

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

[REDACTED] :

Defendant-Appellant. :

NOTICE OF MOTION

Ind. No. **[REDACTED]**

New York County

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PLEASE TAKE NOTICE that upon the annexed affirmation of David J. Klem and the exhibits thereto and the prior proceedings had herein, the undersigned will move a Justice of this Court, at a term for motions thereof, to be held on Monday, August 25, 2003, at the Courthouse, 27 Madison Avenue, New York, New York 10010 at 10:00 a.m., or as soon thereafter as counsel can be heard, for a certificate granting appellant permission, pursuant to C.P.L. § 460.15, to appeal from an order of the Supreme Court, New York County, filed July 25, 2003, denying his motion to vacate judgment under C.P.L. § 440.10; and for such other and further relief as this Court deems just.

Dated: New York, New York
July 31, 2003

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court's denial of defendant's C.P.L. § 440.10 motion. No prior application for a certificate granting leave to appeal has been made.

Procedural Posture

4. On July 10, 1997, appellant [REDACTED], Sergio Lopez, and Ysbel Medina were arrested and charged in a criminal court felony complaint with criminal possession of a controlled substance in the first and third degrees after a car in which they were driving was stopped for a traffic violation, searched, and found to contain a kilogram of cocaine in the trunk. They were subsequently jointly charged in New York County Indictment Number 5728/97 with those offenses.

5. On March 31, 1999, [REDACTED] after jumping bail, bench warranting, and getting re-arrested in Florida for conspiracy to commit murder, pleaded guilty to third-degree possession and was sentenced to one to three years' incarceration.

6. On November 1, 1999, defendant was tried, found guilty, and sentenced to 15 years' to life incarceration for first-degree and third-degree possession.

7. On February 2, 2000, [REDACTED] pleaded guilty to attempted third-degree possession and received a sentence of probation.

8. Only defendant appealed. On appeal he argued that the search of the vehicle was improper and that his right to be present at jury selection had been violated. On September 13, 2001, the First Department affirmed, over a dissent, his conviction.¹

[REDACTED] (1st Dept. 2001). After granting leave to appeal, on

1. This Court modified the conviction by vacating, as a matter of discretion and in the interest of justice, [REDACTED]'s conviction for criminal possession of a controlled substance in the third-degree.

November 19, 2002, the Court of Appeals affirmed, again over a dissent, his conviction.

~~_____~~ _____, 99 N.Y.2d 55 (2002), ~~_____~~ never argued any conflict of interest issue on appeal.

9. On March 25, 2003, appellant filed a motion, pursuant to C.P.L. §§ 440.10(f), (h), alleging that his original trial attorney had labored under an actual conflict of interest that had an effect upon his representation of ~~_____~~. [A copy of the notice of motion, affirmation in support of motion, memorandum of law, and the annexed exhibits is attached hereto as Exhibit B.]

10. On June 13, 2003, the People submitted their response to that motion. [A copy of the affirmation in response, the annexed exhibits, and the response memorandum of law is attached hereto as Exhibit C.]

11. On July 3, 2003, appellant submitted a reply memorandum of law. [A copy of that reply memorandum of law is attached hereto as Exhibit D.]

12. In a written decision filed on July 25, 2003, the trial court (Bruce Allen, J.), denied the motion without holding a hearing. [A copy of the court's decision is attached hereto as Exhibit E.]

The Conflict of Interest Claim

13. At the July 11, 1997, criminal court arraignment, defendant (while represented by unconflicted and independent counsel), alone amongst the three codefendants, provided notice of his intention to testify in the grand jury. His case was adjourned for him to testify in the grand jury.

14. Within the next day or two, each of the three defendants retained the same attorney – Osvaldo Gonzalez, Esq. – to represent them. Upon his entry in the case, Mr. Gonzalez told ~~Mr. Mundo~~ that he had worked out a plea arrangement with the prosecutor prior to the grand jury action. The global deal involved ~~Lopez~~ pleading guilty to third-degree possession and receiving a sentence of two to six years' incarceration. Pursuant to that plea deal, the charges against ~~Mundo~~ and ~~Molina~~ were to be dismissed.

15. According to the prosecutor's response affirmation, after working out that plea deal, "Gonzalez advised ~~Mundo~~ that inasmuch as the plea agreement . . . was being worked out, he should not testify before the grand jury and ~~Mundo~~ agreed." Exhibit C (Abrams' aff. at ¶ 13). Therefore, when ~~Mundo~~ was produced on July 16, 1997, to testify before the grand jury, he followed his attorney's advice and withdrew his notice to testify. In a sworn affidavit, ~~Mundo~~ maintained that he would have testified in the grand jury absent Gonzalez' assurances that the charges against him were going to be dismissed under the plea deal. Exhibit B (Mundo aff. at ¶ 7).

16. Thereafter, a grand jury returned an indictment against defendant, ~~Lopez~~, and ~~Molina~~, charging them with acting-in-concert to possess a controlled substance in the first and third degrees; Lopez was also charged with reckless driving.

17. ~~Lopez~~ then retained independent counsel, who advised him against accepting the global plea deal that Gonzalez had negotiated whereby ~~Lopez~~ would "take the fall" for all three defendants.

