People v Keaway

2007 NY Slip Op 32253(U)

July 19, 2007

Supreme Court, New York County

Docket Number: 0003024/2004

Judge: Michael J. Obus

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

- X

THE PEOPLE OF THE STATE OF NEW YORK, :

- against - : **ORDER**

EXAUDIS KEAWAY, : Ind. No. 3024/04

Defendant. :

- X

OBUS, MICHAEL, J.:

Defendant's pro se motion to vacate judgment pursuant to CPL 440 is denied.

Defendant was indicted for two counts of criminal possession of a controlled substance in the third degree (PL 220.16[1] and [12]). On July 20, 2005, he pleaded guilty before this Court to criminal possession of a controlled substance in the fourth degree to satisfy that indictment, in exchange for a negotiated prison term of three to six years as a second felony offender, and was permitted to remain at liberty. Defendant failed to appear for sentence on August 18, 2005, and the Court issued a bench warrant. Defendant was thereafter arrested in New Jersey, and on January 8, 2007, he was returned on the warrant pursuant to the Interstate Agreement on Detainers. On February 15, 2007, the Court sentenced him to three to six years' imprisonment as second felony offender, to run consecutively to his sentence for attempted bail jumping in the first degree under Ind. No. 1730/06. Defendant filed a notice of appeal under the present possession case but has not perfected that appeal.

Ordinarily, "a plea of guilty. . . marks the end of a criminal case, not a gateway to further litigation." People v. Hansen, 95 NY2d 227, 230 (2000), quoting People v. Taylor, 65 NY2d 1, 5 (1985). In this case, defendant was warned of that very principle. After a thorough guilty plea allocution, the Court asked defendant if he had any questions for the Court or defense counsel, and then admonished defendant:

> I want to be very clear with you that once I do accept the plea that will be a resolution of the case and you will not given an opportunity to change your mind, you will not be permitted to withdraw your plea, you will be entitled to the promised sentence if you comply with the conditions, but this is a resolution of the case.
>
> So are there any questions that you have at this point?
>
> [DEFENDANT] No.
>
> [THE COURT] All right.
>
> I am satisfied, Mr. Keaway, that you understand your rights here and your alternatives and that you have considered this carefully with counsel not only today but during the pendency of this case.
>
> I believe that given the choices you have you are making a knowing a voluntary decision to resolve this case this way and I will accept the plea. . . .

Notwithstanding this general legal premise and the Court's warning, defendant now seeks to vacate his plea on a host of grounds. Because none of them has merit, defendant's motion is denied.

Defendant first argues that the Court lost jurisdiction over him because of the People's alleged failure to comply with the Interstate Agreement on Detainers (CPL 580.20). In response to this claim, the People have supplied a form executed by defendant that appears to conclusively rebut his argument. CPL 440.30(4)(c). This Court need not resolve the parties' conflicting claims, however, because defendant's CPL 580.20 rights were neither fundamental nor constitutionally guaranteed, and were therefore forfeited by his guilty plea. People v. Zak, 242 AD2d 895 (4th Dept.), app. den. 91 NY2d 837 (1997); People v. Gooden, 151 AD2d 773 (1989); People v. Cusick, 111 AD2d 251 (2nd Dept. 1985).

In a second jurisdictional claim, defendant argues in his reply papers that the crime to which he pleaded, criminal possession of a controlled substance in the fourth degree, is limited to methadone, contrary to his plea admissions and the indicted third degree possession charges, which involved only cocaine. Defendant's argument is premised on the mistaken belief that because he pleaded guilty under the indicted third degree offense of PL 220.16(12)(possession of one-half ounce or more of cocaine), his fourth degree plea was necessarily under subdivision 12 of PL 220.09 (possession of 360 milligrams or more of methadone). In fact, the subdivisions of lesser included offenses ordinarily do not correspond with those of their greater offenses. In any event, defendant's argument is incorrect for a number of reasons: no specific fourth degree subdivision was named during the plea allocution, certainly not subdivision 12; subdivision one of PL 220.09 involves the possession of one-eighth ounce or more of cocaine, and is therefore a true lesser included offense of the indicted offense of PL 220.16(12); PL 220.20(1)(i) provides that for purposes of a guilty plea, any lower controlled substance possessory offense is deemed to constitute a lesser included offense of a greater possessory offense; and defendant would have waived any defect by participating in the selection of the lesser offense. See People v. Ford, 62 NY2d 275 (1984).

Defendant next argues that defense counsel was ineffective, and his guilty plea involuntary, in a number of respects. All of these claims lack merit. Contrary to defendant's claim that counsel failed to obtain a laboratory report, the copies of the Voluntary Disclosure Form served on the defense and filed with the Court include that report, which establishes that the cocaine at issue weighed more than 1 3/4 ounces. In addition, defendant expressly admitted in his plea allocution that he possessed more than

one-half ounce of cocaine. Contrary to defendant's claim that his case involved a "pure weight" charge, the charge under which he pleaded, PL 220.16(12), requires only proof that he possessed "one or more preparations, compounds, mixtures or substances containing a narcotic drug and said preparations, compounds, mixtures or substances are of an aggregate weight of one-half ounce or more." Contrary to defendant's claim that counsel and the Court failed to appreciate the significance of People v. Ryan, 82 NY2d 497 (1993), that case was legislatively overruled by statutory amendments effective June 10, 1995, long before defendant's case. In any event, as noted, this case involved more than triple the one-half ounce amount required by the indicted offense.

Defendant's ineffectiveness and involuntariness claims regarding coercion and his misunderstanding of the plea proceeding likewise lack merit. Assuming the truth of defendant's allegation, his New Jersey parole officer's warning of violation of parole proceedings absent a resolution of the New York case was a permissible exercise of the officer's discretion. Assuming that defense counsel warned defendant of a sentence of 15 years or more after trial, such a warning would have been accurate – defendant faced up to 12 ½ to 25 years as a predicate offender. In any event, any advice by counsel to accept the favorable disposition he negotiated did not constitute unacceptable pressure or ineffectiveness. People v. Torrence, 7 AD3d 444 (1st Dept.), lv. den. 3 NY3d 682 (2004); People v. Choice, 298 AD2d 195 (1st Dept. 2002), lv. den. 99 NY2d 581 (2003); People v. Hines, 267 AD2d 17 (1st Dept. 1999), lv. den. 94 NY2d 921 (2000); People v. Polanco, 262 AD2d 75 (1st Dept. 1999). Defendant's claim that he did not understand the plea proceeding is belied by the record. Defendant, whose experience with the criminal justice system included a New Jersey homicide conviction, intelligently participated in an extensive

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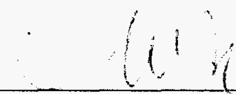
plea allocution and confirmed that he had adequately discussed the matter with counsel, that he understood his waiver of the many rights described to him, that he had not been coerced to plead guilty, and, as stated, that he had no questions for the Court or counsel.

Finally, defendant claims that a new pre-sentence report was completed for his bail jumping conviction, but that no update was supplied for his drug possession conviction. Ordinarily, this claim could not be reviewed without copies of the pre-sentence reports or the sentencing minutes – none of which has defendant supplied – and if apparent from that record, it would be an issue for direct appeal. CPL 440.10(2)(b). Here, however, the record establishes that since both sentences were imposed by this Court on the same date, the Court would have been aware of any information contained in the bail jumping report but not the cocaine possession report. Further, since defendant received the minimum sentence then permitted on the narcotics offense - notwithstanding his failure to return to court – he can articulate no prejudice arising from any lack of an update.

Accordingly, defendant's motion to vacate judgment is denied.

This opinion is the decision and order of the Court.

Dated: New York, New York
July 19, 2007



J.S.C.

HON. MICHAEL J. OBUS