

People v James

2007 NY Slip Op 32737(U)

August 28, 2007

Supreme Court, Kings County

Docket Number: 0005647/1999

Judge: Michael A. Gary

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 31

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THE PEOPLE OF THE STATE OF NEW YORK :

-against- : DECISION AND ORDER
CPL § 440 Motion
ANDREW JAMES :
: IND. NO. 5647-1999
Defendant :
-----X
MICHAEL A. GARY, J.

Defendant moves *pro se* by way of this written motion to vacate the judgment of conviction CPL § 440.10. The People have opposed this motion in a written response. The defendant filed a reply with this court as well.

Mr. James plead guilty in May 2000 to one count of Murder in the second degree (Penal Law § 125.25[1]) in full satisfaction of IND. # 5647-99 which was consolidated with IND. # 8877-99, charging Burglary and related counts, waiving his right to appeal. As promised at the time of his plea, Mr. James was sentenced on June 16, 2000 to an indeterminate sentence of a minimum of 15 years to a maximum of Life. Mr. James filed a motion to vacate the judgment in 2006, which was denied by this court in a decision dated January 9, 2007.

Defendant now brings this motion pursuant to CPL § 440 alleging the plea violated CPL § 220.10, in that the plea was taken without the consent of the People. He further alleges that his attorney was ineffective for allowing the plea to go through/proceed in violation of the statutory provision. He claims that this rendered the plea involuntary.

The People have responded to the defendant's motion and assert that because the

defendant has previously filed a motion to vacate the plea pursuant to CPL § 440, he is precluded from raising issues at this juncture that could have been raised previously. See CPL § 440.10 (3) (c). Further, the People assert that since the issues were record-based, the defendant should have properly raised them on appeal.

CPL § 440.10 governs the court's decision making capacity in regards to the motion to vacate the judgment of conviction. Upon examination of the record and all the previously filed motion papers, the court MUST deny the motion to vacate if : . . .

2.(a) the ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, . . .

(b) the judgment is at the time of the motion appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal; or

(c) although sufficient facts appear on the record of the proceeding underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion , . . . no such appellate review or determination occurred owing to the defendant's unjustifiable failure to . . . raise such ground or issue upon an appeal actually perfected by him;

3. Notwithstanding the provision of subdivision one the court may deny a motion to vacate a judgment when:

(a) Although facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the ground or issue in question was not subsequently determined on appeal; or

(b) the ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state other than an appeal from the judgment, or upon a motion or proceeding in a federal court . . .

(c) upon a previous motion made pursuant to this section , the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.

The court agrees with the People regarding the procedural aspect of the defendant's motion. The statutory scheme outlining the manner in which post judgment motions are considered by the court stress an economy in dealing with the issues, and a preference for finality. This defendant who had specifically addressed the issues of his plea in the previous

motion certainly could have argued the issue he now presents -- what he terms the “voluntariness” of the plea -- along with the other allegations in his previous motion. Thus, pursuant to CPL §440.10 (3)(a), denies the motion to vacate the judgment.

Were it to deal with the issue on the merits, the court finds that the defendant’s position regarding the plea is erroneous. Though the People stated on the record that the plea offer was over the People’s objection, as the this Court finds that the statement by the People that the “allocution was satisfactory to the People ” (Transcript p. 9), should be construed as their acquiescence to the proceedings. The court notes that the People’s view that this defendant was not worthy of a plea offer made to him was explained by the assigned ADA as follows:

I’d like to note for the record that the plea is over the People’s objection. Because this was a two TPO violent felony offense , the burglary and the murder, there was no offer. And because of the serious nature of the charges and the allegations of prior threats there was no offer on this case. (Transcript p. 11, lines 19-24)

This position was echoed loudly at the time of sentencing as well, when the People noted that the plea was over their objection. However, they did not address the court or move to have the defendant withdraw the plea. And the People actively arranged for the victim’s family to address the court at the time of sentence. Further, and more importantly, the People did not appeal this matter as they have done in other instances (*See e.g. Hynes v. Douglas*, 233 AD2d 330 (2d Dept., 1996); *Gold v. Booth*, 79 AD2d 691 (2d Dept., 1980) *app. denied* 52 NY2d 706 [Table, 1981]). This demonstrates to this court that although they were likely displeased with the imposition of a lower than the maximum sentence, as reiterated by the assigned ADA, “that’s why there was no offer in this case”, it appears that the People can be

deemed to have consented to the plea in satisfaction of CPL § 220. 10.

The defendant also raises a constitutional claim of ineffective assistance of counsel, claiming that the attorney did not challenge the “voluntariness” of his plea, in that the People did not give their consent. However, voluntariness is reflected in terms of the defendant’s mind; Mr. James makes no allegation that the plea was forced upon him, that he was coerced in any way or that he felt compelled to enter the plea based on any misrepresentation made to him. And as the People point out, even if there were some infirmity with the plea, it should be said that the defendant benefitted from any alleged error. It cannot be said that the defendant’s attorney failed in his duty to point out a flaw in the proceedings that actually inured to defendant’s benefit. As indicated by this Court in the decision on defendant’s previous 440 motion,

. . . the defendant neglects to mention in this motion that he had been facing consecutive sentences if convicted on each of the consolidated indictments. In effect, the defendant avoided a possible sentence of up to 25 years on the Murder charge and 15 on the Burglary charge, for a total of 40 years. (at p. 4)

Accordingly, as the People did not seek to challenge the defendant’s plea, nor has the defendant established that his attorney was ineffective in his representation, the defendant’s motion is denied in its entirety.

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York
August 28, 2007

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MICHAEL A. GARY, J. S. C.

