NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: TRIAL TERM PART 52

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The People of the State of New York

-against-

Ind. No: 5159-04

David Clifford,

Defendant.

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Daniel P. FitzGerald, J.

On September 19, 2004, the defendant entered an Associated Supermarket on 9th Avenue and took approximately $250 worth of meat from a store freezer. He put the meat in a bag and tried to leave the store without paying. A store employee confronted the defendant and an altercation ensued, after which the defendant was subdued. The store employee testified before the grand jury that the defendant pulled a knife and threatened him with it during the altercation. The switchblade knife was recovered at the defendant's feet, and the defendant told the grand jury that it was his knife and that he stole the meat, but denied that he affirmatively used the knife against the store employee during the altercation.

A New York County grand jury thereafter indicted the defendant for criminal possession of a weapon in the third degree, a class D felony, and petit larceny, a class A misdemeanor. After motion practice, the case proceeded to trial. As jury selection was about to commence, however, the defendant pleaded guilty to one count of attempted possession of a weapon in the third degree, a class E felony, on the promise that he

would be sentenced to an indeterminate sentence of 1 1/2 years to three years in prison. In accordance with that plea, the defendant was later sentenced to the agreed upon term.

The defendant now moves to vacate the judgment of conviction on the ground that he received ineffective assistance of counsel at the time of the plea. He claims that counsel did not apprise him of the maximum penalty he would ultimately face by pleading guilty given that he was on parole at the time he committed the instant offense. He claims that when the parole board denied him parole after his first parole board hearing he learned that "his actual release date would[have been] better achieved had he proceeded to trial." He further charges that his attorney, as well as the court, should have advised him that his actual parole eligibility would not be effective "until the year 2008," and that he was under the impression that he would be released from prison in 2006. The People oppose the motion, and maintain that the defendant is wrong on both the law and the facts.

While it is axiomatic that to enter a knowing and voluntary plea a defendant must understand the consequences of the plea (*see People v Harris*, 61 NY2d 9), a trial court has no constitutional duty to warn a defendant before taking a guilty plea of the collateral consequences of his plea (see *People v Ford,* 86 NY2d 397). In *Ford*, the Court distinguished "direct" consequences from purely "collateral" ones and held, on the facts of that case, that the impact of a conviction on a defendant's immigration status is a collateral consequence of a guilty plea "because it is a result peculiar to the individual's personal circumstances and one not within the control of the court system"

(86 NY2d at 403; *see also El-Nobani v U.S.* 287 F.3d 417; *U.S. v Gonzalez*, 202 F.3d 20; CPL 200.50(7)).

Similarly, the revocation of a defendant's parole and any additional prison term for a parole violation is a collateral consequence of a guilty plea. While the sentence for a predicate felony offender is imposed consecutively to any undischarged sentence by operation of law (see PL § 70.25[2][a]), the revocation of parole is not a condition imposed by the trial court but is the product of a separate proceeding before the New York State Division of Parole (Executive Law § 259-i[3][d]; 9 N.Y.C.R.R. 8004.3; *People v Knight*, 13 Misc.2d 1224(a); *People v Tinort,* 5 Misc.3d 238). Thus, the final aggregate sentence is beyond the control of the trial court because it rests on the outcome of the parole revocation proceeding. As a result, the court is not required to anticipate the outcome of a defendant's parole board hearing or to advise him that the plea might have some unforeseen consequence.

As for the defendant's claim that he was denied the effective assistance of counsel, although a CPL 440 motion may be used to develop additional background facts in order to decide whether a defendant has received effective assistance of counsel, a defendant is not automatically entitled to a hearing (*see People v Satterfield*, 66 NY2d 796). In the first instance a court must determine whether the motion can be denied on the written submissions without a hearing (*Id., at* 799). Moreover, "[c]laims of ineffective assistance of counsel may . . . be denied without delving into the factual accuracy of the allegations where an inspection of the trial record reveals that the factual basis, if true, would at most show a tactical error by counsel, as opposed to

denial of meaningful representation," (Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 440.30, p 579-580, *citing People v Satterfield*, supra).

Additionally, a motion to vacate a judgment which fails to contain sworn allegations substantiating all the essential facts of the motion is subject to summary denial (see CPL 440.30(4)(b)). The motion is further subject to summary denial if the sworn allegations are made solely by the defendant "unsupported by any other affidavit or evidence, and . . . under . . . all the . . . circumstances attending the case, there is no reasonable possibility that such allegation is true" (CPL 440.30(4)(d)).

Here, the defendant has provided no basis to credit his claim of ineffective assistance of counsel. The standard for determining a claim of ineffective assistance of counsel under the federal constitution is whether there is a "reasonable probability" that, but for counsel's errors, the defendant "would not have pleaded guilty and would have insisted on going to trial" (*People v McDonald, supra,* 1 NY3d 109, 115, quoting *Hill v Lockhart,* 474 U.S. 52, 59), and the standard under the New York State Constitution is whether defendant received "meaningful representation" (1 NY3rd at 114 n. 2; *People v Ford, supra,* 86 NY2d 397, 404).

Under either standard, it is readily apparent that he received effective assistance. Defense counsel filed proficient preliminary motions. Moreover, on the eve of trial, counsel secured an extremely favorable plea for the defendant. The defendant is flatly wrong when he asserts that he would have been released from parole sooner if he had proceeded to trial. As a predicate felon, the defendant was facing, at best, a minimum

sentence of two to four years. With his extensive prior record, he was also confronting the very real possibility that he would receive the maximum of 3 1/2 to 7 years had he been found guilty. Having admitted that he possessed the knife, a *per se* weapon (see PL § 265.00(4)), the likelihood that he would be convicted at trial was almost assured. Instead, counsel secured for him the lowest legally permissible plea of a class E felony (*see* CPL 220.10(5)(c)), with the lowest permissible prison term associated with that plea (*see* PL § 70.06 subd. (3)(e) and 4(b)).

While the revocation of a defendant's parole as a consequence of subsequent convictions is, no doubt, a significant by-product of the plea, even if it were true that counsel failed to advise the defendant this potential collateral consequence of his guilty plea, it does not, without more, constitute ineffective assistance of counsel (*People v McDonald, supra*, 1 NY3d at 114; *c.f. U.S. v Couto*, 311 F3d 179).

But, in this case, there is no evidence that counsel was unaware of the parole consequences of the defendant's guilty plea and failed to inform the defendant of them. The defendant's wholly unsupported claim notwithstanding, it is readily apparent from the court record, and corroborated by the People's response, that counsel was acutely aware that the defendant had serious parole consequences as a result of the plea.[1] To

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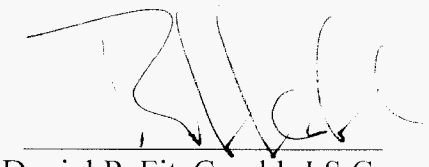
1 That counsel was aware of the defendant's parole problems is further reflected by his conduct at the time of sentence, where he expressly requested that the court "recommend" to the parole board that any violation of parole be run concurrently with his sentence of 11/2 – 3 years. Because the request was made only at the time of sentence, *People v Bobo*, _*AD3d*_, 836 NYS2d 604 is inapposite. In *Bobo*, the Appellate Division held that a defendant who enters a plea on the mistaken belief that his parole violation could run concurrently with his conviction does not enter the plea knowingly (*but c.f., People v Acosta*, 187 AD2d 329). Here, the defendant was not induced to plead guilty on the promise that his parole time could be run concurrently. Moreover, it is clear from the court record that counsel knew the Penal Law required that the sentence be consecutive to parole. His request, initially made at a bench conference, was done in hopes that it would assist the defendant when he appeared before the parole board. Thus, counsel was not only aware of the possibility that the defendant's parole would be violated, but did his best to provide a record to help the defendant at his parole board hearing. Accordingly, I find that the defendant was afforded meaningful representation at sentence.

the extent that the defendant also complains that his attorney led him to believe that he would be eligible for parole in 2006, instead of 2008, the defendant is wrong on the facts. The defendant was indeed eligible for parole in 2006, and the parole board conducted a hearing at that time to determine if he should be granted parole. The board's discretionary refusal to release him on parole, after he was given a full opportunity to be heard, certainly was unremarkable in light of the defendant's self-serving, unsympathetic testimony at the parole hearing.

In the end, it is clear that the defendant received competent advice about whether to plead guilty, and his decision to plead guilty was voluntary made with full knowledge of the potential consequences. There is little possibility that the defendant would have been in a better position had he proceeded to trial and, under all the circumstances, it is obvious that the defendant received "meaningful representation."

For all of these reasons, he defendant's application is denied.

So ordered.



Daniel P. FitzGerald, J.S.C.

July 26, 2007