

People v Rastsiuk

2007 NY Slip Op 30705(U)

April 11, 2007

Supreme Court, Kings County

Docket Number: 0007582/2004

Judge: Raymond Guzman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 9

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

DECISION AND ORDER
Indictment #7582/04

-against-

ANDREI RASTSIUK,

Defendant.

-----X
RAYMOND GUZMAN, J.S.C.

On November 22, 2004, the defendant was arrested for stealing a 2004 Lexus automobile, valued at more than \$50,000, and was subsequently charged under Indictment #7582/04 with grand larceny in the second degree, a class C felony (PL §155.40[1]), and eleven other offenses. On March 16, 2005, the defendant plead guilty to criminal possession of stolen property in the third degree, a class D felony (PL §165.50), in satisfaction of the indictment, and in exchange for a promised “split sentence” of five months in jail¹ and five years probation. As part of the plea agreement, the defendant also waived his right to appeal. On May 3, 2005, the court rendered judgment and sentenced the defendant as promised (Parker, J., at plea and sentence).

On December 15, 2005, the court issued a “Declaration of Delinquency” against the defendant, based on the “Specifications of Alleged Violation of Probation” (“VOP”), filed by the Department of Probation (“Probation”) (Parker, J.).

On April 12, 2006, the defendant appeared before this court in Part 32, and plead guilty to the VOP, under “Specification #1” thereof, in exchange for a sentence [re-sentence] of one-to-

¹ The People initially offered 6 months jail/5 years probation; it appears the 5 month split was ultimately arrived at because it closely approximated the time the defendant had already served.

three years in prison, the minimum prison term authorized for criminal possession of stolen property in the 3rd degree (the crime for which the defendant had originally been sentenced to jail and probation). This court revoked the defendant's sentence of probation, and re-sentenced him accordingly.

In papers dated January 24, 2007, the defendant, who is represented by retained counsel on the instant motion, now states that he wishes to withdraw his guilty pleas, both to the VOP and to the underlying crime of criminal possession of stolen property in the third degree, and he moves this court under CPL §440.10[1][h], to vacate both convictions. On March 23, 2007, the People filed papers opposing the defendant's motion.

This court has reviewed the Supreme Court case file; the papers filed by both parties, including the exhibits appended thereto; and the minutes of the plea and re-sentencing proceeding held before this court on April 12, 2006. For the reasons set forth below, the defendant's motion to vacate either and/or both of the aforesaid convictions is summarily denied.

The Defendant's Motion

The defendant suggests [wrongly as it turns out] that Probation filed the VOP on December 15, 2006, as a result of his arrest in Kings County, on November 29, 2006, on charges of petit larceny, criminal possession of stolen property in the fifth degree, and criminal mischief in the fourth degree, all class "A" misdemeanors (Docket #2005KN077410). The defendant notes that he plead guilty under this docket to the criminal mischief count and was sentenced to "time served" on April 14, 2007,² two days after he plead guilty to the VOP.

² The defendant has submitted the plea minutes for Docket #2005KN077410, 4/14/07 (Kings Co. Crim. Ct., Sciarrino, J.), in which the defendant admits that on 11/29/05, he "broke a window and removed a GPS system from a car."

The defendant now claims he did not understand that he would violate the sentence of probation imposed under Indictment #7582/04, “by merely getting arrested on some new charge,” as opposed to “getting arrested and convicted of a subsequent felony.” Thus, the defendant claims, his guilty plea under Indictment #7582/04 was obtained in violation of his constitutional rights, the ground for *vacatur* under CPL §440.10[1][h], in that it was not entered “voluntarily, knowingly and intelligently.”

The defendant maintains that the court who accepted his guilty plea under Indictment 7582/04, on March 16, 2005, (Parker, J.), is to blame for his failure to understand the conditions of his promised sentence of probation; he alleges that the court engaged him in a plea allocution which was “confusing and unclear,” and “failed to clearly and adequately advise” him of a “direct consequence” of his conviction and five-year probation sentence, citing *People v Catu*, 4 NY3d 242, 244 [2005], and *People v Ford*, 86 NY2d 397, 403 [1995].

Specifically, the defendant contends that the court told him there were three conditions to his probation, and that if he violated any of them, he would be sentenced to state prison. According to the defendant, the court warned that he would violate one condition if he failed to report to Probation, and a second if he failed to appear in court as required -- but as to the third condition, the court “alternately” told the defendant he would be in violation if he “got arrested for something new,” and if he “got convicted of a subsequent felony.” As a result, the defendant maintains, “it is not clear from the record” as to which of the two eventualities would constitute a probation violation, and that he [the defendant] had understood it to be only the latter.

In purported support of this claim, the defendant has submitted the transcribed minutes of the plea proceeding on March 16, 2005. Although the defendant alleges no non-record facts to support his claim, he nevertheless argues that his motion to vacate judgment should not be

procedurally barred under CPL §440.10[2][c], because the court's "error is not readily apparent from the record."

The People's Reply

As the defendant apparently anticipated, the People argue that the defendant's claim is procedurally barred under CPL §440.10[2][c], because it is based entirely on the record and [therefore] could have been raised on direct appeal to the Appellate Division. The People note that the defendant's waiver of his right to appeal (as part of his plea agreement) would not have barred him from challenging the voluntariness of his plea on direct appeal, and therefore, does not justify the defendant's failure to have done so, or entitle him now to use CPL §440.10 as a substitute for appeal (citing *People v Swansbrough*, 307 AD2d 389 [3d Dept. 2003]; *People v Melio*, 304 AD2d 247 [2d Dept. 2003]; *People v Alexander*, 256 AD2d 349 [2d Dept. 1998]).

The People contend that the defendant's motion is also without substantive merit, characterizing as "disingenuous" the defendant's claim that he was not adequately advised as to the terms of his plea. The People correctly note that the three conditions imposed by the court at the plea proceeding on March 16, 2005, pertained only to the court's promise to sentence the defendant as provided in the plea agreement (*i.e.*, to jail and probation, rather than to state prison), and not to the terms of the defendant's service of probation after such sentence was imposed. They assert that the court's plea colloquy was thorough, and properly informed the defendant that (1) if he did not report to Probation, or appear in court when required, or if he "got arrested for something new," the court would sentence him to state prison and would not allow him to withdraw his plea; and (2) upon his sentencing as per the plea agreement, he would have a felony conviction on his record, and if convicted of committing a subsequent felony, he would be

classified as a “predicate felon” subject to a mandatory state prison sentence. The People argue that the court was not required, before accepting the defendant’s plea, to advise him of the rules he would be obliged to follow while serving his sentence of probation. The People (like the defendant) cite *People v Catu*, 4 NY3d 242, *supra*, and *People v Ford*, 86 NY2d 397, *supra*.

The People point out that the defendant, represented by able counsel from the Legal Aid Society, entered into a beneficial plea agreement on March 16, 2005, which subjected him to a much less onerous sentence than the maximum authorized for the crime to which he plead guilty, let alone for the top count in Indictment 7582/04,³ and would have enabled the defendant to avoid prison altogether, but for his own “misdeeds” while serving his sentence of probation.

Decision

This court agrees with the People that the defendant’s instant claim is procedurally barred under CPL §440.10[2][c], which provides that a court *must* summarily deny a motion to vacate judgment when sufficient facts appear on the record underlying the judgment to have permitted adequate appellate review of the issue raised, and yet no such appellate review occurred due to the defendant’s unjustifiable failure to raise the issue on appeal. The defendant’s assertion that this provision does not apply to his motion because the court’s alleged “error” during the plea colloquy “is not readily apparent from the record,” is entirely unsupported. The defendant has submitted the minutes of the plea colloquy with his papers, and relies on his interpretation of the court’s remarks therein to advance his claim for *vacatur*; if he is aware of evidence *de hors* the record to establish that the court did not adequately inform him of the consequences of his plea, he has failed to share it in his papers. See CPL §440.30[4][b].

³ The maximum sentence for criminal possession of stolen property-3rd degree is an indeterminate prison term of 2-1/3 to 7 years; the maximum for grand larceny-2nd degree is 5 to 15 years.

The defendant also appears to have misinterpreted the holdings in *People v Ford*, 86 NY2d 397, *supra*, and *People v Catu*, 4 NY3d 242, *supra*, addressing the question of whether a particular “result” of a conviction is a “direct consequence” thereof. In *Ford*, the Court of Appeals distinguished between “direct” and “collateral” consequences of a conviction, and held that when accepting a plea, a court must advise the defendant of the former, but not the latter. The Court defined a direct consequence as “one which has a definite, immediate and largely automatic effect on the defendant’s punishment” (*Ford, supra*, at 403, citing *Cuthrell v Director, Patuxent Inst.*, 475 F2d 1364, cert denied, 414 US 1005), and then applied that definition to “deportation” (the “consequence” at issue in *Ford*). The Court ruled that deportation is not a direct consequence of conviction,⁴ “because it is a result peculiar to the individual’s personal circumstances and one not within the control of the court” (*Id.*).

In *Catu*, on the other hand, the Court of Appeals applied the same definition and found that “post release supervision,”⁵ a set period of supervision which extends beyond the expiration of a defendant’s prison term, is a direct consequence of conviction if it is included in the sentence for such conviction. Accordingly, the Court held that a defendant must be informed at the plea proceeding if his promised sentence will include a period of post-release supervision. However, the Court did *not* suggest that a defendant must likewise be informed of the rules which would pertain during such supervision and/or the penalties for violation thereof.

Applying the *Ford* definition to probation revocation, the “consequence” at issue in the case at bar, this court finds that revocation is not a direct consequence of a conviction when the

⁴ It might be noted that during the plea colloquy in the instant case, the court did inform the defendant that if he was not a citizen, his conviction could result in deportation.

⁵ Not to be confused with “discretionary” or “conditional” “parole.”

sentence therefor is probation. Indeed, probation revocation is not even a “collateral” consequence in the same sense as deportation – revocation is a consequence solely of a defendant’s conduct while serving probation. Accordingly, this court agrees with the People that the court’s plea colloquy on March 16, 2005, adequately advised the defendant of the direct consequences of his plea.

Moreover, as Probation states in its VOP papers, the defendant was advised in writing of the conditions pertaining to probation at sentencing. The court file contains a document entitled “Conditions of Probation,” dated May 3, 2005, bearing the defendant’s name, indictment number, the court’s name, the court clerk’s signature, and the defendant’s signature, ordering the defendant to comply with nine general conditions, and to “follow the instructions of the Probation Officer as to the way in which they are to be carried out.” The conditions require the defendant, *inter alia*, to report immediately to Probation; to remain within the jurisdiction unless granted permission by the court or Probation Officer; and to notify the Probation Officer if arrested. Notably, they do not specifically require the defendant not to commit more crimes; this admonition is codified under CPL §410.10[2], which provides that a probationer’s commission of an additional offense, other than a traffic infraction, constitutes a ground for revocation of such sentence irrespective of whether such fact is specified as a condition of the sentence. “That condition should be obvious to any offender and revocation has been upheld where the condition was not expressly specified by the court” (Preiser, Practice Commentaries, McKinney’s Cons Laws of NY, Book 11A, CPL 410.10, at 96, citing *People v York*, 2 AD3d 1158 [3d Dept. 2003]). See also *People v Gagnon*, 245 AD2d 593 [3d Dept. 1997]. The defendant need not be convicted of such additional offense; proof by a preponderance of the evidence, at a probation violation hearing, that the defendant committed the offense is sufficient. See Preiser, *supra*, citing, *inter alia*, *People v Outley*, 80 NY2d 702.

Accordingly, four arrests and/or convictions were included among the nine separate probation violations (called "Specifications")⁶ alleged against the defendant by Probation in its collective VOP papers, apparently prepared on November 3, and December 15, 2005 (and filed on December 15, 2005), and on January 3, 2006, respectively. Probation asked the court to revoke the defendant's sentence of probation and re-sentence him to incarceration.

On or about January 5, 2006, after the defendant had twice failed to report for supervision in New York and had returned to Florida without permission (Specifications #8 and #9), a warrant for his arrest was ordered at Probation's request (Marrero, J.). The defendant was eventually "picked up on an out of state action," and brought before this court on April 3, 2006.

On April 12, 2006, as noted *supra*, the defendant plead guilty to the VOP before this court, under Specification #1, his misdemeanor conviction for disorderly conduct (Docket #2005KN068960), to cover all of the Specifications and in exchange for the minimum prison sentence authorized for the underlying crime. The minutes of this proceeding reveal that the

⁶ 1. The probationer failed to lead a law-abiding life. On 10/24/05, he was arrested in Kings Co. for criminal possession of stolen property in the 5th degree and petit larceny; convicted by guilty plea of disorderly conduct (PL §240.20) (Docket #2005KN068960); and sentenced to a conditional discharge, with 5 days community service.

2. The probationer failed to notify the Probation Officer promptly of 10/24/05 Kings Co. arrest.

3. On or about 10/24/05, the probationer [while under "courtesy supervision" in Florida] left Florida and went to New York, without permission from the court or Probation Officer.

4. The probationer failed to lead a law-abiding life. On 9/15/05, he was arrested in Florida for "DUI alcohol or drugs;" case adjourned to 11/9/05.

5. The probationer failed to notify the Probation Officer promptly of 9/15/05 Florida arrest.

6. The probationer failed to lead a law-abiding life. On 7/26/05, he was arrested in Florida for "robbery with no weapon;" case pending.

7. The probationer failed to lead a law abiding life. On 11/29/05, he was arrested in Kings Co. for criminal mischief, petit larceny, and criminal possession of stolen property in the 5th degree, Docket #2005KN077410; adjourned to 1/11/06.

8. The probationer failed to report to his Probation Officer in NY on 12/15/05 & 12/22/05.

9. On or about 1/2/06, the probationer left New York and went to Florida, without permission from the court or Probation Officer.

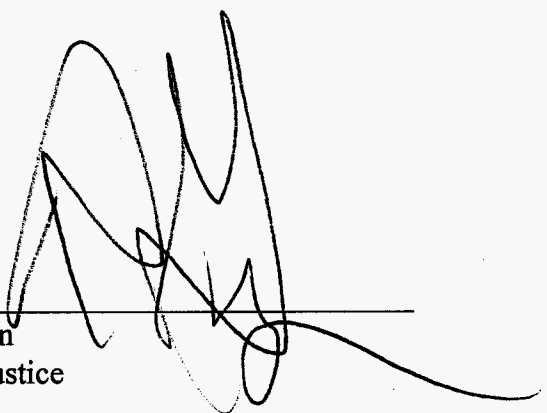
Note: Specification #7 was originally listed in the VOP papers as #8. At the VOP plea proceeding, this court determined that the original Specification #7 was a duplicate of Specification #1 (the conviction under Docket #2005KN068960), with a different (erroneous) date of conviction.

defendant never indicated that he did not understand that a non-felony conviction could result in revocation of his probation; to the contrary, the defendant acknowledged not only that he had plead guilty to the misdemeanor crime of disorderly conduct, but that he had thereby violated his probation.

The defendant's motion to vacate judgment under CPL §440.10 is summarily denied in its entirety.

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

Dated: April 11, 2007
Brooklyn, New York



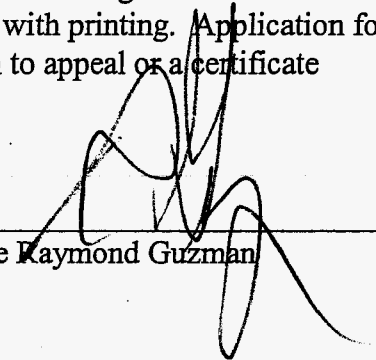
Raymond Guzman
Supreme Court Justice

ENTERED

APR 12 2007

NANCY T. SUNSHINE
COUNTY CLERK

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York 11201, for a certificate granting leave to appeal from this determination. This application must be made within 30 days of service of this decision. Upon proof of financial inability to retain counsel and to pay the costs and expenses of such 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. See 22 NYCRR §671.5.


Justice Raymond Guzman

ENTERED

APR 12 2007

NANCY T. SUNSHINE
COUNTY CLERK