

People v Britt

2007 NY Slip Op 33817(U)

October 12, 2007

Supreme Court, Kings County

Docket Number: 0004504/2006

Judge: Joel M. Goldberg

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART 22**

THE PEOPLE OF THE STATE OF NEW YORK,

vs.

DECISION AND ORDER

HON: JOEL M. GOLDBERG

IND. NO. 4504/06

DATE: OCTOBER 12, 2007

TIMOTHY BRITT,

DEFENDANT.

By a *pro se* motion, dated August 7, 2007, the defendant moves pursuant to CPL 420.40 for deferral of the PL 60.35 mandatory surcharge, crime victim assistance fee, and DNA databank fee imposed at the time of his 16-year to life sentence imposed on March 1, 2007 on the basis of a claimed financial hardship. The People oppose in a response dated September 25, 2007. For the reasons stated below, the defendant's motion is denied.

BACKGROUND

On February 6, 2007, the defendant pleaded guilty to Robbery in the Second Degree, PL 160.10 (1), under Indictment 4504/06 with a promise of 16 years to life in prison. On March 1, 2007, the defendant was sentenced in accordance with the promise. The sentence was to run concurrently with a New York County sentence imposed February 27, 2007. Pursuant to PL 60.35, the applicable mandatory surcharge of \$250 and crime victims assistance fee of \$20 was imposed in addition to a \$50 DNA databank fee (hereinafter "the surcharges"). The defendant is also subject to separate surcharge fees pursuant to PL 60.35 on the New York County Indictment (totaling \$320) and a second Kings County Indictment (totaling \$270) for a total of \$910 in surcharges.

THE DEFENDANT'S CLAIMS

The defendant is requesting an order from the Court granting a financial hardship hearing for the purpose of deferring payment of the surcharges until after the defendant's release from prison, or, in the alternative, reducing the percentage rate withdrawn from his inmate account.

The defendant alleges that he is suffering a financial hardship from the imposed surcharges on the basis that he "is totally unable to afford said fees from the limited salary [he] receives from [his] State prison wages." He states these wages amount to only \$3.50 per week and that he receives no outside help from friends or family.

The defendant asserts that he must totally rely on the \$3.50 per week he receives in wages to purchase necessary items which are not provided by the State, namely, stamps, extra soap (he receives one bar every two weeks) extra toothpaste (he receives 1 tube per month) and other unnamed items which he claims are "necessary ... to thus reduce my exposure to viruses and bacteria... ."

The defendant submitted his inmate funds account statement for the month of June 2007, attached as Exhibit B of his motion, in support of his claims without further explanation. The statement shows the monthly income and disbursements, including the surcharge breakdown, as well as the defendant's balance at the end of the month.

DISCUSSION

Criminal Procedure Law 420.40 (2) sets forth a procedure for deferral of the surcharges for those defendants given a summons to pay the surcharges on a future date if the Court determines after a hearing that the payment of the surcharges would work an "unreasonable hardship" on the defendant or his immediate family. However, contrary to the concession of the People, the procedure set forth in CPL 420.40 (2) does not apply to defendants sentenced to a term of imprisonment in excess of 60 days. *See*, PL 60.35 (8). In such cases, as here, incarcerated defendants are subject to having the surcharges deducted from their inmate fund accounts or from moneys earned in a work release program. *See*, PL 60.35 (5).

Notably, PL 60.35 (8) provides that the collection of the surcharges from the inmate funds account of a defendant sentenced to a term of confinement in excess of 60 days “shall be governed by the provisions of section 60.30” of the penal law. However, neither PL 60.30 nor PL 60.35 specifies that the Court has the authority under CPL 420.40(2) or any other statute to determine whether it is an unreasonable hardship to collect the surcharges from an inmate’s prison fund account.

Some lower court’s have ruled, over the People’s objection, that the power to defer the mandatory surcharge falls within the court’s discretionary authority pursuant to PL 60.30.

People v. Pierce, 16 Misc.3d 1126(A), 2007 NY Slip Op 51587(U) **2 (Sup.Co. NY County 2007) *citing* *People v. Huggins*, 179 Misc.2d 636, 638 (Greene Co. Ct. 1999).

The Fourth Department has concluded in *People v. Kistner*, 291 AD2d 856 (2002) that a lower court had “erred in determining that it lacked authority pursuant to CPL 420.40 (2) to defer the mandatory surcharge.” While the opinion did not provide an extensive analysis for its holding, there can be little question that the Fourth Department considered the precise issue involved here. *People v. Hazel*, 13 Misc. 3d 728, 729 (Sup.Ct. Bronx Co.2006). Subsequently, in *People v. Camacho*, 4 AD3d 862 (4th Dept. 2004) the Appellate Division again stated that “a court has the authority to defer the mandatory surcharge...” as it related to an inmate although not specifically citing CPL 420.40 (2) as the basis for that authority.

Absent contrary authority from the Court of Appeals or the Second Department, this Court is bound by the principles of stare decisis to follow the Appellate Division decisions issued by the other judicial departments of this state. *See, People v. Turner*, 5 NY3d 476, 482 (2005); *Mountain View Coach Lines v. Storms*, 102 AD2d 663, 664-665 (2nd Dept. 1984).

Assuming this Court has the authority to defer payment of the surcharges, the defendant has still failed to present “credible and verifiable information establishing that the surcharge would work an unreasonable hardship on defendant over and above the ordinary hardship suffered by other indigent inmates.” *People v. Kistner*, 291 AD2d 856 *citing* *People v. Abdus-Samad*, 274 AD2d 666, 667 (3rd Dept. 2000), *lv denied* 95 NY2d 862 (2000).

Based on a weekly salary of \$3.50 the defendant’s typical earnings would be \$14.00

a month. The defendant acknowledges that he receives soap and toothpaste without charge from the Prison but chooses to purchase additional or different soap and toothpaste. Furthermore, the defendant fails to state the cost of any of the items he says he needs to purchase, including the additional soap and toothpaste. According to the monthly statement submitted by the defendant, the Department of Corrections deducted a total of \$4.70 for the month of June 2007 to be applied to the defendant's outstanding surcharges. Additionally, the statement shows an ending balance of \$33.21 in the defendant's account. None of the defendant's assertions support a finding that his claimed hardship justifies deferral of the surcharges.

For the foregoing reasons, the defendant's motion is in all respect denied without a hearing.

SO ORDERED

ENTERED

OCT 18 2007

NANCY T. SUNSHINE
COUNTY CLERK


JOEL M. GOLDBERG
Judge