

**People v Livermore**

2007 NY Slip Op 31577(U)

May 17, 2007

Supreme Court, Kings County

Docket Number: 0009658/2001

Judge: Patricia DiMango

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

MEMORANDUM

SUPREME COURT : KINGS COUNTY

(Criminal Term, Part 30)

-----X  
PEOPLE of the STATE of NEW YORK,

By: DI MANGO, J.

- against -

Dated: May 17, 2007

BENJAMIN LIVERMORE,

Indictment No. 9658/2001

Defendant.  
-----X

The defendant, pro se, has moved for an order granting him a free copy of the minutes of his re-sentencing proceedings, which took place on February 26, 2004<sup>1</sup>.

In deciding the motion, the court has considered the moving papers, the People's opposition, and the court file.

***Background***

On February 7, 2002, an indictment was filed charging the defendant (and a co-defendant) with Burglary in the Second Degree and related charges in connection with events which occurred on December 16, 2001. He was arraigned upon this indictment on March 8, 2002. On the next court date, April 24, 2002, the defendant accepted a plea offer, withdrew his "not guilty" plea, and pleaded guilty to Attempted Burglary in the Second Degree in full satisfaction of this indictment. Upon entering his guilty plea, the defendant also executed a waiver of his right to appeal.

On November 7, 2002, the court sentenced the defendant to six months' imprisonment<sup>2</sup> and five year's probation.

---

<sup>1</sup> While in the body of the defendant's form motion papers he referred to trial transcripts, there was no trial herein and an addendum to the motion specifically notes this date.

<sup>2</sup> Although not critical to this application, there is some conflict as to the "split" sentence originally imposed. Court file notations and electronic records, as well as the People's records, all indicate that the defendant was sentenced to six months' incarceration, whereas the order of

Thereafter, while on probation, the defendant was charged with violations thereof. In answer to these charges, the defendant pled guilty to Specification # 1 of the charged violations on February 26, 2004, and was thereupon re-sentenced to two years' incarceration. It is apparently the minutes of these proceedings which the defendant is herein seeking to have provided, free of charge.

### *Transcripts*

A defendant has a constitutional right to have a free transcript in order to effectuate his right to a first appeal.<sup>3</sup> However, a defendant has no federal constitutional right to a free transcript for collateral proceedings unless the defendant can demonstrate that there is a potentially meritorious claim.<sup>4</sup>

The defendant does not state for what purpose he requires his violation of probation plea minutes. The court observes that, in this case, the defendant waived his right to appeal from the original underlying conviction and, in any event, the defendant's time to appeal from either the original judgment of conviction or the amended judgment re-sentencing the defendant to two years' incarceration had long passed before the defendant brought this motion. Furthermore, under Second Department precedent, the defendant is precluded from raising any claim on appeal as to the excessiveness of the violation of probation sentence by virtue of his original plea waiver of appeal.<sup>5</sup> Thus, the

---

commitment and other documents reflect 60 days' imprisonment.

<sup>3</sup> *Griffin v Illinois*, 351 US 12, *reh. denied*, 351 US 958 (1956).

<sup>4</sup> *United States v MacCollom*, 426 US 317 (1976); *Sistrunk v United States*, 992 F2d 258, 259-260 (10th Cir. 1993); *United States v Losing*, 601 F2d 351, 352-353 (8th Cir. 1979); *Crossley v United States*, 538 F2d 508, 509 (2nd Cir. 1976); *see also Pennsylvania v Finley*, 481 US 551 (1987 -- recognizing the right to a free attorney on a first appeal of right, but denying the right to a free attorney for a collateral attack on judgment).

<sup>5</sup> *People v Kimbrough*, 25 AD3d 810, *lv. denied*, 7 NY3d 758 (2006); *People v Gorovoy*, 309 AD2d 764 (2003); *People v Bennett*, 269 AD2d 401, *lv. denied*, 94 NY2d 916 (2000).

only use that the defendant could make of the transcript would be upon a collateral proceeding.

However, CPL 440.10 (2) (c) mandates that a court deny a motion to vacate a judgment if all the necessary facts relating to the legal issue appear “on the record.”<sup>6</sup> The “on-the-record” bar applies regardless of whether or not the issue (as opposed to facts) has been preserved for appellate review.<sup>7</sup> Since the legal sufficiency of a plea allocution<sup>8</sup> and the voluntariness of a plea<sup>9</sup> are matters that appear “on the record,” record-based claims regarding them are barred from being entertained in a post-conviction motion to vacate a judgment. If the issue could have been raised on appeal but was not, the defendant is precluded from raising the claim on a motion to vacate the judgment, as the latter cannot serve as a substitute for a direct appeal.<sup>10</sup>

Thus, any motion to vacate the judgment based on transcripts would be frivolous, as procedurally barred.

Accordingly, the motion is denied because the defendant has failed to show that, based on any potential information obtainable from the transcript, there exists a meritorious issue that could be raised on a prospective motion to vacate the judgment.

Additionally, Judiciary Law § 302 requires a court stenographer to provide a defendant with a transcript of any proceeding upon payment of the appropriate fee. The

---

<sup>6</sup> *People v Cooks*, 67 NY2d 100, 101 (1986); *People v Sadness*, 300 NY 69, 73-74 (1949), *cert. denied*, 338 US 952 (1950).

<sup>7</sup> *People v Mower*, 97 NY2d 239, 245-246 (2002); *Cooks*, 67 NY2d at 103 n 1, 103-104; *People ex rel. Gibbs v Vincent*, 39 NY2d 918, 919 (1976); *People v Jossiah*, 2 AD3d 877, 877 (2nd Dept. 2003), *lv. denied*, 2 NY3d 742 (2004); *People v Donovan*, 107 AD2d 433, 443-444 (2nd Dept.), *lv. denied*, 65 NY2d 694 (1985).

<sup>8</sup> *Cooks*, 67 NY2d at 104.

<sup>9</sup> *Mower*, 97 NY2d at 245-246; *People v Angelakos*, 70 NY2d 670, 672-673 (1987).

<sup>10</sup> *People v Williams*, 5 AD3d 407, 407 (2nd Dept.), *lv. denied*, 3 NY3d 650 (2004).

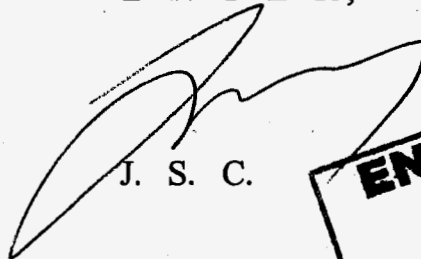
defendant here has apparently never requested such a transcript from the stenographer, and, in any event, has not stated the amount of the stenographer's fee, nor alleged and demonstrated that he cannot afford the requested fee. In this regard, the court notes that the minutes sought (plea proceedings) are typically short and the cost therefor presumably minimal. Moreover, the defendant can earn money while incarcerated which can be applied toward the cost of such minutes.

Therefore, the motion is further deniable on the ground that the defendant has not established that he cannot pay for the stenographer's minutes.

In conclusion, the motion is, respectfully, denied for all of the above reasons.

The foregoing constitutes the decision and order of the court.

E N T E R ,



J. S. C.

**ENTERED**  
JUN - 4 2007  
NANCY T. SUNSHINE  
COUNTY CLERK