

**People v Hamilton**

2007 NY Slip Op 32279(U)

July 3, 2007

Supreme Court, Kings County

Docket Number: 0008344/1991

Judge: Cheryl E. Chambers

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM, PART 18

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

-against-

BRIAN HAMILTON,  
Defendant.

**DECISION AND ORDER**  
Kings County  
Superior Court  
Information Number  
8344/1991

-----X  
**CHERYL E. CHAMBERS, J.S.C.**

Defendant moves pursuant to CPL 440.10 to vacate the judgment which convicted him, upon a plea of guilty, of criminal possession of a controlled substance in the fifth degree. Defendant's motion is denied because it is meritless.

**FINDING S OF FACT**

Defendant was charged by a felony complaint with criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third, fifth, and seventh degrees. Police Officer Edward Serocki alleged that on June 17, 1991, at approximately 2:15 p.m., at Atlantic Avenue and Hendrix Street, he observed an apprehended juvenile give each of two females an object in exchange for money, and then give the money to defendant. Red-capped vials of cocaine were recovered from each of the females and red-capped vials of cocaine weighing in excess of 500 milligrams were recovered from a paper bag found on the ground at the scene.

On July 22, 1991, defendant waived indictment and consented to be prosecuted by Superior Court Information Number 8344/1991 charging him with criminal possession of a controlled substance in the fifth degree. He entered a plea of guilty to the charge in return for a promise of five years of probation and participation in a drug program.

Defendant now moves to vacate the judgment of conviction on the ground that his constitutional right to the effective assistance of counsel was violated in two respects: 1) counsel failed to investigate and develop an available defense and, 2) defendant's guilty plea was induced by counsel's erroneous advice regarding the promised sentence.<sup>1</sup> Defendant admits that Police Officer Serocki's observations, as alleged in the complaint, were accurate. He claims that the actions observed were misinterpreted, and that he was at the scene doing brake repair work for the drug dealer.

### CONCLUSIONS OF LAW

"CPL 440.30 contemplates that a court will in the first instance determine on written submissions whether the motion [to vacate judgment] can be decided without a hearing" (*People v Satterfield*, 66 NY2d 796, 799 [1985] [internal citations omitted]). In order to be entitled to a hearing '[d]efendant must show that the nonrecord facts sought to be established are material and would entitle him to relief' (*People v Satterfield*, 66 NY2d at 799).

Here, defendant must show that the nonrecord facts he has alleged, if true, establish that he has been denied the constitutional right to the effective assistance of counsel. "So long as the evidence, the law, and the circumstances of [the] particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation," *People v Baldi*, 54 NY2d 137, 147 (1981), defendant's right to the effective assistance of counsel has not been violated. "Counsel's performance should be objectively evaluated to determine whether it was consistent with strategic decisions of a reasonably competent attorney" (*People v Benevento*, 91 NY2d 708, 712 [1998] [citations and internal quotation marks omitted]). To prevail on such a claim,

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<sup>1</sup> Trial counsel was employed by the Legal Aid Society. My husband, Seymour W. James, is the Attorney-In-Charge

and overcome the presumption of counsel's effectiveness, the burden is "on [the] defendant to demonstrate the absence of strategic or other legitimate explanations for counsel's [alleged] failure[s]" (*People v Rivera*, 71 NY2d 705, 709 [1998]; *People v Clark*, 254 AD2d 299 [2d Dept 1998]). Further, in the context of a guilty plea, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial" (*Hill v. Lockhart*, 474 US 52, 59 [1985]; *People v Xue*, 30 AD3d 166 [1<sup>st</sup> Dept 2006], *lv denied* 7 NY3d 809 [2006]; *People v Gatién*, 17 AD3d 101 [1<sup>st</sup> Dept 2005], *lv denied* 4 NY3d 886 [2005]).

The record of the plea and sentence here reveal that counsel provided meaningful representation. As defendant concedes that Police Officer Serocki's observations were accurate, a reasonably competent attorney might well have advised defendant to accept a plea to a D felony and no incarceration, rather than risk going to trial on a B felony and face significant jail time if convicted, where the only possible witnesses that defendant could call to support his defense were a drug seller and the drug buyers, whose credibility would be questionable. Moreover, it is likely that they would not have testified for defendant, but, rather, would have invoked the protections of the Fifth Amendment.

Defendant's claim that he would not have pled guilty if he had know that he would be sentenced to five years probation rather than one year, as he claims his counsel advised him, is nonsensical. He supports his claim by alleging that when the judge told him during the allocution that the promised sentence was five years probation, he was surprised, and "only agreed because I felt I had no choice. I had already pleaded guilty to the crime." A defendant must accept the terms of

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of the Criminal Practice. He did not hold that position at the time that defendant plead guilty.

the plea agreement, including the promised sentence, before the guilty plea is entered. The plea minutes reveal that in this case, as in every other case, the plea was entered after defendant agreed to the terms of the plea agreement.

The allegations of nonrecord facts defendant seeks to establish in support of his contentions would not entitle him to relief.

In support of his contention that counsel failed to investigate and develop an available defense, defendant alleges that counsel did not interview the others arrested with him or his co-workers. Defendant claims that the people he was arrested with would have “corroborated” his “innocence.” His coworkers would have “corroborated” that he was at the scene in order to perform brake work. These allegations lack the required evidentiary support.

The court may deny a motion to vacate judgment without a hearing if “the motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts, as required by subdivision one”(CPL 440.30 [4] [b]). CPL 440.30 (1) provides that sworn allegations must be based on personal knowledge or information and belief; further, the sources of the information and the grounds for the belief must also be stated

In order to be entitled to a hearing on this claim, defendant was required to submit sworn affidavits from the witnesses revealing what their testimony would have been at trial, and sworn statements attesting that counsel was made aware of their potential testimony and their willingness to testify (*People v Ford*, 46 NY2d 1021 [1021]; *People v Coleman*, 10 AD3d 487 [1<sup>st</sup> Dept 2004]). Here, defendant did not submit such affidavits from the witnesses.

In support of his contention that he was induced to plead guilty by counsel’s erroneous advice

regarding the promised sentence, defendant alleges that counsel advised him that he would receive a sentence of one year of probation. He also alleges that when the judge told him during the allocution that the promised sentence was five years probation, he was surprised, and “only agreed because I felt I had no choice. I had already pleaded guilty to the crime.” There is no reasonable possibility that defendant’s allegations are true.

Pursuant to CPL 440.30(4)(d), a court may deny a motion to vacate judgment without conducting a hearing when

[a]n allegation of fact essential to support the motion (i) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true.

CPL 440.30(4)(d) “permits a trial court to reach the merits of a post-judgment motion without a hearing, [and] is designed to weed out manufactured claims premised on nothing more than a defendant’s self-serving affidavit” (*People v Mackenzie*, 224 AD2d 173 [1<sup>st</sup> Dept 1996]; see *People v Shenouda*, 307 AD2d 938 [2d Dept 2003], *lv denied* 100 NY2d 645 [2003]; *People v Olivieri-Perez*, 248 AD2d 645 [2d Dept 1998], *lv denied* 91 NY2d 1998).

Defendant’s allegation that he had already pleaded guilty when he learned that he would be sentenced to five years probation is contradicted by the minutes of the plea proceeding, which show that the court informed him of the promised sentence before defendant entered his plea. Defendant’s allegation that counsel advised him that he would be sentenced to one year of probation is made solely by defendant and is unsupported by any other evidence. It is unlikely that counsel did not know the term of felony probation. Moreover, defendant has waited 16 years to make this claim and offers no reason for the delay. Under these circumstances, there is no reasonable possibility that

defendant's allegations are true.

In sum, defendant has failed to meet his burden of showing that the nonrecord facts he seeks to establish in support of his contentions would "demonstrate the absence of strategic or other legitimate explanations for counsel's [alleged] failure[s]" (*People v Rivera*, 71 NY2d at 709).

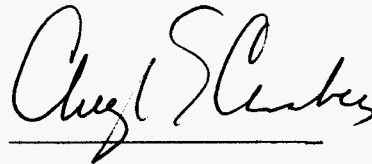
For all of the foregoing reasons, defendant's motion is denied.

This constitutes the decision and order of the court.

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

Dated: July 3, 2007

ENTER



J.S.C.

**ENTERED**  
JUL - 5 2007  
NANCY T. SUNSHINE  
COUNTY CLERK