

People v Graham

2007 NY Slip Op 31411(U)

April 30, 2007

Supreme Court, New York County

Docket Number: 0005846/1997

Judge: Anthony J. Ferrara

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SUPREME COURT COUNTY OF NEW YORK
CRIMINAL TERM: SPECIAL NARCOTICS PART
-----X
THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER
SCI # 05846/97

-against-

KEITH GRAHAM,
Defendant.
-----X
ANTHONY J. FERRARA, J:

On August 5, 1997, the defendant was released on his own recognizance after he pleaded to guilty to criminal possession of a controlled substance in the fourth degree (PL § 220.09). The case was adjourned for sentencing until September 16, 1997, but the defendant failed to appear and the court issued a bench warrant for his arrest. On August 28, 2006, the defendant was returned from New Jersey where he had been incarcerated under a different name since September 14, 2005. On January 5, 2007, this Court sentenced the defendant to three to nine years of incarceration to run concurrently with his New Jersey sentence. On January 29, 2007, the defendant filed a *pro se* motion pursuant to Criminal Procedure Law § 440.10 [1][h], to vacate his conviction on two separate grounds. The defendant argues that the judgment was obtained in violation of his constitutional rights because of the lengthy delay between his plea and the imposition of sentence and that the sentence was imposed in violation of Criminal Procedure Law § 580.20. The People filed their response on April 4, 2007.

Defendant alleges in his motion that he was shot sixteen times in 1997 between the time of his plea and his sentence and that he was hospitalized until sometime in December of 1997. He asserts that he submitted proof of this claim to the court in October of 2006. The court's notes on September 19, 2006, and on October 13, 2006,

indicate that although the defendant stated he was shot sixteen times in November of 1997, he was *unable to explain why he did not appear on his earlier sentencing date of September 16, 1997*. At defendant's next appearance on October 31, 2006, the court notes indicate that the defendant stated he was shot in August of 1997. On the October 31, 2006, appearance the court noted that defense counsel presented a police report confirming that the shooting occurred in August of 1997 but that the defendant was carrying false identification at the time. The probation report states that, according to the defendant, he failed to appear on September 19, 1997, because he was incarcerated in New Jersey. Additionally, the probation report states that defendant has seven felony convictions in New Jersey. The Probation report lists that defendant was *arrested on October 7, 1997, for drug possession and that he was rearrested on September 14, 2005, for manufacture and distribution of drugs*. The People also submitted defendant's New Jersey Judgment of Conviction dated February 24, 2006, under the name Derrick Kitt, and this document lists the date of his original plea on this New Jersey case as September 2, 2000. The New Jersey Judgment of Conviction credits the defendant with a total of ten days incarceration accumulated on five separate dates between the time of his arrest in October of 1997 and his September 14, 2005, arrest. While the reasons for these brief periods of incarceration are not clear on the record before the Court, it is quite clear that none of these dates of incarceration include September 16, 1997. On February 24, 2006, the defendant was sentenced in New Jersey to four years incarceration with two years of parole ineligibility.

The transcript of the defendant's sentencing on this case on January 5, 2007, shows the Court noted that the person who was shot in August of 1997 identified

himself to the Police as Rodney Parks (Sentencing Transcript, January 5, 2007, pages 4-5). The defendant explained that at the time of the shooting his driver's license had been suspended and that he was carrying someone else's license (Sentencing Transcript, January 5, 2007, page 6). The defendant also stated that, although he eventually gave his "real name" to the hospital, he was unable to obtain any of his own hospital records containing his "real name" because he was incarcerated (Sentencing Transcript, January 5, 2007, pages 6-7). The defendant admitted he was represented by an attorney on his cases in New Jersey (Sentencing Transcript, January 5, 2007, pages 8-10). By his own admission, this defendant used at least three different names while a fugitive and, for a majority of the period when he failed to return for his sentence in New York, he was represented by an attorney.

Criminal Procedure Law § 580.20, known as the interstate agreement on detainers, provides for the transfer of a sentenced prisoner from the jurisdiction in which he or she is incarcerated to another state for trial of a pending criminal charge. The defendant alleges that on July 11, 2006, in response to a request for temporary custody, he waived extradition from New Jersey to New York in order to dispose of this case. The defendant argues that the People were required to dispose of defendant's case within one hundred and eighty days of this date (CPL § 580.20[3][a]). Case law is divided on whether the interstate agreement on detainers applies to convicted prisoners awaiting sentence (*see People v. Nosek*, 236 A.D.2d 892 [4th Dept 1997] *citing People v Randolph*, 85 Misc.2d 1022 [Sup Ct Queens County 1976] [finding that CPL § 580.20 applies when an out-of-State prisoner has a pending "untried indictment ... information ... or complaint" not where guilt has been established and defendant is awaiting

sentencing]; *but see Tinghitella v. California*, 718 F.2d 308 [9th Cir. 1983] [concluding that the terms "trial" and "final disposition" as used in the interstate agreement on detainers encompass sentencing]; *Reed v. Farley*, 114 S. Ct. 2291 [1994] [holding that, under the Compact Clause, United States Constitution Article I, Section 10, clause 3, the interstate agreement on detainers is a federal law subject to federal construction]). However, this Court need not decide this issue to resolve defendant's claim.

Here, even if Criminal Procedure Law § 580.20 applied, the defendant was sentenced within the required one hundred and eighty day period. The period commences when a prisoner's request for disposition is "delivered to the court and prosecuting officer of the jurisdiction that lodged the detainer" (*see Fex v. Michigan*, 113 S.Ct. 1085, 1091 [1993]). Even if July 11, 2006, were found to be the date that defendant's request was delivered to the People, defendant's sentencing date of January 5, 2007, is within one hundred and eighty days. Furthermore, much of the delay would be excluded as reasonable and necessary (CPL § 580.20[3][a]). The court notes indicate that the defendant appeared in New York to dispose of this matter on August 28, 2006, and the case was adjourned until September 8, 2006, for defense counsel to be notified and for an updated probation report. On September 8, 2006, defense counsel was not available and the case was adjourned until September 19, 2006. Although the probation report is dated September 5, 2006, the court notes from September 19, 2006, indicate that the case was adjourned until October 13, 2006, for an updated probation report and for the People to file their lab report. On October 13, 2006, the People served and filed the lab report and the court adjourned the case until October 31, 2006, for sentence. On October 31, 2006, the court again adjourned the

case to January 5, 2007, for sentence. Accordingly, defendant's motion for the Court to enter an order vacating his guilty plea and dismissing the indictment due to a violation of Criminal Procedure Law § 580.20 is denied.

Addressing defendant's second argument, Criminal Procedure Law § 440.10[1][h] provides that at any time after the entry of judgment, a defendant may move to vacate a judgment upon the ground that the judgment was obtained in violation of defendant's rights under the Constitution of the State of New York or the United States Constitution. The defendant claims that the sentence was imposed after unreasonable delay and that therefore the court lost jurisdiction over the case. The People, without disputing the factual allegations in defendant's motion, respond that the defendant failed to allege sufficient facts to prove any of his allegations of misconduct or prejudice and therefor his motion should be denied (*see People v. Friegood*, 58 N.Y.2d 467, 472 [1983][trial court properly denied defendant's motion to vacate a judgment of conviction, grounded on claims of prosecutorial misconduct, juror misconduct and misrepresentation by a prosecution witness, without initially conducting an evidentiary hearing]; *People v. Ozuna*, 7 N.Y.3d 913 [2006] [affirming trial court's denial of a CPL § 440.10 motion based on ineffective assistance of counsel when the defendant failed to submit sworn allegations substantiating or tending to substantiate all the essential facts]). For the reasons below the Court finds that the sentence was not imposed in violation of defendant's rights.


A criminal defendant is entitled to be promptly sentenced after conviction, and entry of judgment may not be "indefinitely deferred or postponed" (*see Matter of Hogan v Bohan*, 305 N.Y. 110, 112 [1953]). Criminal Procedure Law § 380.30[1] requires that

a sentence "must be pronounced without unreasonable delay" and a failure to do so results in a loss of jurisdiction over the defendant (*see People ex rel. Harty v Fay*, 10 N.Y.2d 374 [1961] [finding six and one half year delay between plea and sentence unreasonable]; *cf. Matter of Weinstein v Haft*, 60 N.Y.2d 625, *affg* 93 A.D.2d 786 [over three year delay between plea and sentence reasonable when at the defendant's behest]). In New York, a long and unexplained delay is presumed to prejudice a defendant and the burden to sentence a defendant rests with the State and its agents (*see People v. Drake*, 61 N.Y.2d 359 [1984] [finding thirty-nine month delay between conviction and sentence unreasonable and remanding to county court to determine whether delay may be excused or the court lost jurisdiction to sentence the defendant]). However, "If the delay is caused by legal proceedings or other conduct of the defendant which frustrates the entry of judgment, it is excusable" (*see Drake*, 61 N.Y.2d at 366). The People do not have a duty to make efforts to apprehend an absconding defendant (*see People v. Headley*, 134 A.D.2d 519 [2nd Dept 1987] *lv. granted* 72 N.Y.2d 861, *appeal dismissed* 72 N.Y.2d 931 [1988]; *cf. People v. Monaghan*, 34 A.D.2d 815 [2nd Dept 1970] [finding that, when the District Attorney's office knew the defendant was incarcerated in Texas and made no formal attempt made to extradite him, a seven year delay after his guilty plea was unreasonable and divested the court of jurisdiction to sentence]). Here, the defendant did not appear on his sentence date in 1997. Additionally, he gave conflicting reasons for his absence to the court and to the Department of Probation. Even assuming that the defendant was hospitalized due to his gunshot wounds and recovering from those wounds on September 16, 1997, the

nine year delay between his plea and sentence may reasonably be attributed to defendant's actions. Mr. Graham concedes the use of a false name, Rodney Parks, at the time he was shot and he was incarcerated in New Jersey under a third name, Derrick Kitt. Although there were five times that the defendant was in custody prior to the current period, the longest period lasted five days from August 31, 2005, to September 4, 2005. The People could not reasonably have been aware of these brief periods of incarceration such that the lengthy period between defendant's plea and sentence in this case can be found to be unreasonable or unexplained. Accordingly, the Court finds that the delay between defendant's plea and his sentence excusable. Defendant's motion is denied.

This opinion constitutes the decision and order of the court.

Dated: New York, New York
April 30, 2007



ANTHONY J. FERRARA
Acting Justice Supreme Court