

Short Form Order

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

P R E S E N T:

HON. BARRY KRON, A.J.S.C.
Acting Justice

THE PEOPLE OF THE STATE OF NEW YORK	:	Ind. No. 31/98
	:	
-against-	:	Motion Vacate Judgment
	:	
JOSE MAISONET,	:	
	:	
Defendant.	:	Submitted January 19, 2005
	:	

The following papers numbered
1 to 2 submitted in this motion.

By: ALIREZA DILMAGHANI, Esq.
For The Motion

HON. RICHARD A. BROWN, D.A.
By: MICHAEL J. WATLING, ADA
Opposed

Papers
Numbered

Notice of Motion/Affidavits/Exhibits	1
Answering & Reply Affidavits/Exhibits	2

Upon the foregoing papers, defendant's motion to vacate the judgment rendered November 12, 1999, convicting him of robbery in the first and second degrees, upon a jury verdict, and imposing sentence, is denied.

Defendant alleges that he received ineffective assistance of counsel because his attorney "failed to take the appropriate and reasonable steps necessary to secure the presence of his client for

trial", including "fail[ing] to find and inform his client that he had to be present at trial..."

Defendant's claim is subject to a mandatory procedural bar. Defendant appealed his conviction on two grounds, one being that the trial court erred in refusing the defense request for a mistrial. The Appellate Division rejected defendant's argument; rather, as indicated above, the court vacated the conviction for burglary in the first degree and, as so modified, affirmed the judgment. In doing so, the Appellate Division expressly noted that "[t]he defendant does not challenge the Supreme Court's determination that he voluntarily and willfully failed to appear in court at the commencement of trial and that the matter could proceed in his absence. Rather, he contends that the Supreme Court erred in denying his motion for a mistrial to afford him an opportunity to testify, when he appeared in court for the first time during jury deliberations."

Defendant's current motion seeks both to recast the argument found meritless by the Appellate Division and now challenge what the Appellate Division specifically indicated he did not challenge upon his appeal by framing the issues as relating to ineffective assistance of counsel. However, that he cannot do (see, C PL 440.10[2][a], [c]; *People v Mower*, 97 NY2d 239; *People v Cooks*, 67 NY2d 100). A full record of defense counsel's actions in notifying defendant with respect to trial and attempting to locate him are contained in the minutes of the Parker hearing conducted in this matter. Moreover, the facts relating to defendant's absence, subsequent arrest, and production before the court were put on the record by defense counsel when he sought a mistrial. If defendant was aggrieved by counsel's actions, his remedy was to seek a review of them upon his appeal.

I note that defendant's primary allegation seems to be that defense counsel should reasonably have known that he had been arrested in another county on an unrelated matter and made insufficient efforts to have him brought here for trial. However, defendant, by his own admission, was not arrested until June 25, 1999, after the jury had already begun deliberations. Thus, his forfeiture of the right to be present was unaffected by his subsequent arrest (see, *People v Alston*, 279 AD2d 583, lv denied 96 NY2d 797; *People v Herrera*, 219 AD2d 511, lv denied 87 NY2d 847; *People v Aponte*, 204 AD2d 339, lv denied 83 NY2d 963.

Date: January 21, 2005

BARRY KRON, A.J.S.C.