

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

P R E S E N T: HON. BARRY KRON,
A.J.S.C.

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

- against-

Indictment Number: 765-02

KESTER SANDY,

Motion: To Vacate Warrant

Defendant.

-----X

DEFENDANT PRO SE

For the motion

RICHARD A. BROWN, D.A.

BY: ALIX FREDRIKA KUCKER, A.D.A.

Opposed

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

Kew Gardens, New York

Dated: January 24, 2006

BARRY KRON
A.J.S.C.

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART K-TRP

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

BY: BARRY KRON, A.J.S.C.

- against -

Indictment Number: 765-00

KESTER SANDY,

Defendant.

-----X

The following constitutes the opinion, decision and order of the court.

By motion received on or about January 3, 2006, defendant seeks an order of the court “to dispose of a bench warrant now pending against me.”¹ Defendant is currently incarcerated under Docket CR. 04-324 in the Eastern District of Pennsylvania and was sentenced there on or about December 15, 2004.² Defendant is serving a sentence of 78 months upon his conviction of Possession of a Firearm by a Convicted Felon in violation of 18 USC § 922 (G)(1). In his application, defendant relies upon Article III of the Interstate Agreement on Detainers (hereinafter “IAD”) to support his application for the requested relief to have the warrant vacated.

In response, the People have filed an affirmation in opposition dated January 13, 2006, whereby they assert that defendant’s motion should be denied in its entirety. The People contend that defendant is not in the actual or constructive custody of this Court, and therefore is not properly present before the Court to seek the requested relief.

Additionally, the People claim that the IAD is inapplicable because defendant is not invoking its authority upon an untried indictment (See People’s affirmation in opposition, ¶ 14).

¹Defendant has not dated his motion papers which have been submitted in the form of a letter with annexed exhibits.

²See Exhibits annexed to defendant’s motion.

As discussed below, defendant has already been convicted and sentenced by this Court.³

For the reasons stated herein, defendant's application is denied.

FACTS/PROCEDURAL HISTORY

On or about March 13, 2000, indictment number 765-00 was filed with the court charging defendant with two counts of Assault in the First Degree (PL § 120.10 [1], [2]); two counts of Assault in the Second Degree (PL § 120.05 [1], [2]); and one count of Criminal Possession of a Weapon in the Fourth Degree (PL § 265.01[2]).⁴

Thereafter, on December 4, 2000, defendant received warnings pursuant to People v. Parker, 57 N.Y.2d 136, which in sum and substance advised defendant that even if he absented himself from the trial, it would nevertheless proceed in his absence. At that time defendant had been released on bail, having posted it on March 10, 2000.

The case proceeded to trial on January 8, 2001 in Part K-7 (Kron, J.). During the trial defendant absconded, and on January 9, 2001, following a hearing, the court concluded that defendant had voluntarily absented himself from the trial, thereby waiving his right to be present. A warrant was ordered for defendant's arrest.⁵ The trial proceeded in defendant's absence, and on January 11, 2001 the jury returned a verdict convicting defendant of two counts of First Degree Assault and one count of Criminal Possession of a Weapon in the Fourth Degree.

Defendant was sentenced *in absentia* on January 30, 2001 to concurrent terms of 17 years incarceration for each assault conviction and one year upon the weapon's possession conviction. Defendant has not yet commenced serving this sentence.

³Defendant has been sentenced *in absentia* and therefore, has not yet commenced his state sentence.

⁴Count 3, Assault in the Second Degree (PL § 120.05[1]) was dismissed upon motion of the prosecutor on January 10, 2001.

⁵A warrant is still active, although the initial warrant had erroneously been vacated by the police department on or about May 23, 2001.

Upon a review of the exhibits provided by defendant and representations made by the District Attorney's Office, defendant is currently serving a sentence for an offense committed on or about January 13, 2003. The sentence consists of a 78-month period of incarceration, followed by three years post release supervision.

DECISION

Pursuant to Article I of the Interstate Agreement on Detainers, the states which are a party to the compact⁶ have subscribed to it "to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on **untried** indictments, informations or complaints" (CPL § 580.20 (emphasis added)). Thus, cooperative procedures have been implemented by this agreement to secure the speedy trial of individuals already incarcerated in another jurisdiction to resolve all untried matters, as stated above. The IAD is inapplicable under the facts presented. Defendant is seeking to vacate a warrant which exists in New York State. However, the warrant which exists is not based upon an untried matter. Defendant has already been sentenced. Upon completion of his federal sentence, he will be returned to New York State and the warrant will be addressed at that time. The warrant exists so that defendant can be returned to New York for the commencement of his state sentence. Thus, defendant has not asserted any grounds upon which relief can be granted. His application is denied.

Furthermore, this Court need not reach the issue of whether the "Fugitive Disentitlement Doctrine"⁷ bars his ability to make the current motion, as argued by the People,

⁶New York is a party to this interstate compact (See CPL § 580.20).

⁷A court clearly has discretion "to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment . . ." that may be rendered (See Ortega-Rodriguez v. United States, 507 U.S. 234(1993); Bohanan v. Nebraska, 125 U.S. 692 (1887); see also Eisler v. United States, 338 U.S. 189 (1949)). This rule is known as the fugitive disentitlement doctrine. This doctrine was instituted because there is no assurance that a judgment that is issued would be enforceable in the absence of the defendant

since the Interstate Agreement on Detainers is inapplicable.⁸

In sum, defendant's motion is without merit because he is currently serving a federal sentence, and the outstanding state warrant, based upon a sentence imposed *in absentia*, will be vacated when he has completed his federal sentence.

Accordingly, defendant's motion is denied in its entirety.

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

Kew Gardens, New York

Dated: January 24, 2006

BARRY KRON
A.J.S.C.

(See Ortega Rodriguez, 507 U.S. at 239).

⁸Nevertheless, despite the People's assertions to the contrary, it would appear that defendant is in "custody". He is currently in federal prison serving a sentence (See e.g. Lara v. State of New York, 2005 US Dist LEXIS 8355 (S.D.N.Y., April 29, 2005)(federal habeas corpus statute's "in custody" requirement satisfied where defendant serving federal prison term had already been sentenced *in absentia* in New York State; although state court did not yet issue a warrant, it was reasonable to "suppose" state sentence would be served after conclusion of federal sentence)).

The cases relied upon by the People to support their position that defendant is not entitled to the requested relief because he is not present before the court as defined in the Fugitive Disentitlement Doctrine all relate to some type of an appeal or motion to vacate the conviction where the actual physical location of defendant is unknown. That is not what we have here (See People v. Sullivan, 29 N.Y.2d 552; People v. Molina Del Rio, 14 N.Y.2d 165). At present, defendant is only seeking to vacate a warrant or hold which is upon him as a result of his being sentenced *in absentia* by this Court.