SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM

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THE PEOPLE OF THE STATE OF NEW YORK : Indictment No. 01809/2002

-against- : Motion: CPL 440.10(1)(h)

TONY JAMES, :

Defendant.

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Robert Morgenthau, District Attorney, New York County (ADA Eugene Porcaro, of counsel) for the People.

Defendant, pro se.

Honorable Roger S. Hayes:

Findings of Fact and Procedural History

Defendant was arrested and indicted for two counts of Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 220.16), two counts of Criminal Possession of a Weapon in the Third Degree (PL § 265.02), one count of Criminal Possession of Marijuana in the Fifth Degree (PL § 221.10) and one count of Unlawful Possession of Marijuana (PL § 221.05). On July 16, 2002, defendant pled guilty to Criminal Possession of a Controlled Substance in the Third Degree pursuant to an agreement which provided he would participate in a residential drug treatment program, DAYTOP. If he completed the program, he would be allowed to withdraw his plea and re-plead to a class A misdemeanor and receive a sentence of time-served. If he failed to complete the program, he would be sentenced to an indeterminate sentence of three to six years, as long as he had not absconded from the program. If he absconded, the sentence

would be from four and one-half to nine years. Defendant also waived his right to appeal his conviction.

On August 13, 2002, defendant was accepted into DAYTOP, and on September 24, 2002, defendant's attorney signed the plea agreement on defendant's behalf, and defendant was released to the program. Defendant appeared in Court on October 29, 2002 and December 10, 2002 for the Court to monitor his compliance with the plea agreement. On February 25, 2003, defendant failed to appear for his scheduled Court date. The case was adjourned to March 4, 2003 and defendant again failed to appear. After it was discovered defendant had absconded from the program, a bench warrant was issued for his arrest. On March 12, 2003, defendant was returned on the warrant.

Defendant remained incarcerated until June 5, 2003, when he was given another opportunity to complete the program. Defendant was advised it was his last chance to do so. That same day, after defendant left Court with an escort from the program, he walked away from the escort and again absconded. On June 6, 2003, a bench warrant was ordered for his arrest. On November 21, 2003, defendant was involuntarily returned on the warrant following his arrest for Criminal Possession of a Controlled Substance in the Third Degree. On December 17, 2003, defendant was sentenced as promised to an indeterminate term of imprisonment of from four and one-half years to nine years (Atlas, J., at plea and sentence).

Now, by a motion dated April 16, 2007, defendant pro se moves pursuant to CPL § 440.10(1)(h) for an order vacating the judgement of his conviction. Defendant asserts he received ineffective assistance of counsel because his attorney failed to file a notice of appeal on his behalf after he was instructed to do so by defendant. The People oppose defendant's motion.

Conclusions of Law

Initially, counsel's failure to file a notice of appeal, even if true, does not entitle defendant to the relief he requests. A Court has the authority to vacate a judgment of conviction under CPL § 440.10 (1)(h) when "[t]he judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States." Failure to file a notice of appeal does not affect the judgement of conviction, which is completed by imposition and entry of the sentence (CPL § 1.20[15]; *see also People v Bachert*, 69 NY2d 593 [1987]; *People v Bridgeforth*, 13 Misc 3d 1205[A] [Sup Ct, NY County 2006, Carro, J.]). Therefore, the Court has no power to vacate his judgment of conviction on this ground.

Further, a defendant who wants to appeal a judgment of conviction to an intermediate appellate court, but has failed to file a notice of appeal within the prescribed time due to improper conduct of his attorney, must move within one year and thirty days from imposition of sentence for an extension of time for taking an appeal (CPL § 460.30). Defendant was originally sentenced on December 17, 2003. Thus, defendant's time to

appeal would have expired thirty days later, on or about January 16, 2003 (*see id.*). Defendant's time to move to extend his time to appeal would have expired one year later, on or about January 16, 2004. No such request was made.

Most importantly, even if defendant's motion was timely, and even if this Court had the power to entertain it, defendant has not demonstrated there is an appealable issue. The right to effective assistance of counsel in criminal proceedings is guaranteed by the New York and Federal Constitutions. The state standard for effective assistance of counsel has long been whether the defendant has been afforded meaningful representation (*People v Henry*, 95 NY2d 563 [2000]; *People v Baldi*, 54 NY2d 137 [1981]). When the conviction is based on a guilty plea, "a defendant has been afforded meaningful representation when he ... receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404 [1995]). Further, to succeed on a motion to vacate a judgment based on allegations of ineffective assistance of counsel, defendant must show his attorney's ineptitude had a prejudicial effect on defendant's rights (*Strickland v Washington*, 466 US 668 [1984]).

Upon review of the parties's submissions, the Court file, the plea and sentencing minutes and the applicable law, the Court finds that defendant had meaningful representation. Defendant's attorney procured an extremely advantageous plea bargain, and nothing in the record casts doubt on the apparent effectiveness of counsel (*see People v Boodhoo*, 191 AD2d 448 [2d Dept 1993]). Defendant was charged with two counts of

Criminal Possession of a Controlled Substance in the Third Degree, two counts of Criminal Possession of a Weapon in the Third Degree, one count of Criminal Possession of Marijuana in the Fifth Degree and one count of Unlawful Possession of Marijuana. If he had been convicted after trial of Criminal Possession of a Controlled Substance in the Third Degree, the top charge, as a second felony offender, defendant would have faced a minimum term of imprisonment of from four and one-half years to nine years and a maximum term of imprisonment of from twelve and one-half years to twenty-five years. His attorney, negotiated a favorable plea, which could have resulted in a misdemeanor conviction with no additional jail time had defendant successfully completed DAYTOP.

Moreover, even after defendant violated the agreement the first time by absconding, defense counsel was successful in getting defendant a second chance. After defendant absconded from the program a second time and committed a new crime, he was sentenced to an indeterminate term of imprisonment of from four and one-half years to nine years. It was not any failing on his attorney's part which resulted in this sentence. It was defendant's actions which resulted in this sentence and there is no appealable issue.

Moreover, as part of his plea, defendant waived his right to appeal. When a defendant knowingly, intelligently, and voluntarily waives his right to appeal as part of a plea agreement, such waiver will be given full force and effect (*see People v Piparo,* 256 AD2d 91 [1st Dept 1998]; *People v Aponte*, 212 AD2d 157, 159 [2d Dept 1995]). This waiver is reflected in the plea agreement signed by defense counsel and the district

attorney on September 24, 2002. Thus, not only is there no issue to appeal, but defendant had bargained away the right to appeal.

In addition, defendant has not submitted an affidavit from counsel indicating counsel was asked to file a notice of appeal on defendant's behalf and failed to do so. Indeed, defendant fails to set forth any facts as to when this request was made or what the substance of the conversation was with counsel regarding an appeal. Therefore, because defendant fails to assert sworn allegations substantiating or tending to substantiate all the essential facts, defendant's motion must be denied (*see* CPL § 440.30[4][b]).

For the above stated reasons, defendant's motion to vacate the judgment of his conviction is denied. This constitutes the Decision and Order of the Court.

New York, New York
August 30, 2007

Roger S. Hayes, J.S.C.