

MEMORANDUM

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART K-19**

THE PEOPLE OF THE STATE OF NEW YORK : BY: STEPHEN A. KNOPF
: :
: DATED: April 12, 2007
-against- : :
: INDICTMENT NO. 3792/92
: :
MICHAEL OCASIO : :
: Defendant : :
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The defendant, Michael Ocasio, seeks an order from this court vacating his judgment of conviction pursuant to CPL §440.10. The defendant specifically argues that the trial court erred by depriving the defendant of his constitutional right to counsel of his own choosing by first, appointing counsel for defendant even though the defendant was financially able to retain his own counsel; second, by failing to conduct an inquiry into the defendant's ability to pay for his own counsel; third, by appointing counsel who was not on the "18B" panel, and finally, erroneously

finding that the defendant was indigent. The defendant also seeks "poor person relief" and the assignment of counsel. The People oppose the defendant's claims as procedurally barred. The People oppose the defendant's application for assigned counsel. The defendant, in reply papers submitted herein, further argues that his claims could not have been raised previously on direct appeal or in a CPL 440 motion. The defendant specifically alleges that he was not in possession of certain documents that support his allegations at any prior time. The defendant also asks this Court to exercise its discretion and consider his claims "in the interest of justice" and "for good cause".

This indictment arose out of an incident that took place on August 12, 1992. On that date, the defendant and his co-defendant drove down Liberty Avenue, in Queens, in a red Toyota vehicle until they found the victim, Joseph Guerra. The co-defendant left the vehicle and proceeded to argue with Mr. Guerra. The defendant

stepped out of the vehicle, and removed a gun from his waistband. The defendant then fired five shots at Mr. Guerra, killing him.

The defendant was charged with murder in the second degree (PLS 125.25 [1]), criminal possession of a weapon in the second degree (PLS 265.03), and criminal possession of a weapon in the third degree (PLS 265.02(4)). The defendant proceeded to trial, which was conducted by the Hon. J. Demakos, J.S.C. The defendant was convicted of all charges.

On April 14, 1994, the defendant was sentenced, as a second felony offender, to concurrent indeterminate prison terms of twenty-five years to life on the murder count, seven and one-half years to fifteen years on the second degree weapons possession count and three and one half-years to seven years on the third degree weapons possession count.

In August of 1994, the defendant's attorney filed his appellate brief with the Appellate Division, Second Department, raising a

number of issues. The People opposed the defendant's claims, arguing that they were either unpreserved or without merit. On December 29, 1995, the Appellate Division, Second Department, affirmed the defendant's conviction. (*People v. Ocasio*, 222 AD2d 706 [2d Dept 1995]). On April 10, 1996, the Court of Appeals denied the defendant leave to appeal. (*People v Ocasio*, 88 NY2d 851 [1996]).

On or about June 24, 1997, the defendant sought a writ of error coram nobis, claiming his appellate attorney was ineffective. The People opposed this relief, arguing that the defendant had received effective assistance of counsel on his direct appeal. On December 1, 1997, the Appellate Division denied defendant's application. (*People v Ocasio*, 245 AD2d 309 [2d Dept. 1997]).

On April 6, 1998, the defendant filed a pro se motion to vacate his judgment of conviction, pursuant to CPL§ 440.10. The People opposed this relief, claiming that the defendant's application was barred and without merit. On June 9, 1998, the Court summarily

denied the defendant's motion, finding his claims to be procedurally barred. The defendant sought leave to appeal this decision to the Appellate Division. On September 8, 1998, this application was denied.

While the appeal from the Court's denial of his motion to vacate judgment was pending before the Appellate Division, the defendant moved to reargue the court's denial of it's decision on this motion. On August 24, 1998, the defendant's motion for reargument was denied because of the failure to assert any new issues by the defendant.

On September 8, 1998, the defendant filed a motion with the Appellate Division seeking to reargue his application for leave to appeal the denial of his June 9, 1998 motion to vacate judgment. This was ultimately denied.

On October 18, 1999, the defendant filed a second motion to vacate his judgment of conviction. The People opposed this motion.

On December 23, 1999, the court denied the defendant's second motion to vacate his judgment of conviction.

On or about February 1, 2000, the defendant sought to appeal the denial of his second motion to vacate judgment. Such application was opposed by the People. On March 8, 2000, the Appellate Division denied the defendant's motion for leave to appeal.

On December 23, 1998, the defendant filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York. The People opposed such relief.

On May 24, 2002, the United States District Court for the Eastern District of New York denied the defendant's petition for a writ of habeas corpus.

On or about June 19, 2002, the defendant moved for a certificate of appealability to the United States Court of Appeals for the Second Circuit. On December 17, 2002, the defendant's application was denied. The defendant moved for reconsideration of

this application. This motion was denied on July 3, 2003.

On November 8, 2004, the defendant pro se filed a second motion for a writ of error coram nobis claiming he was denied the effective assistance of appellate counsel. The People opposed this relief.

On February 22, 2005, the Appellate Division denied the defendant's application. (*People v Ocasio*, 15 AD3d 596 [2d Dept. 2005]).

On May 6, 2005, the Court of Appeals denied the defendant's application for leave to appeal from the decision of February 22, 2005. (*People v Ocasio*, 4 NY3d 889, [2005]).

Section 440.10 (2)(c) specifically provide that the court must deny a motion to vacate a judgment when:

Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable

failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him.

Section 440.10 (3)(c) provides in pertinent part, that the court may deny a motion to vacate a judgment when:

Upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.

After a review of the motion papers submitted by the parties, the official court record and the voluminous procedural history, this Court finds the defendant's instant claims to be procedurally barred. This Court finds that each of the defendant's claims are readily apparent from the record. As such, these claims should have been litigated on his direct appeal. See CPL §440.10(2)(c). The defendant having failed to so litigate these claims, cannot prevail on this motion.

This Court also finds the defendant's claims to be procedurally barred pursuant to CPL §440.10 (3)(c). This Court finds that despite defendant's argument that he now has additional documentation that supports the relief he requests, these claims could have been raised in any one of the defendant's prior motions to vacate judgment. As the defendant failed to do so, his claims are again, procedurally barred.

Finally, this Court agrees with the People that the defendant is not entitled to "poor person relief" and assignment of counsel. It is well-settled that a defendant is not entitled to "poor person relief" on a collateral attack of a judgment of conviction. (See *Pennsylvania v Finley*, 481 US 551 [1987]); (See *People v Richardson*, 159 Misc 2d 168 [Kings Co Sup. Ct 1993]).

Based on the forgoing, the defendant's third motion to vacate his judgment of conviction and his request for poor person relief and assignment of counsel is denied.

The foregoing constitutes the order, opinion and decision of
this court.

STEPHEN A. KNOFF, J.S.C.