex parte, for an order directing that he be transferred to Rikers Island pending decision on this motion.

By separate motion, consolidated for the purpose of this decision and accompanying order, the defendant moves, ex parte, for an order (i) directing forensic testing of the .38 caliber bullet which was entered into evidence in the trial of Indictment No. 4841/94, (ii) vacating both the drug possession conviction under Indictment No. 3794/94 and the judgment of conviction under Indictment No. 4841/94, and (iii) appointing counsel on the motion.

The defendant's motion made on notice to the District Attorney alleges that the convictions under Indictment No. 3794/94 must be vacated for the following reasons: (i) the gun to which the weapon possession counts relate is the same gun he was found

guilty of possessing under Indictment No. 4841/94, thereby constituting "double jeopardy" or "a malicious blunder"; (ii) the possession of a controlled substance count was barred under CPL 40.40, which prohibits separate prosecution of offenses committed by a single criminal transaction; and (iii) his trial counsel was ineffective for failing to both realize the above, and move to consolidate the drug count in Indictment No. 3794/94 with the counts in Indictment No. 4891/94.

Those portions of the defendant's consolidated motion which were made on notice to the District Attorney are procedurally barred, and, as such, denied with prejudice. A motion to vacate judgment may not be used as a substitute for, or means of obtaining an additional, appeal (see, People v Cooks, 67 NY2d 100). Sufficient facts appear on the record of these proceedings for the Appellate Division, upon the defendant's direct appeal, to have adequately reviewed the claims now raised by him; as he unjustifiably failed to there raise them, the claims are barred before this court (CPL 440.10[2][c]; see, People v Cooks, supra; People v Mower, 97 NY2d 239; People v Kandekore, 300 AD2d 318, lv denied 99 NY2d 616, cert denied 540 US 896).

Were the court, nevertheless, to address the substance of the defendant's claims, they would be found to be without merit. The defendant's possession of the same gun on different dates and under different circumstances were separate crimes;

accordingly, the defendant was not subjected to double jeopardy (see, People v Okafore, 72 NY2d 81; People v Almanzar, 209 AD2d 285, lv denied 85 NY2d 905), nor did the People run afoul of CPL 40.40 in either indictment. Thus, the defendant's trial attorney cannot be faulted for failing to make a meritless motion to sever and/or consolidate counts.

To the extent that the defendant seeks appointment of counsel to represent him on this consolidated motion, an indigent defendant has no federal or state constitutional right to appointed counsel, other than in connection with prosecuting an initial appeal as of right (see, Pennsylvania v Finley, 481 US 551; Ross v Moffitt, 417 US 600; People ex rel Williams v LaValle, 19 NY2d 238; People ex rel Combes v LaVallee, 29 AD2d 128). The defendant has had such appointment, and prosecuted such appeal. His current allegations and speculations, unsupported by any evidentiary fact, fail to provide a basis for the discretionary appointment of another attorney.

Nor do the defendant's bare allegations provide a basis for obviating the need for his motions to be made on notice to the People and, where appropriate, the Department of Corrections (see, CPLR §§ 2211, 2214; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2211:6, at 40; CPL 440.30[1]). Accordingly, those portions of the defendant's consolidated motion which were made ex parte are denied, without prejudice to renewal

upon proper notice, except that portion seeking a transfer to Rikers Island pending decision on this motion, which is denied, with prejudice, as moot.

In the interest of judicial economy, however, I note that the balance of the defendant's ex parte claims face the same procedural barriers as do the claims denied herein, and appear to suffer from the same lack of merit.

Accordingly, the defendant's motion to vacate judgment, and for related relief, is denied in its entirety.

Order entered accordingly.

The Clerk of the Court is directed to forward a copy of this decision and order to the defendant at his place of incarceration and to the District Attorney.

ROBERT CHARLES KOHM, J.S.C.