

**People v Foye**

2007 NY Slip Op 30601(U)

April 3, 2007

Supreme Court, Kings County

Docket Number: 0000122/2003

Judge: Carolyn E. Demarest

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At an IAS Term, Part 19 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of April 2007.

P R E S E N T:

HON. CAROLYN E. DEMAREST,

Justice.

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THE PEOPLE OF THE STATE OF NEW YORK

Indictment No. 122/2003

- against -

CHRISTOPHER FOYE,

Defendant.

-----X

The above-named defendant moves, pursuant to CPL 440.10(1), for an order vacating his judgment of conviction obtained by his plea of guilty, entered before this court on October 14, 2003.

### **BACKGROUND**

The factual predicate underlying the present motion stems from an incident which occurred on December 31, 2002 at approximately 11:00 p.m. At that time, the complainant, Mark Faulkner, was walking on Evergreen Avenue in Brooklyn, when he encountered his father, Neil Faulkner, and had a brief conversation. As he began walking away, he encountered the defendant, whom both he and his father knew from the neighborhood, in front of 553 Evergreen Avenue. The defendant then shot the complainant twice in the leg.

After the shooting, Neil Faulkner identified the defendant in a photo array that was shown to him in the 83<sup>rd</sup> Precinct. Thereafter, on January 3, 2003, Detective Simms of the Homicide Team, 83<sup>rd</sup> Precinct, observed the defendant and brought him to the station. The defendant was placed under arrest after being identified as the shooter by Neil Faulkner.

The People presented their case to the grand jury commencing on January 9, 2003. The grand jury heard testimony from Neil Faulkner and from Detective Griffin of the 83<sup>rd</sup> Precinct, who testified as to the presence of shell casings at the scene. On January 16, 2003, the defendant exercised his right to testify before the grand jury. Thereafter, on February 3, 2003, an indictment charging the defendant with Assault in the Second Degree (PL 120.05[2]), Assault in the Third Degree (PL 120.00[1]), Criminal Possession of a Weapon in the Second Degree (PL 265.03[2]), Criminal Possession of a Weapon in the Third Degree (PL 265.02[4]), and Criminal Possession of a Weapon in the Fourth Degree (PL 265.01[1]) was filed. On February 20, 2003, the defendant was arraigned on said indictment.

On October 14, 2003, the defendant, represented by counsel, pled guilty to Assault in the Second Degree (PL 120.05[2]) in satisfaction of all counts of the indictment, in exchange for a sentence of one and a half to three years of incarceration, to run concurrently with a sentence imposed in an unrelated matter under Indictment No. 264/2003 (New York County). As an additional condition for acceptance of his plea, he agreed to waive his right to appeal.

### ***THE INSTANT MOTION***

Defendant is now unrepresented by counsel. In a rambling motion, he seeks an order vacating the judgment of conviction alleging that the court lacked jurisdiction, that his due process rights were violated, and ineffective assistance of counsel.

### ***DISCUSSION***

At any time after entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate the judgment upon certain statutorily enumerated grounds (see CPL 440.10[1]). Among such grounds are: the court did not have jurisdiction of the action or the person of the defendant (CPL 440.10[1][a]); during the proceedings, the defendant by reason of a mental disease or defect was incapable of understanding or participating in such proceedings (CPL 440.10[1][e]); and the judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States (CPL 440.10 [1][h]).

It is well settled that a judgment of conviction is presumed to be valid. This presumption of regularity exists until contrary substantiating evidence appears. (*see People v. Richetti*, 302 NY 290 [1951]). Sufficient evidentiary facts must be alleged in order to successfully challenge the presumed validity of a judgment of conviction. Bare, conclusory allegations are insufficient to carry this evidentiary burden. (CPL 440.30[4][d]; *People v Brown*, 56 NY2d 242[1982]); *People v Session*, 34 NY2d 254 [1974]).

[\*4]

None of defendant's contentions possess merit so as to warrant the vacating of his judgment of conviction.

***Jurisdiction***

Defendant's contention that his conviction must be vacated because the court lacked jurisdiction is devoid of merit.

Initially, the court notes that such claim is procedurally barred because the facts underlying the claim are reviewable from the record (CPL § 440.10[2][b], [2][c], [3][a]; *People v Hall*, 28 AD3d 678 [2006]; *People v Donovan*, 107 AD2d 433 [1985]). However, defendant fails to demonstrate that his challenge to the court's jurisdiction is substantively meritorious.

Defendant erroneously cites Washington State law in support of his jurisdictional arguments. In New York, CPL 210.05 provides that "the only methods of prosecuting an offense in a superior court are by an indictment filed therewith by a grand jury or by a superior court information filed therewith by a district attorney" (*see People v Wiltshire*, 23 AD3d 95 [2005]), and "the right to indictment by a Grand Jury before being tried for an infamous crime is explicitly guaranteed by section 6 of article I of our State Constitution" (*People v Ianone*, 45 NY2d 489, 493 [1978]). In the instant case, it is beyond dispute that defendant was prosecuted, and pled guilty to a count contained in, an indictment duly voted upon and filed by a grand jury. Moreover, the court rejects any assertion by the defendant that the evidence before the grand jury was legally insufficient to support the indictment (*see*

[ 5 ]

*People v Pelchat*, 62 NY2d 97, 106 [1984]), or that it failed to comply with the statutory mandates as to form and content (CPL 200.50<sup>1</sup>; *see Ianone*, 45 NY2d at 595-596).

Defendant's contention that the court lacked jurisdiction because there was improper service of process is likewise devoid of merit. In a criminal matter, the court gains jurisdiction over an individual once a valid accusatory instrument has been filed and the defendant is arraigned (CPL 1.20[9]). Defendant, who was first arraigned in Criminal Court on January 5, 2003, and subsequently, following the grand jury's voting of the indictment, on February 20, 2003, sets forth no facts in support of his contention that the court did not have jurisdiction over his person.

Defendant's challenge to the court's jurisdiction based upon the purported lack of an enacting clause in the statute is refuted by the fact that Penal Law § 120.05(2), as duly enacted by the Legislature in 1965, has stood as a valid statute since. In addition, defendant's attempt to declare himself a sovereign and to declare himself a corporate entity in order avoid liability under the laws of the United States is unsupported by any authority.

### ***Due process***

"A trial court has the constitutional duty to ensure that a defendant, before pleading guilty, has a full understanding of what the plea connotes and its consequences. Although the

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<sup>1</sup> CPL 200.50 requires an indictment to contain "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of the offense charged and the defendant's or defendants' commission thereof with sufficient precision as to clearly apprise the defendant or defendants of the conduct which is the subject of the accusation."

court is not required to engage in any particular litany when allocuting the defendant, due process requires that the record must be clear that the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant” (*People v Catu*, 4 NY3d 242, 244-245 [2005] [citations and internal quotation marks omitted]; *see also Desrosiers v Phillips*, 2006 WL 2092481 [US Dist Ct EDNY 2006]). A review of the transcript of defendant’s plea allocution amply refutes his contention that he was deprived of due process. The court explained to defendant the consequences of the withdrawal of his plea of not guilty, including: (1) his relinquishing of his right to trial; (2) that he would be adjudicated and sentenced as a second felony offender (*see People v Harris*, 61 NY2d 9 [1983]); and (3) that he was waiving his right to appeal. The court further ascertained from defendant that he had not consumed alcohol or taken any drugs within the previous 24 hours (*see People v Galagan*, 35 AD3d 973 [2006]). Thereafter, the defendant, upon questioning by the court, stated that he had discussed his case and possible defenses with his attorney, that he had not been promised anything but the sentence of one and one half to three, concurrent, and that his plea was voluntary. He then stated that on December 21, 2002, with the intent to cause physical injury to Mark Faulkner, he did so by the use of a firearm, thus establishing his guilt of the crime of Assault in the Second Degree (*see People v Hurling*, 2007 NY Slip Op 00900 [4<sup>th</sup> Dept 2007]).

### ***Ineffective assistance of counsel***

In support of the instant motion, defendant alleges several reasons that his counsel was ineffective, including that he hired counsel under duress, that counsel failed to challenge and disclose adverse legal authority to the court and to defendant, that counsel assisted or counseled defendant in illegal conduct, thereby creating a conflict of interest, and that counsel failed to preserve issues for appeal.

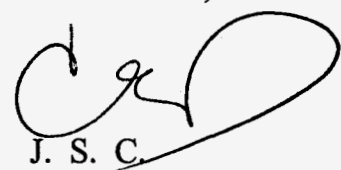
Here, defendant's bare-boned and unsupported allegations provide no support for a record-based claim that counsel provided ineffective assistance in representing him in connection with his plea of guilty (*see People v Samuels*, 2007 NY Slip Op 01468 [1<sup>st</sup> Dept 2007]; *see People v Satterfield*, 66 NY2d 796 [1985]), and he fails to show material non-record facts which entitle him to relief (*see People v Coleman*, 2007 NY Slip Op 01141 [2<sup>nd</sup> Dept 2007]). Moreover, "defendant fails to meet his burden of demonstrating the absence of strategic or other legitimate explanations for his counsel's allegedly deficient conduct" (*People v Silent*, 2007 NY Slip Op 01331 [2<sup>nd</sup> Dept 2007], citing *People v Caban*, 5 NY3d 143, 152; *People v. Rivera*, 71 NY2d 705, 709). Absent such a showing, it is presumed that counsel acted in a competent manner and exercised professional judgment (*see People v Rivera*, 71 NY2d at 709).

In view of the foregoing, the defendant's motion is, in all respects, denied. Since the parties' submissions are sufficient in order for the court to render a determination, there is

no need for a hearing to be held on the instant motion (CPL 440.30[1], [4]; see *People v Satterfield*, 66 NY2d at 799; *People v Demetsenare*, 14 AD3d 792, 793 [2005]).

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

**ENTERED**  
APR 9 2007  
NANCY T. SUNSHINE  
COUNTY CLERK