

People v Edwards

2006 NY Slip Op 30840(U)

September 25, 2006

Supreme Court, Westchester County

Docket Number: 05-1470

Judge: Gerald E. Loehr

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COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

-against-

KEITH EDWARDS,

Defendant.

-----X

LOEHR, J.

This is defendant's motion pursuant to CPL 440.20 for an order setting aside the sentence on the grounds that it was unauthorized and/or illegally imposed and/or otherwise invalid as a matter of law and not in accordance with defendant's plea agreement.

The defendant was charged in an eight count indictment with criminal sale of a controlled substance in the third degree and related crimes arising out of two separate alleged sales of cocaine to undercover police officers on July 1, 2005 and August 4, 2005. Additionally, on March 5, 2005 the defendant was arrested and charged in Yonkers City Court with possession of a weapon in the third degree and criminal trespass in the first degree. On March 8, 2005, the defendant entered a plea of guilty to one count of attempted criminal sale of a controlled substance in the third degree (count 4 as reduced) in full satisfaction of the indictment as well as the two charges pending in Yonkers City Court. The plea agreement was that in exchange for his plea of guilty to the reduced charge of attempted criminal sale of a controlled substance in the third degree in full satisfaction of all the aforementioned charges and a waiver of his right to appeal, defendant would be sentenced as a youthful offender to shock probation, *i.e.*, sixth months incarceration concurrent with five years probation. The

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DECISION AND ORDER

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COUNTY OF WESTCHESTER

defendant who had made bail was continued on bail pending sentence upon certain conditions.

These were as follows:

“THE COURT: I will caution you, Mr. Edwards, as the District Attorney already did, however, that although I’ve placed my sentence promise to you on the record, in the event that you’re arrested on a new charge while at liberty pending sentence and if there’s probable cause to support that new charge or if you fail to cooperate with the Probation Department in their preparation of your pre-sentence report, or if you fail to appear on May 31st or any adjourned date for sentence without a legal excuse for that failure to appear, if any of those things occur, I’m no longer bound by my sentence promise to you.

“I will be free to impose a sentence that could be up to the maximum sentence permitted by law¹ and you would not be permitted to withdraw your plea of guilty. . . . Do you understand?”

“THE DEFENDANT: Yes, Sir.”

(Minutes of March 8, 2006.)

The case was then adjourned to May 31, 2006 for sentencing. On May 5, 2006, the

¹ During the plea allocution, the defendant was also advised as follows:

“Q: Mr. Edwards, do you understand that you’re pleading guilty to a class C felony and that it’s punishable by a maximum possible sentence of up to five and a half years’ incarceration in state prison and that could be accompanied by or would be accompanied by up to two years of post release supervision? Do you understand that that’s the sentence that could be imposed for such a conviction?”

“A: Yes, Sir.”

The defendant also waived his right to appeal.

(Minutes of March 8, 2006.)

defendant was again arrested and charged in the Yonkers City Court with criminal possession of a controlled substance in the third degree and resisting arrest, and on May 19, 2006 the defendant was indicted for those and related crimes. On May 31, 2006, the defendant's sentencing was adjourned to June 21, 2006. On June 21, 2006, based on that arrest and indictment, the Court did not adjudicate the defendant a youthful offender but imposed an enhanced sentence of five years in state prison to be followed by two years of post release supervision.

Defendant first moves to set aside his sentence on the grounds that it was unauthorized and/or illegally imposed and not in accordance with the plea agreement. More precisely, he seeks specific performance of the Court's promise of shock probation and youthful offender treatment. Defendant argues that there was insufficient evidence before the Court at his June 21, 2006 sentencing for the Court to enhance his sentence and that, in any event, he is entitled to a hearing to determine whether there is any legitimate basis for this new charges.

Here, as a condition of the plea agreement, the defendant was warned not to get arrested pending sentence, and that if he did and if there was probable cause for such arrest, the Court could impose an enhanced sentence up to the maximum for the crime to which he pleaded guilty – 5 ½ years. Under such circumstances, where the People prove by a preponderance of the evidence that the defendant had been arrested and that there was a legitimate basis for the new charges, an enhanced sentence may be imposed (*People v Outley*, 80 NY2d 702 [1993]). That the defendant had been indicted is sufficient evidence in and of itself to satisfy this burden and thus, there was no necessity to conduct a hearing (*People v Ricketts*, 27 AD3d 488 [2d Dept], *lv denied* 6 NY3d 852 [2006]; *People v Coleman*, 266 AD2d 227 [2d Dept

1999], *lv denied* 94 NY2d 946 [2000]).

Defendant also moves to set aside his sentence on the grounds that, as enhanced, it is excessive. Inasmuch as the sentence imposed was less than the maximum allowed by law, it is not illegal and may not be set aside by this Court pursuant to CPL 440.20 (*People v Burke*, 2005 WL 3423122). Moreover, defendant's contention that the enhanced sentence is excessive, while beyond the jurisdiction of this Court (*People v Carter*, 63 NY2d 530 [1984]), is, in any event, precluded by defendant's knowing, voluntary and intelligent waiver of his right to appeal (*People v Ricketts*, 27 AD3d 488 [2d Dept], *lv denied* 6 NY3d 852 [2006]).

For the foregoing reasons, the motion is denied. This constitutes the decision and order of the Court.

The Court has considered the following papers in connection with this application: (1) Notice of Motion dated July 12, 2006 together with Affidavit and attached exhibits; (2) People's Affirmation in Opposition and Memorandum of Law (3) Defendant's Reply Affirmation dated September 8, 2006.

Dated: White Plains, New York
September 25, 2006



HON. GERALD E. LOEHR
County Court Judge

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