

JUN 16 1997

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

-against-

DOMINIC FRANZA,

Defendant-Appellant.

APPELLATE DIVISION, SUPREME
COURT, FIRST DEPARTMENT

AFFIRMATION IN OPPOSITION
TO DEFENDANT'S MOTION

N.Y. Co. Ind. No. 11987/91

Cal. Date: June 17, 1997

CAROL A. REMER-SMITH, an attorney duly admitted to practice before the courts of this state, affirms that:

1. I am an Assistant District Attorney of counsel to ROBERT M. MORGENTHAU, District Attorney of New York County, and I submit this affirmation in response to defendant's pro se motions seeking reargument of his direct appeal, reversal of the order of the trial court denying the motion to set aside the verdict, and reversal of the order of this Court denying the pro se motion to file CPL 440.10 exhibits. The People respectfully submit that these motions should be denied -- defendant has presented no basis warranting the relief sought.

2. On May 13, 1997, this Court unanimously affirmed defendant's conviction of three counts of attempted second degree murder and one count of first degree criminal possession of a weapon, unanimously affirmed the order of the trial court summarily denying the motion to vacate the conviction (Slip Opinion 60763-63A), and unanimously denied the pro se motion to file CPL 440.10 exhibits (M-4924).

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NEW YORK COUNTY

3. The procedure and criteria for reargument of an appeal is set forth in Criminal Procedure Law Section 470.50. See 22 NYCRR §600.14(a). In the interest of justice and for good cause shown, this Court may in its discretion order reargument or reconsideration of an appeal. However, reargument is not designed to provide a second opportunity to press previously considered and rejected arguments on an appellate court. Thus, as "a practical note, reargument is one of the most rarely granted remedies known to the appellate species but is all too often sought as the last grasp at the last straw." McKinney's, Practice Commentary to CPL §470.50 at 745 (1994). Since defendant merely repeats the same arguments, he has not satisfied the burden imposed by Section 470.50.

4. Defendant concedes that testimony regarding the shooting and the shipment of a pipe bomb to Puerto Rico was uncontroverted at trial (Motion at ¶¶12-13, 57-58). At trial defendant did not contest that Franza and Mendez had been shot or that the pipe bomb was delivered to Puerto Rico. Disputing only proof of his culpability, defendant treated the details of the crimes as immaterial to that defense.

5. Obviously, a trial is the proper forum for a defendant to impeach a witness or contest the minutiae of a crime. Here, the details were contested for the first time in a post-conviction motion. But, CPL Section 440.10 contemplates raising facts which were unknown before sentencing, or when a defendant's opportunity to present them prior to conviction was substantially impaired or denied. See People v. Bennett, 30 N.Y.2d 283, 287-88 (1972). Here

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defendant complains of neither obstacle. Thus, his application controverting the proof presented at trial was untimely made, and not proper under Section 440.10.

6. Nor does defendant allege that these facts were newly discovered evidence which tends to show that a favorable verdict would have resulted had such facts been known at trial. Indeed, purported inconsistencies cited in defendant's pro se papers were, or could have been, known with due diligence at trial. See CPL §440.10(3)(a). Thus, at best, this alleged proof was merely designed to contradict the witnesses on immaterial details, and as such, does not warrant the relief sought. See People v. Caminito, 3 N.Y.2d 596, 601 (1958); People v. Donovan, 107 A.D.2d 433, 443-44 (2nd Dept.), appeal denied, 65 N.Y.2d 694 (1985).

7. Thus, fully familiar with the trial evidence, the trial court properly denied the post-conviction motion based solely on hearsay.¹ See People v. Williams, 190 A.D.2d 590, 591 (1st Dept.), appeal denied, 81 N.Y.2d 1021 (1993). It found the allegations of fraud to be "completely unsubstantiated" and the claim of collusion to be "nothing but self-serving, wishful thinking" (Decision of October 19, 1993 at 2-4). Not surprisingly, the trial judge also found the pro se analysis of the record to be "Byzantine," and specific claims to be "without merit" and "nothing but self-serving, wishful thinking" (id.). An affirmance of the trial

¹ Indeed, defendant disregards the simple fact that the burden of proof was his under Section 440.10. And, if a defendant as here raised no meritorious substantive claim, there is no need for the People to refute the specific allegations (cf. Motion at ¶¶ 14, 16-46 [shooting]; 47, 59-65 [bomb]).

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court's order was proper, and this Court's finding that the CPL 440.10 motion presented no meritorious claim is amply supported by the record below (cf. Motion at ¶¶ 66-71). In this motion, defendant presents no credible contrary proof.

8. Finally, defendant's pro se conclusory allegations that this Court overlooked the evidence or misapprehended the law in deciding his appeal are utterly without merit. Defendant clearly has not shown that some question decisive of the case has been overlooked by this Court, or that its decision is in conflict with an express statute or with a controlling decision. See Mount v. Mitchell, 32 N.Y. 702 (1865). In fact, the trial court held that "evidence of defendant's guilt was overwhelming" (Decision of October 19, 1993 at 4), seconding the jury's credibility findings. Upon independent review of the evidence and the parties' claims, this Court too found that the evidence was legally sufficient and that the verdict was not against the weight of the evidence. Defendant has in no way impugned those findings.

9. In sum, defendant has neither shown good cause for granting reargument in the instant matter nor has he presented any basis for this Court to exercise its discretion and review the case in the interest of justice.

WHEREFORE, the People urge this Court to deny the application.

Dated: New York, New York
June 10, 1997


CAROL A. REMER-SMITH
Assistant District Attorney
Appeals Bureau

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