

People v Fabre

2007 NY Slip Op 32308(U)

July 20, 2007

Supreme Court, New York County

Docket Number: 0003711/2005

Judge: Edward J. McLaughlin

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CRIMINAL TERM: PART 93
-----X

THE PEOPLE OF THE STATE OF NEW YORK,

— against —

**Decision On Motion
To Vacate Judgment**

RAYLIN FABRE,

Ind. Nos. 3711/05

Defendant.

-----X

EDWARD J. MCLAUGHLIN, J.:

Defendant was convicted by guilty plea of criminal possession of a weapon in the second degree (PL 265.03 [2]) under indictment 3711/05, and two counts of criminal sale of marijuana in the second degree (PL 220.50) under indictment 2266/06. He moves under CPL 440.10 to vacate that judgment of conviction on the ground that defense counsel provided ineffective assistance of counsel and coerced him to plead guilty. Defendant’s motion is denied.

THE GUILTY PLEA OFFER

During the pendency of the cases under these indictments, the prosecutor informed defense counsel that a grand jury had voted to indict defendant for kidnaping and other crimes that arose from another criminal incident. The prosecutor offered to withdraw that case from the grand jury and not file the indictment if defendant accepted the prosecution’s guilty plea offer for indictments 3117/06 and 2266/06. The prosecutor stated that the guilty plea offer would be

withdrawn after the kidnaping indictment was filed. In such a case, the prosecutor would be recommending that the defendant receive the maximum sentence of 25 years for the kidnaping case, because the victim was afraid of the defendant, and that the sentence be served consecutively to any sentences imposed under indictments 3117/05 and 2266/06. On June 16, 2006, the last day of the Grand Jury term, the prosecutor informed defense counsel that defendant had to accept the guilty plea offer on that day or else the offer would be withdrawn and the kidnaping indictment would be filed.

THE GUILTY PLEA

On June 16, 2006, defendant pleaded guilty to criminal possession of a weapon in the second degree under indictment 3117/05 and two counts of criminal sale of marijuana in the second degree under indictment 2266/06 in full satisfaction of the charges contained in those indictments. In the exchange for the guilty plea, the court promised to impose a prison sentence of five years and five years of postrelease supervision on the weapon possession charge, to be served concurrently with two concurrent one-year sentences on the marijuana sale charges.

During the allocution, defendant acknowledged that he understood the nature of the charges and admitted possessing a gun with intent to use it

unlawfully against another person, and to selling marijuana in excess of four ounces on two different occasions. He stated that he had discussed the case with counsel, and that he was admitting guilt because he was, in fact, guilty of those crimes. Defendant then stated that what he had told the court was the truth, and that any future statement to this court or another judge, different than the statements made today, would not be true because the defendant had told the truth today in court. After the court had accepted the guilty plea, the prosecutor stated that she would be withdrawing the kidnaping indictment pending against defendant.

Defendant was thereafter sentenced as promised.

DEFENDANT'S MOTION TO VACATE JUDGMENT

Defendant alleges that he wanted to tell this court during the guilty plea and at sentencing that he did not possess the gun, but that counsel each time had advised him that this court would not accept the guilty plea if he made that statement. Defendant alleges that counsel had coerced him to plead guilty, and that counsel opposed the defendant's "claim of innocence" to avoid revealing that defendant had been coerced by counsel to plead guilty.

Defendant argues that counsel failed to advise him that he had a defense to the charge of possessing a gun with intent to use it unlawfully against another.

According to defendant, the intent element for that crime “was negated by the fact that he was not found in possession of a weapon,” and that, in such a case, the prosecution would be unable to convict defendant of that charge. Defendant argues that counsel was ineffective when he advised defendant that he had no defense to the gun possession charge.

Defendant also alleges that he was dissuaded from moving to withdraw his guilty plea by counsel’s statement that a withdrawn guilty plea could be used for impeachment if defendant testified at trial.

Defendant’s motion also includes two affidavits, one from his mother and one from his fiancé. In both affidavits, both women explain that they had advised defendant to plead guilty, even though he had proclaimed his innocence, because counsel had explained that defendant could receive a more severe sentence, between twenty and thirty years in prison, if he did not accept the guilty plea and went to trial.

LAW

The record amply demonstrates that defense counsel provided defendant with effective representation in this matter. Defense counsel would have been remiss if he did not explain to defendant that a rejection of the guilty plea offer could result in him receiving a prison sentence of up to thirty years if he was

convicted after trial of the charges contained in the two filed indictments and the soon-to-be-filed indictment for kidnaping. Defense counsel had a duty to inform defendant of the consequences of rejecting the guilty plea offer and to advise him to accept it if counsel believed that a guilty plea was the best option to avoid the risk of receiving a significantly longer prison sentence (*see Boria v Keane*, 83 F3d 48, 53-54 [2d Cir 1996]). Defense counsel also correctly advised defendant that this court would not have accepted the guilty plea if defendant had denied possessing the gun.

Nothing in the record suggests that defendant had a viable defense to the charge that he possessed a gun with intent to use it unlawfully against another person. No such defense was suggested by defendant's admission that he possessed the gun on the date charged in the indictment, and that he did so with intent to use that gun unlawfully against another person. This charge arose from an allegation that defendant had shot a 16-year-old boy in the elbow by firing a gun into the air between ten and twelve times. The mere fact that the defendant might not have possessed the gun when he was arrested is not a defense to a charge that he possessed it four days earlier with intent to use it unlawfully against another person. Defendant's unsupported and belated claim of innocence regarding the weapon possession charge provides no basis for vacating his guilty

plea (*see People v Dixon*, 29 NY2d 55, 57 [1971]).

The record provides no support for defendant's allegation that counsel had coerced him to plead guilty. During the guilty plea, defendant stated that he had consulted with counsel about the decision to plead guilty, and made no complaint about defense counsel's representation. The record demonstrates that defendant understood the consequences and benefits of his guilty plea, and that he had entered the guilty plea knowing, intelligently, and voluntarily. Defendant provides no independent corroboration of his allegation that counsel had stated that a withdrawn guilty plea could be used for impeachment if defendant testified at trial. Under these circumstances, this court finds no reasonable possibility that such an allegation is true (*see* CPL 440.30 [4] [d]).

For the reasons stated above, defendant's motion is denied.

Dated: July 26, 2007

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J.  EDWARD J. McLAUGHLIN