People v Goldberg
2007 NY Slip Op 34501(U)
April 9, 2007
County Court, Nassau County
Docket Number: 99519-97
Judge: John L. Kase
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COUNTY COURT - NASSAU COUNTY

STATE OF NEW YORK

Crim. Term Part 12
Ind.#:99519-97

DECISION AND ORDER

Present: Hon. John L. Kase, A.J.S.C.

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THE PEOPLE OF THE STATE OF NEW YORK	:Honorable Kathleen M. Rice : District Attorney :Nassau County : By: Martin Meaney, Esq. : Assistant District Attorney
- against -	
DARRIN GOLDBERG,	:Darrin Goldberg, Pro Se : Nassau County Correctional : Facility : 100 Carman Avenue : East Meadow, NY 11554 : CC# 06011557
Defendant	:Ronald J. Bekoff, Esq. :Stand By Attorney for the : :Defendant :29 Roslyn Road :Mineola, NY 11501
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Darrin Goldberg was charged, along with co-defendant Melvin MeLeod, with the crimes of Robbery in the First Degree, two counts of Robbery in the Second Degree, and Assault in the Second Degree. Melvin McLeod pled guilty to the class B violent felony of Robbery in the First Degree and was sentenced to a determinate sentence of imprisonment of fifteen years.

The defendant herein, represented by Elliot Bloom, Esq., proceeded to trial in March of 1998, resulting in a hung jury and a mistrial. In June of 1998, the case was re-tried before Acting Nassau County Supreme Court Judge Victor M. Ort, resulting in a

jury finding the defendant guilty on all counts in the indictment. On July 20, 1998, the defendant was sentenced as a prior violent felony offender to a determinate term of imprisonment of sixteen years for the First Degree Robbery conviction, two determinate terms of imprisonment of fifteen years for the Second Degree Robbery convictions, and a determinate term of imprisonment of seven years for the Assault conviction. All sentences were ordered to run concurrently.

Thereafter, the defendant appealed his conviction to the Appellate Division Second Department. The conviction was affirmed on November 22, 1999. (People v Goldberg, 266 AD 2d 470 [2nd Dept. 1999]). Defendant's leave application to the Court of Appeals was denied on January 25, 2000. (People v Goldberg, 94 NY 2d 880 [2000]).

In February of 2001, the defendant, pro se, moved pursuant to CPL § 440.10 to vacate the conviction alleging that he was denied the effective assistance of counsel. Particularly the defendant contended that: he was not informed by his attorney of the particulars relative to a plea offer advanced by the District Attorney following the mistrial and preceding the commencement of the second trial; and, he was not informed of the sentence exposure upon conviction but was told by his attorney that it was his opinion that the sentencing judge would, upon conviction, sentence him to no more than ten years.

The People submitted papers in opposition, asserting that there was no reasonable possibility that the defendant's allegations were true, however, the People did not explicitly deny that there was a new plea offer following the first trial and prior to the second trial. Judge Ort, by order dated March 20, 2001, held the defendant's CPL

§ 440.10 motion in abeyance and provided the People with an opportunity to submit an affirmation of the trial assistant disclosing any plea negotiations which took place following the mistrial.

The affirmation of Fred B. Klein, Esq., the then chief of the Major Offense Bureau of the Nassau County District Attorney's Office, as well as the affirmation of Wayne Kiernan, Esq., the trial assistant, were submitted to Judge Ort. Each assistant had reviewed the file of the District Attorney and each had no recollection of extending any plea offer after the first trial. Thereafter, Judge Ort denied the defendant's motion to vacate his judgement of conviction by order dated April 17, 2001.

Thereafter, in February of 2002, the Nassau County District Attorney's Office discovered documents (commonly referred to as "yellow cards") containing written indication that the District Attorney's Office, subsequent to the mistrial and prior to the second trial, in fact, communicated a plea offer of a class C violent felony in satisfaction of the indictment with a recommendation of seven (7) years, the minimum sentence.

The People further indicated that a review of the file disclosed that the plea offer prior to the first trial was a plea to a C violent felony in satisfaction of the indictment with the People taking no position on sentence. The "yellow card" entries further indicated that the offer containing the People's recommendation for the minimum of seven years was rejected out of hand by the defendant's counsel.

By order dated March 12, 2002, Judge Ort assigned Ronald J. Bekoff, Esq., to advise the defendant, who was pro se.

By order entered October 11, 2002, Judge Ort denied defendant's motion to vacate the judgement of conviction in all respects and did so without conducting a

hearing. By notice of motion dated January 9, 2003, the defendant moved, through his advisor Ronald J. Bekoff, Esq. for leave to reargue Judge Ort's decision.

By order of Judge Ort dated January 24, 2003, the motion to reargue was granted and upon reargument, Judge Ort denied defendant's motion to vacate the judgement of conviction in all respects.

The defendant appealed the January 24, 2003 order.

The Appellate Division found that questions of fact necessitating a hearing existed as to whether the defense counsel conveyed the terms of the offer and sentence recommendation to the defendant prior to the second trial, and, if such offer was conveyed, as to whether the defendant would have accepted it.

Accordingly, by order of the Appellate Division dated October 31, 2006, Judge Ort's order was reversed insofar as it was appealed from, on the law, that upon reargument, the order entered October 11, 2002, was vacated and the matter was remitted to this Court for a hearing on the defendant's motion and a new determination thereafter.(People v Goldberg, 33AD 3rd 1018[2d Dept 2006])

A hearing was conducted by this Court at which testimony was taken from the defendant, the trial assistant who prosecuted the matter, the trial assistant's Bureau Chief and the attorney who represented the defendant throughout the prosecution. Admitted into evidence as business records were the two aforementioned "yellow cards". At the hearing, the defendant proceeded pro se with his assigned counsel, Mr. Bekoff, acting as stand by attorney.

Elliot Bloom, Esq., the attorney who represented the defendant on the trial which resulted in a mistrial as well as the trial which resulted in conviction testified at the

hearing. He had no independent recollection of a discussion with the defendant or with the trial assistant regarding any plea offer including of a class C violent felony with a recommendation of the minimum sentence of seven years. Mr. Bloom also had no independent recollection of discussing the defendant's maximum sentence upon conviction with him. A review of his file did not refresh his recollection as to any relevant issue. Regrettably, Mr. Bloom testified that the administrative section of his file was not located, although he had the trial portion.

Bloom did testify as to his recollection of spending a significant amount of time speaking with Goldberg and members of the Goldberg family concerning many issues related to the case.

Bloom negated the possibility of his rejection of the offer in issue without communicating it to Goldberg. He testified that he had never rejected a plea offer without first consulting with his client.

The attorney further testified that although he had no immediate recollection of discussing the maximum sentence upon conviction with Goldberg, there had never been a time in his career when he did not inform his client of his maximum sentence exposure.

Each representative of the District Attorney's office testified as to having no independent recollection of the circumstances surrounding any plea offer extended to the defendant during the period between the first and second trial. The trial assistant, however, confirmed that the "yellow cards" were in his handwriting and clearly indicated that an offer of a plea to a C violent felony in satisfaction of the indictment, with the office of the District Attorney taking no position regarding sentence, was extended to

the defendant prior to the first trial. The" yellow cards" also relate that between the mistrial and the commencement of the second trial, a plea offer of a plea to a C violent felony in satisfaction of the indictment with a recommendation of seven years was communicated to the attorney for the defendant and "rejected out of hand".

The defendant testified under oath and thereafter presented argument in support of his motion.

The substance of the defendant's testimony was that prior to the first trial, he was aware of a plea offer permitting him to plead guilty to a class C violent felony in satisfaction of the indictment and receive a sentence of seven years; that he refused that offer and instructed his attorney to proceed to trial; and, that, at his first trial, aware of the jury's eleven (11) to one (1) vote for conviction, gleaned from a jury note, he instructed his attorney to substitute an alternate juror to replace an ill juror rather than force a mistrial. He further testified that following the first trial he was informed by his attorney that there was a new plea offer, however, he was not told, nor did he press for, the particulars of the new offer; that his attorney told him that he believed that Judge Ort was a fair judge and upon conviction would probably sentence him to no more than ten years; and, the defendant stated that he was unaware that he was facing maximum exposure, upon conviction, of twenty five (25) years.

It was established at the hearing that the defendant had received some college level education, having started at Holy Cross College in Worcester, Massachusetts and thereafter transferring to Southern Connecticut State University. Moreover, he testified as to having some experience with the criminal justice system, resulting from previously being charged with robbery.

In addition, the defendant presents and impresses as a very articulate and intelligent man, whose pro se papers were cogent and artfully drawn.

"The right to the effective assistance of counsel is guaranteed by both the Federal and State Constitutions (US Const., 6th Amdt; NY Const., art I, § 6) .

An attorney provides effective assistance to his client "[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in 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 NY 2d 137, 147[1987]).

A defendant who moves pursuant to CPL § 440.10 to vacate the judgement of conviction has the burden, at a hearing, to prove "by a preponderance of the evidence, every fact essential to support the motion" (CPL § 440.30(6)).

Where the motion is grounded on a claim that he was ineffectively represented by counsel, resulting from counsel's failure to inform him of a specific plea offer, he has the burden of showing that a plea offer was in fact made; that counsel failed to inform him of the offer; and, that he would have been willing to accept the offer. (See People v Rogers, 8 AD 3rd 888 [3rd Dept. 2004]).

This Court credits the substance of the records consisting of the two "yellow cards", moved into evidence without objection, to the extent that it finds that a plea offer consisting of an opportunity to plead guilty to a class C violent felony in satisfaction of the indictment and with the assurance that the People would take no position on the occasion of sentence was in fact approved by the Nassau County District Attorney's Office prior to the commencement of the first trial. The Court further

finds that some time between the mistrial and the commencement of the second trial, the Nassau County District Attorney's Office extended to defense counsel, an offer permitting the defendant to enter a plea of guilty to a class C violent felony, along with a recommendation from the District Attorney that the defendant receive the minimum sentence, seven years.

The defendant's claim, however, that the plea offer advanced following the mistrial and prior to the commencement of the second trial was not conveyed to him, was not sustained by the evidence adduced at the hearing. Throughout the defendant's testimony, he repeated on several occasions that he was aware of, and rejected, a plea offer involving a plea to a C felony and a sentence recommendation of seven years. He claimed, however, that this offer was made and rejected by himself prior to the first trial. This scenario, however, is contradicted by the entries on the "yellow cards".

The defendant testified at the hearing that his attorney visited him at the Nassau County Correctional Center following the mistrial and prior to the commencement of the second trial, and indicated to him that the District Attorney had advanced a "new offer" but did not convey the sentence recommendation component. Bloom's omission of this simple but significant component of the new offer on the occasion of the jail visit, as well as on other occasions, is highly unlikely and is contradicted by the attorney's testimony. Elliot Bloom testified that he has never rejected a plea offer on behalf of a client without communicating it to the client.

Similarly, the defendant's claim that he was not made aware of the maximum sentence exposure, upon conviction, throughout the near completion of two trials , as

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well as the trial and sentence preparation periods, is not likely. Mr. Bloom represented the defendant from the outset and testified to meetings with the defendant, as well as family members. It is equally unlikely that discussions concerning alternatives to trial did not occur on these occasions Moreover, this Court credits Mr. Bloom's testimony to the effect that there had never been a time that he did not discuss with a criminal client the client's maximum exposure.

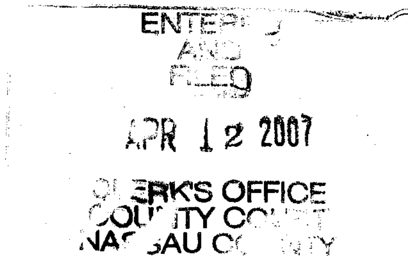
In any event, it is the defendant's burden, not only to show that a plea offer was made and communicated to him, but to show that he would have, in fact, accepted the plea and forgone his trial. The defendant's testimony belies the position that he would have accepted the plea to a class C violent felony and a recommendation of a seven year sentence. The defendant, in summing up to the Court, indicated that "Mr. Bloom came to me after the first trial, ... he said that there was a new offer extended by the People. I asked Mr. Bloom, I said what's the terms? That's when Mr. Bloom did not convey the terms of the plea offer, but he, rather, said, you're thinking about taking a plea? I said, I don't know". (hearing transcript p. 206) Moreover, the defendant testified at the hearing that he turned down the class C felony with a seven year sentence prior to the first trial. He further testified that during the course of deliberations at the first trial, he became aware, through a jury note, that the jury was deadlocked, with a vote of eleven (11) to one (1) favoring conviction. The defendant, armed with that information, shortly thereafter, consented to a substitution of a juror rather than instructing his attorney to move for a mistrial. The Court considers such conduct a reaffirmance of this defendant's unwillingness to give up his right to a trial in favor of a reduced plea or a mistrial.

This Court finds that the defendant has failed to substantiate a claim that if he were in fact informed of the opportunity to dispose of the matter with a plea to a class C violent felony, along with a recommendation of a seven year determinate term, he would have accepted it. (See People v Fernandez, 5NY3d 813[2005])

Accordingly, the defendant has not been denied effective assistance of counsel, and his motion to vacate the conviction pursuant to CPL § 440.10 is denied in all respects.

SO ORDERED

Dated: April 9, 2007



Hon. John L. Kase, A.J.S.C.

PLEASE TAKE NOTICE THAT: the petitioner be and is hereby advised of his right to apply to the Appellate Division, Second Department for a certificate granting leave to appeal from this determination and upon proof of his financial inability to retain counsel and to pay the costs and expenses of the appeal, petitioner may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Such application for poor person relief will be entertained only if, and when such permission or certificate is granted. 22 A NYCRR Section 671.5