

**People v Chabbott**

2007 NY Slip Op 33870(U)

November 1, 2007

Supreme Court, Kings County

Docket Number: 0003625/2004

Judge: Sheryl L. Parker

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: CRIMINAL TERM, PART 5**

-----X  
**THE PEOPLE OF THE STATE OF NEW YORK** :

**-against-**

**JOSEPH CHABBOTT**

**Defendant**

:  
:  
**DECISION AND ORDER**  
:  
**IND. 3625/04**

-----X  
**Justice Sheryl L. Parker**

Defendant moves pursuant to both C.P.L. §440.10 (1)(f) and (h) for an order vacating his judgement after a plea of guilty on November 10, 2005 and pursuant to C.P.L. §440.20 for an order setting aside the sentence imposed in this matter on January 9, 2006. Based on the defendant's motion and reply affirmation, the People's response, the court file, and the minutes of the proceedings, the following is the Court's decision.

On June 9, 2004 defendant was arrested for multiple felony and misdemeanor charges arising out of an incident in which Arthur and Sylvia Horowitz were killed after being hit by the vehicle defendant was driving. Defendant was indicted for two counts of manslaughter in the second degree (P.L. §125.15), two counts of vehicular manslaughter in the second degree (P.L. §125.12), two counts of criminally negligent homicide (P.L. §125.10), reckless driving, two counts of operating a motor vehicle while under the influence of alcohol (V.T.L. §1192), reckless endangerment in the second degree (P.L. §120.20) and violating the maximum speed limit.

The People's evidence in this case was that defendant, at 12:30 in the morning, while driving under the influence of alcohol and legally intoxicated (V.T.L. §1192[2]), drove his car

approximately 16 miles over the speed limit and collided with the victims as they crossed the street. The top count being a class C non-violent felony, the defendant faced up to five to fifteen years incarceration if convicted after trial.

Upon his arrest, defendant's family retained Stephen Flamhaft, Esq. and his law firm, Flamhaft Levy Kamins Hirsch and Rendeiro. Both Mr. Levy and Mr. Kamins made appearances with Mr. Flamhaft on behalf of the defendant. In June of 2005, a year after defendant's arrest, defendant retained Arthur Aidala, Esq. to join his defense team.

On November 10, 2005, after defendant and his attorneys made ten court appearances, defendant accepted the Court's offer to plead guilty to the entire indictment and receive a sentence of two to six years incarceration. The District Attorney's recommendation was consistently nothing less than the maximum sentence.

#### Motion to Vacate Judgement

The gravamen of defendant's motion to vacate the judgement is ineffective assistance of counsel. Defendant avers that Mr. Flamhaft was delinquent in his efforts to obtain a favorable disposition for the defendant and that he failed to investigate the case sufficiently and bring any exculpatory or mitigating evidence to the attention of the People. (*See*, Defendant's Affirmation). Additionally, defendant avers that he was not correctly informed of the amount of time that he would spend incarcerated before being eligible for parole. Defendant alleges that Mr. Flamhaft informed him that he would be eligible for early release programs and that he "would serve no more than two years in prison." (*Id.* Par. 16). In addition to defendant's own

affidavit and the affidavits of defendant's family, defendant has supplied the Court with an affidavit from social worker Sylvia Gelfand and Mr. Aidala. The People have responded to the defendant's motion and supplied the Court with sworn affirmations by Mr. Flamhaft, Mr. Kamins and Mr. Levy. The defendant's reply included another affidavit by Ms. Gelfand.

The actions of defendant's attorneys demonstrate that substantial effort was made to reach the best possible disposition for their client. On February 7, 2005 a voluminous pre-pleading memorandum was completed by the Consulting Project at the behest of defendant's attorneys. The law firm also retained investigators and experts to evaluate the People's evidence and the facts surrounding the incident. Additionally, the firm filed a motion and memorandum of law moving to dismiss the indictment as insufficient. Mr. Flamhaft contacted the New York State Department of Correction and sought counsel on defendant's eligibility for parole. It is also noted that subsequent to defendant's plea of guilty Mr. Flamhaft became aware of discrepancies in the Probation Report, contacted the Court and the Department of Probation, and requested, successfully, that the report be corrected pursuant to C.P.L. §390.50.

The District Attorney's office was adamant that the defendant should serve the maximum sentence under the law, and through defense counsel's investigation, mitigation and presentation of the case, the defendant was offered by the Court a much more lenient sentence for a crime which resulted in the death of two people. (*People v. Ford*, 86 NY2d 397 [1995]). Defendant's assertions that Mr. Flamhaft failed to attempt to obtain a favorable disposition or that Mr. Flamhaft's representation was "marked by inactivity" (*See*, Defense Affirmation, Par. 15) are clearly without merit. (C.P.L. §440.30 [4][a-d]).

Defendant's remaining claim is that he was not completely informed in his decision to accept two to six years incarceration, in that Mr. Flamhaft and his firm promised him early release from prison. Sylvia Gelfand, an advocate for criminal defendants and prison inmates and the clinical director of Defendant's Consultation Services affirms that, after being brought into the case by Mr. Aidala, she met with the defendant, his attorneys and the defendant's family. This meeting occurred after defendant had pleaded guilty but before he was sentenced. Defendant's sentence was discussed and Ms. Gelfand affirms that she provided the defendant with her opinion regarding his eligibility for early release or parole after serving the minimum period of two years. That opinion apparently contradicted that of Mr. Flamhaft and his law firm. (*See*, People's exhibits A, B and C. *See also*, affirmation of Arthur Aidala, Esq.). Defendant contends that Mr. Flamhaft and his firm informed him that he would be eligible for early release programs and if not, at the very least would likely be paroled after serving the two year minimum. Ms. Gelfand affirms that she informed defendant and his family of her opinion that in cases such as this defendant would neither be eligible for early release programs *nor* would he be eligible for parole after the minimum of two years.

Defendant's claim that Mr. Flamhaft's advice was incorrect is not yet ripe. Defendant entered the Department of Correction on January 9, 2006 to begin serving his sentence. Accordingly, he will not be eligible for parole until January 8, 2008. Notwithstanding, the Court will address defendant's argument.

C.P.L. §440.10 (1) states that at any time after an entry of judgement, the Court may vacate such judgement on the ground that:

(f) Improper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgement which conduct, if it had appeared on the record, would have required a reversal of the judgement upon an appeal therefrom; Or,

(h) the judgement was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

Defendant's claims that the judgement was in violation of his constitutional right to effective assistance of counsel pursuant to C.P.L. §440.10(1)(h) in that his attorneys gave him erroneous off-the-record advice. (C.P.L. §440.10[1][f]).

The Court of Appeals has held that under the New York State constitution "as long as the evidence, the law, and the circumstances of a particular case, viewed in the totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met." (*People v. Baldi*, 54 NY2d 137 [1981]). Under the state rule, a defendant need only show that under the *totality* of the case he was deprived meaningful representation.

Obviously, meaningful representation does not mean perfect representation. (*People v. Modica*, 64 NY2d 828 [1985] [A mistake by defense counsel with respect to the minimum sentence will not rise to the level of ineffective assistance of counsel when bargained for sentence was substantially less than the maximum.]). When applying the state test, the Court finds under the totality of this case, the attorney's actions did not fall below an expected standard of reasonableness, that the defendant received an advantageous plea offer from the Court and

there is nothing in the record that casts doubt on the apparent effectiveness of counsel. (*People v. Boodhoo*, 191 AD2d 448 [1993]).

The New York State test may require less from a defendant to establish ineffective assistance of counsel than the Federal test set forth in *Strickland v. Washington*, 466 US 608 (1984). (*People v. Turner*, 5 NY3d 476 [2005] [State test is a rule more favorable to defendants]; *People v. Benevento*, 91 NY2d 708 [1998]). Under the Federal Standard Defendant must first show that his attorney's actions or advice fell below an objective standard of reasonableness and that there is a reasonable probability that but for counsel's deficiency the result of the case would have been different. Therefore, under the Federal standard the defendant must additionally show that *but for* counsel's errors defendant would not have pleaded guilty and would have insisted on going to trial. (*People v. McDonald*, at 114). In this case, defendant contends:

Had I known at the time of my plea that I would be required to serve possibly four years prior to being released on parole and had I known that I was ineligible for any type of early release program, I would never [have] entered a plea of guilty. (See, Defendant's Affirmation, Par. 29).

However, the remainder of defendant's affirmation states the opposite: That he does not wish to withdraw his plea only that he wishes to receive the sentence promised to him by Mr. Flamhaft. Additionally, defendant avers that it was his parents that insisted that he go forward with sentence. Defendant's self-serving statement in Paragraph 29 is belied by the remainder of his affirmation, and the full plea allocution entered into before the Court.<sup>1</sup>

---

1

The Court: Mr. Chabbott, your attorneys are standing here with you. Have you had enough time to speak with them and are you satisfied with their representation?

The defendant: Yes.

A plea of guilty may only be entered if it is knowing and voluntary. (*People v. Fiumefreddo*, 82 NY2d 536 [1993]). Here, defendant was represented by *four* attorneys, one of

---

The Court: I'm going to ask you some questions. You may stop at any time and speak to your attorneys. You have sworn to tell the truth. All of your answers are under oath. Do you understand?

The defendant: Yes.

The Court: Have you taken any alcohol, drugs or medication in the last 24 hours?

The defendant: No.

The Court: Do you feel that you are physically and mentally able to go ahead with this plea at this time?

The defendant: Yes.

The Court: As you have just heard, your attorney has entered a plea on your behalf to counts 1,2,3,4,5,6,9 and 10 of this indictment. Do you understand that?

The defendant: Yes.

The Court: And is that what you wish to do?

The defendant: Yes.

The Court: By your plea, do you admit that on June 9, 2004, at approximately 12:36 a.m., on Bay Parkway, in the County of Kings, that you recklessly caused the death of Arthur and Sylvia Horowitz in that you were operating a motor vehicle on a public highway, specifically Bay Parkway, at a greater speed than was reasonable and prudent and while in an intoxicated condition, and having a blood alcohol level of .11 percent which is over the legal limit of .08 percent. Is that true?

The defendant: Yes.

The Court: Do you also admit that on June 9, 200[4], at approximately 12:36 a.m., on Bay Parkway, in the County of Kings, that you recklessly caused the death of Mr. and Mrs. Horowitz under those circumstances by striking them with your motor vehicle?

The defendant: Yes.

\*\*\*

The Court: Mr. Chabbott, are you pleading guilty of your own free will?

The defendant: Yes.

The Court: Has anyone forced you or paid you any money in order to get you to plead guilty?

The defendant: No.

The Court: Are you pleading guilty because you are guilty?

The defendant: Yes.

\*\*\*\*

The Court: The promise that has been made to you is that you will receive a sentence of two to six years incarceration. Do you understand that promise?

The defendant: Yes.

The Court: Has any promise other than that been made to you?

The defendant: No.

whom, Mr. Aidala, had no affiliation with Mr. Flamhaft or his law firm. Additionally, a fifth attorney, Mr. Gottlieb, was consulted. Mr. Levy contacted the associate counsel in charge of New York State Department of Correctional Services and sought guidance regarding defendant's sentence. He and his firm advised defendant and based on that advice defendant entered a plea of guilty accepting the Court's offer of two to six years. After his plea of guilty, defendant, his family, and his lawyers met with Ms. Gelfand, a specialist in the area of matters relating to incarcerated individuals. She explained to them "the reality that awaited him." (*Gelfand reply affidavit*, Par. 24). Specifically, she told them that he would not be eligible for work release and that the current practice of the Parole Board made it highly unlikely that he would be released to parole after serving two years. Despite this information, defendant and his family chose to go forward with the sentence. No motion to withdraw his plea was made by the defendant, nor did he make any mention of his attorney's "promise". There is no doubt that the People were adamant in their offer of five to fifteen years, the evidence against defendant was strong, and the defendant did not deny his guilt. Defendant's claims that he was pressured and cajoled appear unreasonable in light of the fact he was at liberty, had a large family and community support network, and he had retained all of the attorneys representing him. Were he unhappy with his representation, he was free to retain new counsel or seek solely the advice of Mr. Aidala.

Absent any on the record misrepresentations by counsel regarding "early release", the Court is entitled to rely on the record of the plea. (*People v. Ramos* 63 NY2d 640 [1984]). A review of the allocution in this matter reveals that the defendant was fully apprised of the sentence in this case, that he admitted his guilt, was satisfied with his attorneys and that his plea

was voluntary. Moreover, it should be noted that it was the Court, not the attorneys, who promised defendant a sentence of two to six years. Under all of the circumstances in this case, an allegation by the defendant that he misinterpreted the plea agreement or that his attorney provided erroneous advice does not warrant the vacating of this judgement. (*People v. Henderson*, 130 AD2d 789 [1987]; *People v. Cataldo*, 39 NY2d 578 [1976]; *People v. Ramos*, *Id.*).

#### Motion to Set Aside the Sentence

Despite his above-discussed motion to vacate his judgement, defendant maintains that he admits his guilt and does not wish to withdraw his plea. He only states that he would like his sentence to reflect what he was promised by Mr. Flamhaft. (*See*, Defendant's Affirmation, Par. 28).


C.P.L. §440.20(1) states that [a]t any time after the entry of a judgement, the court in which the judgement was entered may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law. An attorney's purported ineffective assistance by erroneously advising a defendant of his minimum sentence is not a basis to set aside a sentence. An issue must be raised as to the *propriety* of the sentence. (*People v. Cooks*, 67 NY2d 100 [1986]). Defendant provides no evidence that his sentence was unauthorized, illegal or otherwise invalid as a matter of law. Defendant's reliance on *People v. McClinton*, 43 AD2d 930, is misplaced. The facts in that case were that the defendant did not receive the sentence that the Court had promised. Here, defendant received

two to six years, exactly as promised by the Court. Contrary to defendant's assertions, the Court is not required to inform a defendant of the *minimum* portion of a sentence that he will be required to serve. (*People v. Ramos*, 63 NY2d 640 [1984] [attorney's alleged off the record erroneous advice with respect to jail-time credit and parole eligibility not entitled to judicial recognition]).

Accordingly, for the above reasons, the defendant's motions to vacate the judgement and set aside his sentence are denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: Brooklyn, NY  
November 1, 2007

  
\_\_\_\_\_  
J.S.C.

**ENTERED**  
NOV 7 2007  
NANCY T. SUNSHINE  
COUNTY CLERK