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Committee on Opinions (22 NYCRR 7300.1)**

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

PRESENT:

HON. SEYMOUR ROTKER
Justice.

-----X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

Indictment No.:N-10014-2000

VICTORY BAILEY,

Motion: TO DEFER SURCHARGE
PURSUANT TO CPL 420.40

Defendant.

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VICTORY BAILEY

PRO-SE

For the Motion

RICHARD A. BROWN, DA

Opposed

Upon the foregoing papers, and due deliberation had, the motion is denied. See the accompanying memorandum this date.

Kew Gardens, New York

Dated: May 17, 2001.

SEYMOUR ROTKER, Acting J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART K-TRP
-----X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

MEMORANDUM DECISION

VICTOR BAILEY,

Defendant.

-----X

On January 11, 2001, the defendant plead guilty to one count of criminal possession of a controlled substance in the second degree under indictment N-10014-2000. On January 31, 2001, he was sentenced to an indeterminate term of six years to life imprisonment with the Court’s specific recommendation that he be paroled at the earliest possible date. Pursuant to Penal Law 60.35(1)(a), the Court, at the time of sentence, levied a mandatory surcharge of \$200 and a crime victim assistance fee of \$10.

By motion pursuant to CPL 420.40 dated March 24, 2001, the defendant seeks to defer payment of the surcharges and victim assistance fees pursuant to CPL 420.40. The People have responded with an affirmation in opposition dated May 8, 2001.

The Defendant’s motion poses the question of whether the court has the power to defer the surcharge imposed upon incarcerated defendants.

Legislation enacted in 1995 deprived courts of their prior authority to waive the payment of the mandatory surcharge and the crime victim’s assistance fee¹ and established instead a procedure whereby defendants who were not incarcerated or who were to serve less than sixty days could seek

¹ See CPL 420.35(2) which reads, “Under no circumstances shall the mandatory surcharge or the crime victim assistance fee be waived”.

deferral of payment based upon financial hardship². The deferral procedure set forth in the 1995 legislation, however, does not by its terms apply to defendants sentenced to more than 60 days incarceration.

As to those defendants (the defendant here falls into this class), the legislature established a separate mandatory procedure for the collection of the surcharge and the crime victims' fee. Penal Law 60.35 (5) was enacted which requires collection of these obligations from inmate funds. It provides that if the fees are not paid, the clerk of the court "shall notify the superintendent...of the facility where the person is confined" and that "the superintendent...shall cause any amount owing to be collected from...money to the credit of inmate funds" (emphasis added). This provision is commonly invoked by prison officials to justify mechanical collection of the surcharge from inmate accounts. The language of the section, however, only becomes effective when the defendant fails to pay a surcharge duly imposed and ordered paid by the court. Neither CPL 420.40 nor Penal Law 60.35(5) specifically addresses the authority of a court to defer payment of a mandatory surcharge in the case of an imprisoned defendant. .

This question has been addressed in three lower court decisions and one appellate opinion from the Third Department.

In People v. Huggins, 179 Misc. 2d 636 (Co. Court, Greene County, 1999) the court found that the authority to defer the payment of the surcharge was within the court's discretionary authority provided by Penal Law 60.30. The Huggins court, without making a specific finding as to hardship, ordered payment deferred until three months after the defendant's release on parole.

In People v. Parker, 183 Misc 2d 737 (Kings Co. Sup Ct, 2000) the court applied the hardship criteria set forth in CPL 420.40(2) for at liberty defendants seeking deferral to the case of an incarcerated defendant. The Parker court held that because the defendant's basic needs were being provided for by the Department of Correctional Services, he had failed to establish any "unreasonable" hardship so as to warrant deferral of the surcharge.

² See, CPL 420.40.

In People v. Hopkins, 185 Misc 2d 312 (Kings Co. Sup Ct, 2000), the Supreme Court, Kings County, in the most detailed and well reasoned of the three lower court decisions that addressed this subject, held that the legislature intended that the surcharges should be collected from inmate funds and that the “statutory scheme did not contemplate deferral as an option for incarcerated individuals”.

The only Appellate authority that directly addresses this subject is People v. Abdus-Samad 274 AD2d 666(3rd Dept, 2000). In that case, the Third Department, in dicta, noted that deferral would not be appropriate on a record that established no “unreasonable hardships on the defendant over and above the ordinary hardship suffered by other indigent inmates.” The opinion is especially significant in that it cited with approval the decision in People v. Parker, supra.. Thus, even if Huggins is correct in its holding that an incarcerated defendant can seek deferral under CPL 420.40, the Appellate Court suggests that the mandatory “docking” of inmate income does not establish the required showing of hardship which is required before such deferral can be ordered by the court.

This Court accepts as true defendant’s allegation that after the deduction of the surcharge repayment he is left with a weekly income of \$3.00. The Court commends the defendant’s efforts at rehabilitation as evidenced by his attempts to further his education and to learn a trade and is not unsympathetic to his plight. The Court is, however, forced to conclude based upon the holdings in Hopkins and Abdus-Samad to conclude that it is either without authority to defer payment (see, People v. Hopkins, supra) or, if deferral is permitted (see, People v. Hopkins, supra) that the facts as alleged by the defendant are not considered by the Appellate Courts to constitute a showing of “unreasonable hardship”, (See, People v. Parker, supra; People v. Addus-Samad, supra..

Therefore, the motion must be denied.

The Clerk of the Court is directed to forward a copy of this decision to the defendant at his place of confinement.

Kew Gardens, New York
Dated: May 17, 2001.

SEYMOUR ROTKER, Acting J.S.C.