

**People v Diaz**

2007 NY Slip Op 32469(U)

August 8, 2007

Supreme Court, New York County

Docket Number: 0002528/1997

Judge: Ruth Pickholz

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SUPREME COURT : NEW YORK COUNTY  
TRIAL TERM : PART 66

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THE PEOPLE OF THE STATE OF NEW YORK :

- against - : Indictment No. 2528/97

PIO DIAZ,

Defendant. :

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RUTH PICKHOLZ, J.:

Defendant moves for a writ of error coram nobis.

The defendant pled guilty to attempted criminal sale of a controlled substance in the third degree in 1997 before Judge Herbert Adlerberg. He did not appeal his conviction. In 2004 he moved to vacate his conviction on several grounds, including that he was not guilty of the crime in question, and that his attorney wrongly informed him that he would not face deportation as a result of his plea. He also asked me to vacate his conviction in the interest of justice. I denied the application in its entirety in a decision dated September 21, 2004.

In his current application to vacate his conviction, which he denominates an application for an "order of dismissal pursuant to a writ of error coram nobis," he repeats several of his earlier claims and raises additional arguments in favor of vacatur. He contends that the factual recitation portion of the indictment was insufficient, and

that given the evidence that is known to him it was legally impossible for him to have sold cocaine or to have attempted to sell it. He also contends that the plea allocution was deficient, and that it would be injustice to not to vacate the plea.

I do not reach the merits of these arguments. Defendant unsuccessfully moved to vacate his conviction in 2004. At that time he was well aware of the facts underlying the issues he now raises. Indeed, he has been aware of them since 1997. He was therefore fully in a position to raise these issues on direct appeal or in his prior motion pursuant to CPL 440.10. As he did not do so, the instant motion is denied pursuant to CPL 440.10 [2][c] and [3][c].

It is irrelevant that defendant designates his current application a motion for a writ of error coram nobis. Most, if not all, of the alleged errors he mentions in his current motion are apparent on the face of the record and could therefore have been argued upon appeal. Just as CPL 440.10 is not available to remedy errors of this type, neither is coram nobis (see People v. Cook, 67 NY2d 100; People v. Harris, 109 A.D.2d 351). To the extent that defendant raises arguments that could not have been raised on direct appeal, his application is also denied. CPL 440.10 replaced “all aspects of the common law writs that it directly covers and thus resort to coram nobis is unavailable in situations covered by the statute” (Preiser, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 11A, CPL 440.10, at 248). Additionally, defendant cannot raise these arguments in a second application pursuant to CPL 440.10, as there is no reason why he could not have raised them in his first collateral attack.

Were I to review defendant's claims on the merits I would deny the motion. The one-count indictment was sufficiently clear to apprise the defendant of the crime with which he was charged. The count, which charged the defendant with criminal sale of a controlled substance in the third degree, reads " the defendant in the County of New York, City of New York, on or about March 21, 1997, knowingly and unlawfully sold to Lorna Rivera, a narcotic drug, to wit cocaine." The People were not required to make any additional factual allegations when they drafted the count. Defendant's argument that it was legally impossible for him to have committed or attempted to commit the crime is premised upon his contention that there no evidence supporting either crime. The argument is meritless. Defendant could have tested the strength of the People's evidence by moving for inspection of the grand jury minutes and by going to trial. He chose instead to plead guilty and admit their allegations. The strength of the People's case is therefore irrelevant. The argument that the plea allocution was defective is also without merit. The defendant admitted that he sold cocaine at about 8:30 in the evening on March 21, 1997 on East Houston Street and Avenue D in Manhattan. Additionally Judge Adlerberg fully advised him his Boykin rights.

Were I convinced of defendant's claims I could not vacate his conviction in the interest of justice. CPI. 440.10 does not give me the authority to do so (see People v. Felamn, 137 Ad2d 413). Moreover, he may have pled guilty because it was the expedient course to follow at the time, but that does not mean that he is not guilty of the charge or that he is entitled to change his mind. It also may be that he would have

continued to contest the charge had he known that in ten-year's time he would be subject to deportation. The fact remains that he chose to admit the People's allegations and never established that he was affirmatively misled by his attorney. Accordingly, the instant application is denied.



A.J.S.C.

Dated: August 8, , 2007