

People v Borges

2007 NY Slip Op 30317(U)

March 21, 2007

Supreme Court, Kings County

Docket Number: 0002234

Judge: Cassandra M. Mullen

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 11**

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THE PEOPLE OF THE STATE OF NEW YORK

DECISION
Indictment # 2234/92

-against-

Judge Cassandra M. Mullen

DOMINGO BORGES

Defendant

Dated: March 21, 2007

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

FINDINGS OF FACT

The Pro Se Defendant, Domingo Borges is moving to set aside his sentence, pursuant to CPL §440.20(1), arguing that the sentence was invalid as a matter of law, in that he was denied access to the Department of Probation pre-sentence report as required by CPL §390.50(2)(a). CPL §390.50(2)(a) states *inter alia* that a pre-sentence report must be made available for examination and for copying by the defendant's attorney, not less than one court day prior to sentencing.

The conviction stemmed from a murder on February 16, 1992. Defendant and his co-defendants broke into the home of Alfonso Franco; during a struggle, the defendant shot Franco twice killing him.

In preparing for a Parole appearance, the defendant, by way of motion made on or about September 13, 2006, obtained a copy of his pre-sentence report. In obtaining said report, he noticed that it was dated as being both prepared and reviewed on April 1, 1993, which was the exact date of his sentencing. Defendant argues that there is no way to know, based on the dates in question, whether or not the report was ever received and reviewed one day prior to sentencing

as mandated by the CPL and that the defendant is entitled to be re-sentenced. Defendant further argues that the pre-sentence report is erroneous in that it states that he was apprehended during a high speed chase which he denies, and that if his attorney did in fact review the pre-sentence report his attorney was ineffective for failing to object to the alleged errors.

The People, in their reply, claim that the defendant's arguments are without merit because the defendant has the burden of rebutting the presumption of regularity that attaches to all judicial proceedings, and that the defendant has failed to meet this burden. The People point out that the only evidence that the defendant and his attorney were not afforded an opportunity to review the report prior to sentencing is the date on the report. Both the plea and the sentencing minutes are silent regarding the pre-sentence report and specifically reflect no objection by defense counsel regarding the availability of said report. Furthermore, the People argue that even if the defendant did not receive the pre-sentence report one day prior to sentencing, there was no prejudice to him since the sentencing minutes do reflect that the defendant, in exchange for his plea was given the minimum sentence of 15 years to life. Finally, the People argue that the defendant received effective assistance of counsel.

FINDINGS OF LAW

CPL §390.50(2)(a) states in pertinent part "Not less than one day prior to sentencing, unless such time requirement is waived by the parties, the pre-sentence report or memorandum shall be made available by the court for examination and for copying by the defendant's attorney, the defendant himself, if he has no attorney, and the prosecutor." The Appellate Division, Fourth Department in *People v Vaughan 20 AD3d 940 (2005)* refused to set aside the sentence upon the defendant's averment that he had not reviewed the pre-sentence report, at least one day prior to

sentencing holding that said averment did not constitute a legal basis upon which to set aside the sentence because the defendant was represented by (substitute) counsel at the time and the defendant's motion papers were insufficient. Defendant's claim clearly can be denied without a hearing pursuant to CPL §440.30(4)(b) in that "the motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts". We agree with the Vaughan court that there is no legal basis to set aside this sentence based upon the alleged and unproven argument that the report was not received one day prior to sentencing.

In addition, there is no evidence that the report was not reviewed by defense counsel prior to the sentencing on April 1, 1993. At sentencing, pursuant to §380.50, the defendant and his attorney were asked if there was any legal reason why sentence could not be imposed, affording the defendant the opportunity to address either the lack of a pre-sentence report or the alleged inaccuracies in it. The defendant's attorney, Mr. Monteleone, said there was no reason sentence could not be imposed. Defendant did not make a statement. The defense clearly did not raise an objection that the sentence was based on false material in the pre-sentence report or claim that they did not have an opportunity to review the pre-sentence report. *People v Hansen* 99 NY2d 346 (2003).

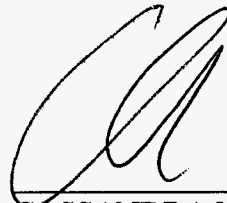
In this case, the defendant, on March 11, 1993, pleaded guilty to Murder in the Second Degree (Penal Law §125.25[3][A]) for a promised sentence of fifteen years to life imprisonment. On that date, Judge Thaddeus Owens informed the defendant "I told Mr. Monteleone and Mr. Reilly I would give you the minimum sentence I could give you, that's the least I could give you, that's fifteen to life." At sentence, on April 1, 1993, when defense counsel was asked if there

was anything he wished to say before sentence was imposed, he replied "I'll rely on the commitment made at the time of the plea." Since the court honored it's promise of the minimum sentence, the court clearly was not negatively influenced by the statement that the defendant was apprehended during a high speed chase.

The defendant received an advantageous plea and nothing in the available record indicates ineffectiveness of counsel. *People v Ford* 86 NY2d 397 (1995); *People v Benevento* 91 NY2d 708 (1998).

The defendant's motion is denied.

ENTER,



CASSANDRA M. MULLEN, J. S. C.