

People v Ulerie

2007 NY Slip Op 34155(U)

December 10, 2007

Supreme Court, Kings County

Docket Number: 0005458/2002

Judge: Patricia DiMango

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MEMORANDUM

SUPREME COURT: KINGS COUNTY

(Criminal Term, Part 30)

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PEOPLE of the STATE of NEW YORK,

By: DI MANGO, J.

- against -

Dated: December 10, 2007

TYRRELL ULERIE,

Indictment No. 5458/2002

Defendant.

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The defendant moves, in primary part¹, to terminate his probation sentence before its expiration, as provided in CPL § 410.90.

In deciding this motion, the court has considered the moving papers and exhibits, the affirmation in opposition, and the court file.

As discussed below, the court herein determines to grant the defendant certain relief from the conditions of his probation, but declines to terminate same outright.

Background

On August 13, 2002, the defendant was pulled over by police for driving his vehicle without having his headlights appropriately illuminated. Upon the stop, marihuana and a Derringer and ammunition were recovered from a backpack on the front seat next to the defendant. As a result of these events, an indictment charging the defendant with Criminal Possession of a Weapon in the Third and Fourth Degrees and Unlawful Possession of Marihuana was filed on August 28, 2002. (The defendant had no prior criminal history.) The defendant was arraigned thereon on September 30, 2002 and pleaded "not guilty."

¹ The defendant's application also seeks other relief, as will be discussed, *infra*.

Thereafter, on June 16, 2003, the defendant moved to withdraw his prior “not guilty” plea and to plead guilty. In return for his plea, the defendant was promised a sentence of five years’ probation and six months’ incarceration. He entered his guilty plea to Criminal Possession of a Weapon in the Third Degree in satisfaction of the indictment on that date and such plea was accepted by the court.

However, prior to sentencing, the defendant’s attorney made an application that the defendant be given an alternative, non-incarceration sentence. In support of this request, the defense submitted an array of letters (numbering seven) from various individuals, all attesting to the defendant’s good character and good deeds, and indicating that the charged criminal acts were an aberration and, therefore, requesting leniency for him and to permit him to continue supporting his family and helping in the community. Also, one of these letters was from a program which was willing to accept the defendant, in lieu of his being incarcerated.

Nevertheless, ultimately, the defendant was sentenced, on January 5, 2004, to the promised terms.

Thereafter, on or about April 29, 2005, defense counsel brought an application before the court requesting a modification of the terms and conditions of the defendant’s probation. In it, counsel stated that the defendant had completed his sentence of incarceration on May 5, 2004 and since that time has been on probation, living “an exemplary life.” Counsel was requesting a modification of the defendant’s conditions of probation which would permit him

to travel outside of New York City on shorter notice² for the purposes of conducting business and to pursue other, permanent employment opportunities.

Counsel averred that the defendant, in addition to having a Bachelor of Science degree in engineering and having formed a technology consulting company with former classmates as his business associates, had completed real estate courses. According to counsel, the defendant had completed all the requirements necessary to become a licensed real estate salesperson and had sponsors therefor, but that in order to obtain his license, he needed to acquire a Certificate of Relief from Civil Disabilities. Additionally, the defendant and one associate were trying to form a not-for-profit organization to help high school students. However, the defendant's travel restrictions were precluding him from taking advantage of certain business/employment opportunities, developing and expanding his business ventures, and from pursuing other professional endeavors and fully engaging in his other pursuits (namely, his volunteer work). (The defendant is married and has two small children.)

In lieu of the four-week travel notice requirement the defendant was then currently subject to, counsel proposed that the Department of Probation ("Probation") allow the defendant to travel on two weeks' notice and further, that there be a contingency for emergency business travel whereby the defendant would be able to obtain (oral) travel

² According to counsel, Mr. Ulerie's then existing travel restrictions required him to give four months' notice in order to travel outside of New York City. Furthermore, it was alleged that such restrictions severely hampered the defendant in carrying out his business (which required travel beyond New York City and, occasionally, out-of-state) and precluded his taking advantage of various out-of-state employment opportunities (as detailed by counsel); whereas relaxing these restrictions would permit him to improve his economic condition and better support his family.

permission from his Probation officer and document same upon his return. Counsel urged that the court grant this application for modification, indicating that the court would not regret having done so. (The court was also provided with the contact information for the defendant's Probation officer.)

[It appears that nothing came of this application. According to counsel's representation in the instant moving papers, while the court had been in favor of expanding the defendant's travel privileges, the court's approval had been contingent upon Probation's contacting the court (and agreeing to same), and thus, at present the defendant is still restricted in the pursuance of business and employment opportunities.]

Now, on papers executed in July and August of 2007, the defendant is seeking to have his probation terminated, pursuant to CPL § 410.90.

This application is supported by defense counsel's affirmation, the content of which the defendant adopts in whole in his own affidavit, as well as by seven attached letters of personal references. In seeking to have the defendant's sentence of probation terminated, counsel avers that it has been 43 months since the defendant was sentenced and that he "had excellent behavior while incarcerated, and his probation status has been exemplary." Additionally, counsel believes that the six-month period that the defendant was out on bail, between the plea and sentencing (and during which the defendant apparently led a law-abiding, well-behaved existence), should also reflect favorably upon this application.

Defense counsel maintains that the defendant meets all of the statutory criteria for termination of probation, namely, that he is no longer in need of probation guidance or

training, that he has diligently complied with all of the conditions of his probation sentence, and that the termination of his probation would not be adverse to the protection of the public.

In addition to referring to the reference letters previously submitted on behalf of the defendant, counsel discussed the new ones³ (from different individuals) submitted in support of the present application, documenting the defendant's business and personal activities and achievements, such as real estate investment, teaching 8th grade math, and his involvement in other community and volunteer activities (including his church's community outreach program). Counsel stated that the probation restrictions made it difficult for the defendant to take advantage of various community, business, and employment opportunities outside New York City, which pursuits counsel itemized⁴ (and some of which are elaborated upon in detail in the reference letters). Also, it was again noted that, although he was otherwise eligible to become a licensed real estate salesperson, because of his felony conviction, the defendant required a Certificate of Relief from Civil Disabilities in order to obtain such license.

³ Among the authors of these letters were: a neighbor of the defendant, a school principal of the institution where the defendant tutored students, a member of the church where the defendant had been a volunteer tutor for three years, a business associate (who characterized the defendant as a responsible father and a good business partner, and discussed how defendant's travel restrictions impinged on their business as well as his plans to pursue his Masters studies), and other church members and friends extolling the defendant's good works and helpful nature. All of these people praised the defendant's help and positive influence on others, and several expressed surprise and disbelief that the defendant had a criminal record. These individuals urged that the defendant's probation be terminated and that he be granted a Certificate of Relief from Civil Disabilities.

⁴ The defendant was involved in various real estate ventures, some for investment as well as for non-profit entities, and was still working with his technology consulting company as well as volunteering in the community and with his church.

In response to this application, the New York City Department of Probation has submitted the terse affirmation of an Assistant General Counsel in which it is asserted that the defendant is currently reporting to Probation on a monthly basis (through the “KIOSK machine”), that he “reports as directed, has not been rearrested and . . . has complied with the Conditions of Probation,” but that, “due to the serious nature of the probationer’s arrest on possession of a weapon,” the “Department of Probation objects to the Termination of Probation.” (This is the extent of Probation’s response and the Department does not address any of the factual particulars of the defendant’s application or his circumstances; nor is any mention made of the possibility of modifying the terms of the defendant’s probation or of granting him a Certificate of Relief.)

Discussion

CPL 410.90 (3) provides as follows:

“(a) The court shall grant a request for termination of a sentence of probation under this section when, having regard to the conduct and condition of the probationer, the court is of the opinion that:

“(i) the probationer is no longer in need of such guidance, training or other assistance which would otherwise be administered through probation supervision;

“(ii) the probationer has diligently complied with the terms and conditions of the sentence of probation; and

“(iii) the termination of the sentence of probation is not adverse to the protection of the public.”

It is undisputed that the defendant has fulfilled all the requirements of his probation thus far and, thus, has established one branch of the three-part test for termination, namely, the criteria set forth in CPL 410.90 (3) (a) (ii). However, notwithstanding the defendant's compliance and exemplary behavior on probation, which the court applauds, the court is very mindful of the finality of termination of probation. For, once a court terminates probation, the court lacks jurisdiction to re-sentence a defendant should he or she commit another crime or violate any condition previously imposed by the court,⁵ and, given the severity of the defendant's original offense, this court cannot conclude that the defendant is no longer in need of the guidance and assistance which Probation supervision provides.

The motion to terminate probation is, therefore, respectfully denied.

However, in lieu of outright termination, the court, sua sponte, will consider whether modification of the defendant's conditions of probation is appropriate in order to accommodate the defendant's business travel needs. That analysis ensues below. Regarding the defendant's wish to attend graduate school outside of New York State, the court declines to consider same until and unless the defendant has actually applied to and been accepted into a Master's degree (or other) program.

At any time prior to the expiration of the probationary term, a court is authorized to modify or change the terms of the probation sentence.⁶

⁵ See, *People v John P., Jr.*, 294 AD2d 951, 952 (2002).

⁶ See, Penal Law 60.01(2)(b); *People v Rodney E.*, 77 NY2d 672, 675-676 (1991).

CPL 410.20, as is relevant, reads as follows:

“1. The court may modify or enlarge the conditions of a sentence of probation or of conditional discharge at any time prior to the expiration or termination of the period of the sentence. Such action may not, however, be taken unless the defendant is personally present, except that the defendant need not be present if the modification consists solely of the elimination or relaxation of one or more conditions. Whenever the defendant has not been present, the court shall notify the defendant in writing within twenty days of such modification specifying the nature of the elimination or relaxation of such condition or conditions and the effective date thereof. In any such case the modification or enlargement may be specified in the same manner as the conditions originally imposed and becomes part of the sentence.”

It has been said that the overriding purpose of imposing a probationary sentence is to rehabilitate a convicted individual.⁷ It is unquestionable here that facilitating the defendant's pursuance of business ventures and allowing him to service out-of-state clients would further his rehabilitation and increase his productivity in society.

Given all of the above, the court finds it appropriate to modify the conditions of the defendant's probation, and so modifies same, as follows:

1. The defendant is authorized to travel outside of New York City and State (but not outside of the Country) for the purpose of conducting business; but, to the extent practicable, shall give five days' advance notice thereof to his Probation officer. In the case of travel being required on short notice and advance notice being impossible, the defendant may so

⁷ *People v Letterlough*, 86 NY2d 259, 264-265, *motion to amend denied*, 86 NY2d 775 (1995).

travel for business purposes, however, as soon as possible thereafter, the defendant shall notify Probation of the particulars of his travels and document same. Travel outside of New York State for any other purpose, unrelated to business, shall be upon two weeks' notice to Probation and within the discretion of the defendant's Probation officer. However, incidental travel beyond New York City but within New York State or one of the adjoining states of New Jersey, Pennsylvania, or Connecticut for periods of less than 24 hours for business or personal reasons (such as for visiting friends and relatives) shall be permissible and not require advance notice to the defendant's Probation officer.

2. Should the defendant be arrested for any crime in any location, the defendant must immediately notify the court and his Probation officer.

3. All other terms and conditions of the defendant's probation shall remain in full force and effect. Furthermore, to the extent any of the current terms and conditions of the defendant's probation are less restrictive than those herein provided, such less restrictive terms and conditions shall govern and supersede those set forth herein.

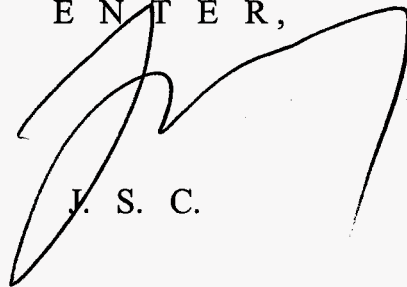
Finally, the court turns to the defendant's application for a Certificate of Relief from Disabilities, which application the court deems to be raised in these papers.

Upon consideration of such application, the court finds the defendant to be an "eligible offender" as defined under the statute, and also finds that the issuance of such certificate is both consistent with the defendant's rehabilitation as well as with the public interest (*see*, Correction Law §§ 701 and 702).

Therefore, in order to further assist the defendant in his rehabilitation and reintegration into society as a full and productive member thereof, the court additionally determines it appropriate that the defendant be granted a Certificate of Relief from Disabilities and, accordingly, in the exercise of its discretion hereby issues a Certificate relieving the defendant from all applicable disabilities and bars.

The foregoing constitutes the decision and order of the court.

E N T E R ,



J. S. C.

HON. PATRICIA M. DIMANGO

ENTERED
DEC 17 2007
NANCY T. SUNSHINE
COUNTY CLERK