

People v Serva

2007 NY Slip Op 32429(U)

July 9, 2007

Supreme Court, Kings County

Docket Number: 0008588/2005

Judge: Patricia DiMango

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MEMORANDUM

SUPREME COURT : KINGS COUNTY

(Criminal Term, Part 30)

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PEOPLE of the STATE of NEW YORK,

By: DI MANGO, J.

- against -

Dated: July 9, 2007

JAMES SERVA,

Ind Nos. 8588/05 & 6582/05

Defendant.

----- X

The defendant, *pro se*, has moved before this court for re-sentencing with respect to the imposition of the mandatory surcharges upon him at the time of his original sentencing. Upon this motion the defendant seeks either a waiver of the surcharges in their entirety or, alternatively that their payment be deferred until he is released from prison.

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

Background

On January 12, 2006, the defendant pleaded guilty to Burglary in the Third Degree (under Indictment No. 8588/2005) and to Criminal Possession of a Controlled Substance in the Fifth Degree (under Indictment No. 6582/2005), in full satisfaction of both indictments. While the defendant was originally sentenced on February 1, 2006, the sentences ultimately imposed upon him, by Amended Orders of Commitment (on April 13, 2006 and April 10, 2006) were, respectively, an indeterminate term of two and one-half to five years, and a

definite sentence of two and one-half years' incarceration (to run consecutively), followed by a period of post-release supervision.

Upon sentencing, the court imposed a \$250 mandatory surcharge, \$50 DNA fee and \$20 crime victim assistance fee, under Ind. No. 8588/05; and the \$250 mandatory surcharge and \$20 crime victim assistance fee, under Ind. No.6582/05, all of which is to be paid from inmate funds. Upon this motion, the defendant is only seeking to have waived or deferred the \$500 in surcharges.

In support of this application, the defendant states that he only earns \$7.60 every two weeks at his institution, has no other income or assets, and alleges and explains that various amounts are deducted therefrom for various purposes, leaving him with the inadequate amount of only \$3.42 with which to purchase personal hygiene articles and postage stamps. (The defendant has attached his inmate financial statement as proof of the allocation of his funds.) The defendant maintains that he is "unable to meet his weekly expenses and at the same time pay the surcharge imposed by the Court."

Law

The court commences its discussion by noting that the Criminal Procedure Law does not permit the outright waiver of the mandatory surcharges¹ for this defendant, and thus, this branch of his application is deniable outright. But, CPL § 420.40 does authorize the court

¹ *see*, CPL 420.35(2).

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.² On the other hand, the Appellate Division, Third Department³ and another Kings County *nisi prius* court⁴ 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*⁵ also found that the sentencing court had the authority to defer payment of the mandatory surcharge for such a defendant.

The Fourth Department was presented with this issue in *People v Kistner*.⁶ In *Kistner*, the defendant was sentenced to a two-year determinate sentence followed by one and one-half years of post release supervision.⁷ 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

² *People v Hopkins*, 185 Misc2d 312, 314-317 (2000).

³ *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).

⁴ *People v Parker*, 183 Misc 2d 737, 738 (2000).

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

⁶ 291 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.

⁷ The facts are gleaned from the parties' briefs and telephone conversations with the Niagara County District Attorney's office and appellate defense counsel.

the County Court had “erred in determining that it lacked authority pursuant to CPL 420.40 (2) to defer the mandatory surcharge.”⁸ 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.⁹

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*,¹⁰ the 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*¹¹ 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

⁸ 291 AD2d at 856.

⁹ *People v Camacho*, 4 AD3d 862, 862 (2004), *lv. denied*, 2 NY3d 761; *People v Smith*, 309 AD2d 1282, 1283 (2003).

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

¹¹ *Supra*, 179 Misc2d at 638.

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]." ¹²

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 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.

This court is mindful of the fact that the defendant here must pay off two sets of fees, due to his two convictions. Nevertheless, under the circumstances presented and the lack of proof of an unreasonable hardship, this court finds that the defendant's moving papers are

¹² *Kistner*, 291 AD2d at 856; *see also, Rodriguez*, 292 AD2d at 647; *Abdus-Samad*, 274 AD2d at 667; *Parker*, 183 Misc 2d at 738.

legally insufficient to warrant a grant of deferment in this case, nor to require a hearing upon this application.

Accordingly, the motion for re-sentencing for deferral or waiver of the mandatory surcharges is, respectfully, denied in all respects.

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.¹³

E N T E R ,

ENTERED
AUG - 2 2007
NANCY T. SUNSHINE
COUNTY CLERK

J. S. C.
RON. PATRICIA M. DIMANCO

¹³ 22 NYCRR § 671.5.