

People v Bilbrew

2007 NY Slip Op 31195(U)

April 24, 2007

Supreme Court, Kings County

Docket Number: 0006727/1995

Judge: Abraham G. Gerges

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

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THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Abraham G. Gerges

Date: April 24, 2007

-against-

DECISION & ORDER

MICHAEL BILBREW

Indictment No. 6727/1995

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Defendant was convicted by jury verdict of murder in the second degree (P.L. §125.25[3]), attempted robbery in the first degree (P.L. §§110/160.15[2]) and criminal possession of a weapon in the second degree (P.L. §265.03) and sentenced on June 11, 1996 to concurrent terms of imprisonment of twenty-five years to life for the murder, seven and one-half to fifteen years for the attempted robbery and six to twelve years for weapon possession as a second felony offender (Aiello, J., trial and sentence). Defendant's conviction was affirmed by the Appellate Division Second Department (*People v Bilbrew*, 268 AD2d 591 [2d Dept 2000]) and leave to appeal to the Court of Appeals was denied (*People v Bilbrew*, 95 NY2d 832 [2000]). Defendant's petition for a federal writ of habeas corpus was denied on May 17, 2001 and a certificate of appealability was denied by the Second Circuit Court of Appeals.

Defendant now moves, pro se, pursuant to CPL §440.20 to set aside his sentence on the grounds that the sentencing court failed to comply with CPL §380.50(1). Specifically, defendant asserts that the court's failure to inquire of him directly as to whether he wished to make a statement prior to the imposition of sentence resulted in an invalid sentence.

Section 380.50(1) of the Criminal Procedure Law requires that the sentencing court afford

the prosecutor, defense counsel and defendant the opportunity to speak at sentencing (*People v McClain*, 35 NY2d 483, 491 [1974]). The statute provides:

At the time of pronouncing sentence, the court must accord the prosecutor an opportunity to make a statement with respect to any matter relevant to the question of sentence. The court must then accord counsel for the defendant an opportunity to speak on behalf of the defendant. The defendant also has the right to make a statement personally in his or her own behalf, and before pronouncing sentence the must ask defendant whether he or she wishes to make such a statement.

It is well established that literal compliance with CPL §380.50(1) is not required because the disappearance of the historical basis for a defendant's allocution before sentence has decreased its significance (*People v McClain* at 491). Because "legal cause for not imposing judgement now is raised by a motion to set aside the verdict, the purpose of addressing the court at judgement time is to convey information relevant to the sentence to be imposed." (Preiser, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 11A, CPL §380.50 at 283). The Court of Appeals has determined that while literal compliance is preferable, substantial compliance is sufficient (*People v McClain* at 491-492).

In *McClain*, the Court of Appeals held that the sentence was valid, even though the sentencing court had not expressly asked the defendant whether he wished to speak before being sentenced (*Id.* at 483). The Court based its holding on the fact that the defendant did not claim to have anything to say or that he would have addressed the court, that the sentencing court had invited the defense attorney to speak, that counsel had spoken for the defendant, and that the defendant did not express a desire to speak (*Id.* at 491).

In this instance, defendant was aware of his right to address the court because he was initially advised by the court clerk that he may speak before sentence was pronounced. After

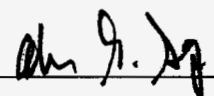
defendant's predicate status was resolved with his participation, defense counsel spoke on his behalf. He sought to delay defendant's sentence so that defendant could marry, he spoke of defendant's mother and asked the court to impose the minimum sentence because of defendant's age and background. Moreover, defendant expressed no desire to speak and at no time was the failure to address the statutory requirement brought to the court's attention when it could have readily been corrected (*see People v Regan*, 88 AD2d 664 [2d Dept 1982]; *People v Pope*, 163 AD2d 905 [4th Dept 1990]).

Finally, in a supplemental submission defendant claims that he had a great deal to say to the court if only he had been asked directly. However, because the subject matter of his proposed remarks would not have addressed the prospective sentence but rather was directed toward repeating arguments already raised at trial or in his motion to set aside the verdict, such remarks would have been inappropriate under the circumstances and misplaced under CPL§380.50(1).

Accordingly, defendant's motion is denied.

This decision shall constitute the order of the court.

ENTER:



ABRAHAM G. GERGES

J.S.C.

HON. ABRAHAM G. GERGES
J.S.C.

ENTERED
MAY 11 2007
NANCY T. SUNSHINE
COUNTY CLERK