

People v Caroselli

2007 NY Slip Op 30318(U)

March 15, 2007

Supreme Court, Kings County

Docket Number: 0003847

Judge: L. Priscilla Hall

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DECISION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 14

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THE PEOPLE OF THE STATE OF NEW YORK,

Hon. L. Priscilla Hall

vs.

Date: March 15, 2007

Dino Caroselli AKA Wayne Horan

Indictment No.: 3847/79

Defendant

-----X

Defendant, *pro se*, moves to reargue, pursuant to CPLR §2221, his previously denied motion to set aside his sentence pursuant to CPL§440.20. The defendant contends that the court's decision failed to acknowledge his Reply to the People's Answer, evaluate his claim of ineffective assistance of counsel or consider his application for a Writ of Error Coram Nobis. Initially, this court notes that while not specifically mentioned in the previous decision, all of these issues were considered by the court.

In reviewing the facts at issue, it is uncontested that the defendant and two co-defendants were indicted for multiple counts of forgery and grand larceny for having endorsed and cashed New York State employment checks over a three year period. On September 17, 1980, defendant was allowed to plead guilty to one count of Grand Larceny in the Second Degree and was to receive a sentence of 1-1/2 to 3 years. On September 18, 1980, the plea was vacated because the minimum sentence for Grand Larceny in the Second Degree was 2 to 4 years. However, the parties agreed to allow the defendant to plead guilty to the reduced, lesser included, crime of Attempted Grand Larceny in the Second Degree and receive the previously agreed upon sentence of 1-1/2 to 3 years. In his allocution the defendant stated that the value of the stolen property, which he received, was less than \$1500.00 while the elements of the crime of Grand Larceny in the Second Degree required

that the value of the property exceed that amount. In the minutes of the September 18, 1980 plea proceeding supplied by the defendant, he is not advised of his right to appeal.

The defendant's CPL §440.20 motion sought to have his sentence set aside twenty-six years after it was imposed. The grounds for such relief are statutory and require a showing that the sentence "was unauthorized, illegally imposed or otherwise invalid as a matter of law." (CPL §440.20[1]).

The gravamen of the defendant's motion is that he was not advised of his right to appeal at sentencing, which is not a ground for CPL §440.20 relief. The motion however, mentioned that his appealable issue would be that his plea allocution was defective and his counsel was ineffective for not advising him of his right to appeal making his sentence unauthorized. These were viable grounds and the court therefore considered his CPL §440.20 motion. Defendant's Reply added no legal arguments to his original motion. It refuted the People's Answer and reiterated that which was already before the court.

Defendant's September 17, 1980 plea of guilty, to one count of Grand Larceny in the Second Degree, was based on the understanding that he would receive a reduced sentence for his plea, to cover all of the crimes charged in the indictment. Realizing that the sentence was not authorized for that charge, the defense counsel, the prosecutor and the court allowed the defendant to plead guilty to a lesser included charge of Attempted Grand Larceny in the Second Degree which permitted the lesser sentence.

The Grand Jury found sufficient evidence to indict the defendant and two co-defendants for multiple counts of forgery and grand larceny for having endorsed and cashed New York State employment checks over a three year period. The defendant's self-serving statement at his allocution, that his share of the proceeds was less than \$1500.00, did not mean that the People could not prove otherwise at trial.

In North Carolina v. Alford, (400 U.S. 25), the Supreme Court stated that "An individual

accused of a crime may voluntarily, knowingly and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.” (Id. at 37). In People v. Friedman, (39 NY2d 463) the Court upheld a defendant’s plea where the defendant failed to admit that he had committed the crime. In People v. Clairborne, (29 NY2d 950), at the close of the defendant’s trial she was permitted to plead guilty to the crimes of falsely reporting an incident and criminal solicitation in full satisfaction of the indictment. On appeal the Appellate Division reversed the judgment of conviction and dismissed the indictment finding, *inter alia*, that the facts at trial did not establish all of the elements of the crime of falsely reporting an incident. The Court of Appeals reversed the appellate court, holding that “A bargained guilty plea to a lesser crime makes unnecessary a factual basis for the particular crime confessed.” (Id.; see also, People v. Alexander, 97 NY2d 482). Where a defendant pleads guilty to a lesser included crime than one which is charged in the indictment there is no need for him to provide a factual account of the crime (People v. Moore, 71 NY2d 1002; People v. Burney, 306 AD2d 173). Thus the factual basis for a plea of guilty is not required in either the New York State or the Federal courts and the defendant’s appealable issue is without merit.

Defendant’s allegation of ineffective assistance of counsel is belied by the totality of the facts and circumstances surrounding defendant’s plea and sentencing. Defendant’s attorney was sufficiently effective to convince the prosecutor and the court to permit the defendant to plead to one reduced count of a multiple count felony indictment wherein he was sentenced to the minimum amount of permissible time in prison to be served concurrently with a previously imposed sentence. There is nothing before this court to suggest that defendant’s counsel was ineffective during the pre-trial stages of the case or during his plea and sentencing.

This court thus found, in determining the CPL §440.20 issues presented, that the defendant’s sentence was not “unauthorized, illegally imposed or otherwise invalid as a matter of law.” (CPL §440.20[1]).

Defendant’s Application for a Writ of Error Coram Nobis would be applicable, as defendant states, only where “no other avenue of judicial review” is available. Unfortunately for the

defendant, this court conducted a review of the legal issues presented in his CPL §440.20 motion. The fact that the relief he sought was denied does not entitle him to additional review by way of a Writ of Error Coram Nobis.

Notwithstanding the requirements of CPL §§440.20 and 460.30, such a writ requires the defendant to demonstrate, under the circumstances before this court, that he had a “. . . genuine appealable issue which, but for ignorance of or improper advice as to his rights, he might have raised on appeal.” (People v. Melton, 35 NY2d 327, 330). Since this court has determined that the defendant did not have a “genuine appealable issue” his application would not be viable.

Furthermore, the Melton Court further held, that a defendant, “by pleading guilty evinces, *prima facie*, an intention to forego appellate review of his conviction.” (Id.) and where, as here, the defendant “during the time allowed for taking an appeal” did not dispute the validity of the conviction (People v. Lynn, 28 NY2d 196, 203) resentencing for the purpose of extending the time for appellate review is beyond the jurisdiction of this court (CPL §460.30; People v. Corso, 40 NY2d 578; People v. Artusa, 12 Misc. 3d 1196A).

Accordingly, defendant’s motion to reargue and his application for a Writ of Error Coram Nobis are denied. This constitutes the decision and order of the court.

ENTERED
MAR 22 2007
NANCY T. SUNSHINE
COUNTY CLERK

~~HON. L. PRISCILLA HALL~~
J.S.C.