

People v Cole

2007 NY Slip Op 30609(U)

April 9, 2007

Supreme Court, Kings County

Docket Number: 0008935/2002

Judge: Cheryl E. Chambers

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM, PART 18

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

-against-

DECISION AND ORDER
Kings County
Indictment Number 8935/02

QUAWAN COLE,

Defendant.

-----X
CHERYL E. CHAMBERS, J.S.C.

Pursuant to CPL 440.10, defendant moves pro se to vacate the judgment of conviction entered against him on September 27, 2005 upon a plea of guilty. Defendant's motion is denied because it is procedurally barred.

FINDINGS OF FACT

Defendant was charged by Kings County Indictment Number 8935/02 with robbery in the first, second and third degrees, and with petit larceny, for the gunpoint robbery of Ibrahim Sylla in a discount store located at 1563 Fulton Street in Brooklyn on May 27, 2002. On May 5, 2003 defendant entered a plea of guilty to attempted robbery in the second degree and waived his right to appeal in return for a promised sentence of five years probation, on the condition that he complete the Adolescent Link program; if defendant failed to complete the program he would be sentenced to up to seven years in prison.

On June 21, 2003, defendant absconded from the program. The court gave him another opportunity to complete the program. Defendant again absconded and was involuntarily returned to court on a warrant. On March 17, 2005, defendant was released into the custody of DAYTOP's residential program. After several negative reports from DAYTOP detailing

defendant's failure to comply with the program's requirements, the court set the case down for sentencing.

On September 27, 2005, defendant was sentenced to three years in prison, a \$200 surcharge, and a crime victim's assistance fee of \$10. On September 29, the Sentence and Order of Commitment was amended to reflect that defendant's sentence includes a three year period of postrelease supervision.

Defendant now moves to vacate the judgment of conviction on the ground that the sentence is illegal in that he was not informed at the time he entered his plea that he would be subject to a period of post-release supervision.

CONCLUSIONS OF LAW

CPL 440.10 (2) (c), in relevant part, mandates denial of a motion to vacate a judgment when:

[a]lthough sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon an appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take . . . an appeal during the prescribed period.

"The purpose of [this] provision is to prevent CPL 440.10 from being employed as a substitute for direct appeal when defendant . . . could readily have raised [an issue] on appeal but failed to do so (CPL 440.10[2][c]) [citations omitted]" (*People v Cooks*, 67 NY2d 100, 103 [1986]).

Here, the plea agreement, the sentence, and the court's remarks are all on the record. Defendant could have raised the issue on direct appeal. The issue was not reviewed, however, because defendant did not take an appeal, and that failure was not justified. Defendant could have raised his claim on a direct appeal, notwithstanding his waiver of the right to appeal

(*People v Murray*, 2 AD3d 1160 [3d Dept 2003]; *People v Melio*, 304 AD2d 247 [2d Dept 2003]). Defendant's failure to raise the issue on direct appeal precludes collateral review (*People v Murray*, 2 AD3d 1160).

In any event, the sentence imposed was both legal and in accordance with the plea bargain. The determinate sentence of three years was authorized by Penal Law 70.02 (3) (c) upon a conviction of attempted robbery in the second degree, a class D violent felony offense. The three year determinate sentence includes, by operation of law, an additional three year period of postrelease supervision (Penal Law 70.45 [2]). The postrelease supervision period is properly entered on the records of the court on its sentence and commitment order (*People v Sparber*, 34 AD3d 265 [1st Dept 2006]).

Defendant's plea bargain was conditional: if he completed the Adolescent Link program, he would be sentenced to five years probation; if he did not complete the program, he would be sentenced to up to seven years in prison. Plea bargains conditioning favorable treatment on successful completion of a rehabilitative program are proper (*People v Avery*, 85 NY2d 503 [1995]). Here, defendant did not successfully complete the Adolescent Link program, even after being given a second chance by the court. The court also gave him the opportunity to try to complete DAYTOP's program. He failed, and was sentenced accordingly. The sentence imposed of three years imprisonment and three years postrelease supervision is less than the maximum sentence of seven years the court could have imposed under the plea bargain, as defendant understood it.

For the foregoing reasons, defendant's motion is denied.

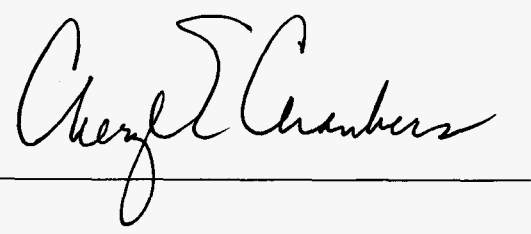
This constitutes the decision and order of the court.

The defendant is hereby advised of his right to apply to the Appellate Division, Second

Department, 45 Monroe Place, Brooklyn, NY 11201 for a certificate granting leave to appeal from this determination. This application must be made within thirty days of service of this decision. Upon proof of financial inability to retain counsel and to pay the costs and expenses of the appeal, the defendant may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Application for poor person relief will be entertained only if and when permission to appeal or a certificate granting leave to appeal is granted (22 NYCRR 671.5).

Dated: April ⁹ 2007

ENTER



Cheryl E. Chambers

ENTERED
APR 10 2007
NANCY T. SUNSHINE
COUNTY CLERK