

People v Vidal

2007 NY Slip Op 32425(U)

July 9, 2007

Supreme Court, Kings County

Docket Number: 0003398/2006

Judge: Patricia DiMango

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MEMORANDUM

SUPREME COURT : KINGS COUNTY
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(Criminal Term, Part 30)

PEOPLE of the STATE of NEW YORK,

By: DI MANGO, J.

- against -

Dated: July 9, 2007

VICTOR VIDAL,

Indictment No. 3398/2006

Defendant.

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The defendant, *pro se*, moves for deferral of the mandatory surcharge imposed by operation of law at the time of sentencing.

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

Background

On June 28, 2006, the defendant pleaded guilty to Attempted Burglary in the Second Degree (with respect to events which occurred on April 13, 2006), in full satisfaction of the instant indictment, in exchange for a promised sentence of three years' incarceration (and five years' post-release supervision).

On July 17, 2006, the court sentenced the defendant in accordance with the sentence promise, and, at that time also imposed a \$250 mandatory surcharge, together with a \$50 DNA fee and \$20 crime victim assistance fee.

It is the payment of this \$320 charge which the defendant is herein seeking to have deferred on the ground that the only income he has is his prison wages, which are minimal, and in furtherance of said application, the defendant has requested a “financial hardship hearing.”

Law

CPL 420.40 authorizes the court to defer payment of a surcharge under certain conditions. However, one Kings County *nisi prius* court has held that CPL 420.40 does not authorize delaying the payment of the surcharge for a defendant who has been sentenced to more than 60 days of incarceration.¹ On the other hand, the Appellate Division, Third Department² and another Kings County *nisi prius* court³ have found that CPL 420.40 does authorize postponing the payment of the surcharge for persons sentenced to jail for a period greater than 60 days. In a well-reasoned decision, the County Court in *People v Huggins*⁴ also found that the sentencing court had the authority to defer payment of the mandatory surcharge for such a defendant.

¹ *People v Hopkins*, 185 Misc2d 312, 314-317 (2000).

² *People v Rodriguez*, 292 AD2d 646, 647, *lv. denied*, 98 NY2d 654 (2002); *People v Abdus-Samad*, 274 AD2d 666, 667, *lv. denied*, 95 NY2d 862 (2000).

³ *People v Parker*, 183 Misc 2d 737, 738 (2000).

⁴ 179 Misc2d 636, 637-638 (1999; Greene County).

The Fourth Department was presented with this issue in *People v Kistner*.⁵ In *Kistner*, the defendant was sentenced to a two-year determinate sentence followed by one and one-half years of post release supervision.⁶ Four months after sentencing, Mr. Kistner requested deferral of the surcharge, but the County Court stated that it had no jurisdiction to delay the payment of the surcharge. On appeal, the Appellate Division, Fourth Department, held that the County Court had “erred in determining that it lacked authority pursuant to CPL 420.40 (2) to defer the mandatory surcharge.”⁷ Nevertheless, the court went on to find that Mr. Kistner had failed to demonstrate the requisite hardship deemed necessary to entitle him to such a deferral. Since *Kistner*, the Appellate Division, Fourth Department, has consistently held that the court is authorized to defer the mandatory surcharge of a defendant sentenced to more than 60 days’ imprisonment.⁸

Our Appellate Division has not yet spoken directly on the question of whether a sentencing court has the authority to defer payment of one’s mandatory surcharge in the case of a defendant sentenced to more than 60 days’ imprisonment. In *People v Domin*,⁹ the

⁵ 291 AD2d 856 (2002; 4th Dept.). Although the memorandum decision did not provide the underlying facts nor contain an exposition on the arguments made, this court has obtained and considered the legal briefs from that case. The court thanks all involved for their assistance.

⁶ The facts are gleaned from the parties’ briefs and telephone conversations with the Niagara County District Attorney’s office and appellate defense counsel.

⁷ 291 AD2d at 856.

⁸ *People v Camacho*, 4 AD3d 862, 862 (2004), *lv. denied*, 2 NY3d 761; *People v Smith*, 309 AD2d 1282, 1283 (2003).

⁹ 13 AD3d 391 (2004), *lv. denied*, 4 NY3d 830 (2005).

Appellate Division, Second Department, indicated that the defendant's application for deferral was "premature." It is not revealed therein, however, to what term of incarceration Mr. Domin was sentenced. The *Domin* court does cite, with apparent approval, the *Huggins*¹⁰ case, which as noted above, held that deferral of the mandatory surcharge payment was within the discretionary authority of the sentencing court.

In light of these authorities, this court holds herein that it has the authority to grant such a deferral. Nevertheless, such conclusion does not end the discussion of the instant defendant's application. On the contrary, the defendant must demonstrate his entitlement to such a deferral.

The court notes that under those cases which authorize the deferral of the mandatory surcharge, in order to be entitled to deferral of the surcharge, a defendant must establish, by "credible and verifiable information," that the surcharge "would work an unreasonable hardship on defendant over and above the ordinary hardship suffered by other indigent inmates [citations omitted]."¹¹

Upon a review of the allegations contained in the defendant's papers, this court is constrained to conclude that the defendant here has failed to establish that his alleged hardship (in having payments towards the surcharge and fees deducted from his prison wages) differs from that of any other indigent inmate. On the contrary, this court finds, as

¹⁰ *Supra*, 179 Misc2d at 638.

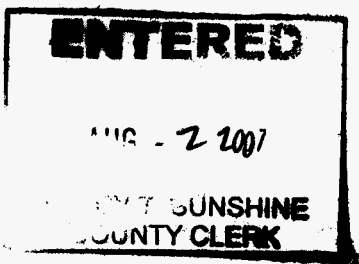
¹¹ *Kistner*, 291 AD2d at 856; *see also*, *Rodriguez*, 292 AD2d at 647; *Abdus-Samad*, 274 AD2d at 667; *Parker*, 183 Misc 2d at 738.

asserted by the People, that the defendant has failed to substantiate any allegations of unreasonable hardship upon himself or his family. Rather, his allegations merely reflect a hardship similar to that borne by other indigent inmates; and he makes no claim that he helps support any family member or has any other relevant obligations or unusual expenses.

Given these circumstances and lack of proof of unreasonable hardship, this court finds that the defendant's moving papers are legally insufficient to warrant a grant of deferment in this case, nor to require a hearing thereon. Accordingly, the motion to defer the mandatory surcharge and fees is, respectfully, denied.

The foregoing 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, New York 11201 for a certificate granting leave to appeal from this determination. This application must be made within 30 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.¹²



E N T E R ,

[Handwritten signature]
J. S. C.

¹² 22 NYCRR § 671.5.