

People v Johnson

2007 NY Slip Op 34588(U)

August 15, 2007

Supreme Court, Westchester County

Docket Number: 06-0569-03

Judge: Richard A. Molea

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

FILED and ENTERED
8/17/07
WESTCHESTER
COUNTY CLERK

-against-

MARK JOHNSON,

MOLEA, J.

FILED
AUG 17 2007
Defendant
NICHOLAS J. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

AMENDED
DECISION AND ORDER
Indictment No. 06-0569-03

Upon consideration of the defendant's present application brought pursuant to CPL 440.20 for an order setting aside the sentence imposed under the instant indictment, the Court has considered the notice of motion, affirmation, memorandum of law and reply memorandum of law of counsel for the defendant, David B. Weisfuse, and the affirmation in opposition and memorandum of law of Assistant District Attorney Shara Abraham. Upon these submissions, the instant motion is decided as follows:

Factual Background

Under the instant indictment, the defendant was charged with three counts of Criminal Possession of a Controlled Substance in the third degree, two counts of Criminal Possession of a Controlled Substance in the fifth degree, and three counts of Criminal Possession of a Controlled Substance in the seventh degree. The defendant was arraigned on the instant indictment in the Supreme Court, Westchester County (Adler, J.) on June 22, 2006 and entered pleas of not guilty to all charged counts. This case was subsequently transferred before this Court, presiding over the Trial Assignment Part, where the defendant entered a guilty plea on December 14, 2006 to a single reduced count of Attempted Criminal Possession of a Controlled Substance in the third degree, in full satisfaction of all remaining counts charged under the indictment. The negotiated plea agreement entered into between the parties with the approval of the Court provided for the

defendant's entry of his guilty plea in exchange for a sentence commitment providing for his adjudication as a second felony offender and the imposition of a determinate term of imprisonment of 2½ years, a term of post-release supervision of 1½ years, the mandatory surcharge of \$250.00, the crime victim assistance fee of \$20.00, the DNA fee of \$50.00, and the suspension of his NYS Driver License. Although the defense claims that an unnamed attorney from the Legal Aid Society of Westchester County who represented the defendant had advised the Court during a conference conducted on December 7, 2006 of the defendant's desire to challenge his adjudication as a second felony offender, the Court's notes do not reflect any such communication. To the contrary, the Court's notes reflect that counsel for the defendant, Karen Needleman, Esq., advised the Court on December 7, 2006 that the defendant intended to avail himself of the negotiated plea offer which provided for his adjudication as a second felony offender with the meaning of Penal Law §70.06(1)(b)(i) and the imposition of a determinate term of imprisonment of 2½ years when the case was next scheduled before the Court on December 14, 2006.

On December 14, 2006, in advance of the Court's acceptance of the defendant's guilty plea, the prosecutor specifically stated on the record during the defendant's plea allocution that the terms of the negotiated plea agreement entered into between the parties included the defendant's waiver of his right to contest his status as a second felony offender upon the imposition of sentence, based upon his previous conviction of the crime of Sale of a Hallucinogenic or a Narcotic Drug on August 7, 1998 in the State of Connecticut (hereinafter, the underlying offense). When questioned about his willingness to waive his right to contest his status as a second felony offender by the prosecutor, the defendant unequivocally waived same

and acknowledged that he was lawfully and constitutionally convicted of the underlying offense.

On April 26, 2007, upon examination by the Court prior to the imposition of sentence in this case, the defendant reiterated his previously expressed waiver of his right to contest his status as a second felony offender in exchange for the plea bargained sentence promise.

Thereupon, the Court adjudicated the defendant a second felony offender and imposed sentence in accordance with the terms of the negotiated plea agreement entered into between the parties, providing for a determinate term of imprisonment of 2½ years with a term of post-release supervision of 1½ years, the mandatory surcharge of \$250.00, a crime victim assistance fee of \$20.00 and a DNA databank fee of \$50.00, in addition to the suspension of his New York State Driver License. On July 5, 2007, the defendant filed the instant application with the Court.

Conclusions of Law

Through the instant application, the defense moves the Court to set aside the sentence imposed upon the defendant under the instant indictment pursuant to CPL 440.20, alleging that the defendant's sentence was unauthorized, illegally imposed, or invalid as a matter of law due to the improper adjudication of the defendant as a second felony offender. Specifically, the defense claims that the defendant's previous conviction of the crime of Sale of a Hallucinogenic or a Narcotic Drug on August 7, 1998 in the State of Connecticut should not have been considered a predicate felony within the meaning of CPL 400.21(1) and (2) in connection with the defendant's sentencing under the instant indictment. The People oppose the defendant's instant application, arguing that the allegations raised by the defense are belied by the defendant's explicit and

unequivocal waiver of his right to contest his adjudication as a second felony offender during examinations conducted before the Court on December 14, 2006 and April 26, 2007.

Upon the state of the record made before the Court, the Court finds that the defendant's adjudication as a second felony offender was the result of an intentional, knowing and voluntary admission on his part while addressing the Court under oath on two distinct occasions. Specifically, on December 14, 2006 the defendant was examined by the prosecutor in advance of the Court's acceptance of his guilty plea with respect to the terms of the negotiated plea agreement entered into between the parties, who explicitly stated that one of these conditions included the defendant's waiver of his right to contest his status as a second felony offender based upon his previous conviction of the crime of Sale of a Hallucinogenic or a Narcotic Drug on August 7, 1998 in the State of Connecticut. At that time, the defendant unequivocally expressed his willingness to waive his right to contest his status as a second felony offender, further acknowledging that he was lawfully and constitutionally convicted of that predicate felony offense. Thereafter, on April 26, 2007, the defendant was examined by the Court prior to the imposition of sentence, when he reiterated his previously expressed waiver of his right to contest his status as a second felony offender in exchange for the plea bargained sentence promise. Only after the defendant had been thoroughly examined with respect to the intentional, knowing and voluntary nature of his admission and his waiver, having occurred on two distinct occasions, did the Court adjudicate him as a second felony offender and impose sentence in accordance with the terms of the negotiated plea agreement entered into between the parties.

In this regard it is well-settled that CPL 400.21(7)(b) affords all defendants the opportunity to object to, or controvert, the sentencing court's consideration of a predicate felony

conviction for the purpose of adjudicating the defendant as a second felony offender in connection with the imposition of a sentence pursuant to Penal Law §70.06 (*People v. Harris*, 61 NY2d 9, 16). However, the failure of a defendant to raise such a challenge to the alleged predicate felony conviction prior to the imposition of sentence will be deemed to constitute an absolute waiver of such a claim on the part of the defendant pursuant to the express terms of CPL 400.21(7)(b) (*see, People v. Shriay*, 240 AD2d 783, *app. denied* 91 NY2d 880; *see also, People v. Andre*, 132 AD2d 560, *app. denied* 70 NY2d 797; *People v. Khatib*, 166 AD2d 668).

Under circumstances similar to those present here, the Appellate Division, Third Department held in *People v. Crippa* (245 AD2d 811) that where the defendant declined to challenge the sentencing court's consideration of his alleged predicate felony conviction in an apparent effort to avail himself of a favorable plea bargain, despite the sentencing court's explicit advisement in advance of the imposition of sentence that he had the right to do so, the defendant was deemed to have waived his right to challenge the validity of the predicate felony conviction and would not be permitted to challenge his adjudication as a second felony offender through a motion brought pursuant to CPL 440.20 seeking to set aside his sentence.

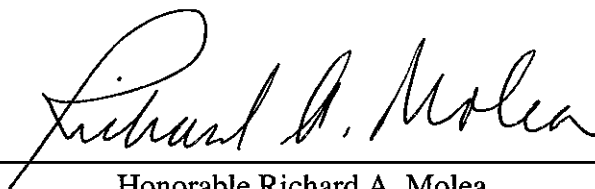
Of further significance, the Court notes that the defendant's desire to avail himself of the negotiated plea bargain reached in this case which provided for a sentence of a determinate term of imprisonment of 2½ years in satisfaction of the entire indictment, as opposed to the potential maximum sentence exposure of three determinate terms of imprisonment of 9 years under the counts originally charged in the indictment, clearly reflects a reasonably calculated election by the defendant to substantially reduce his exposure to a much lengthier sentence. In this regard, the Court also finds that the defendant's waiver of his right to challenge the alleged predicate

felony conviction was a condition of the plea bargain reached between the parties after extensive conferencing of this matter with the Court, which the defendant knowingly and voluntarily assented to with the benefit of the advice of counsel in order to avail himself of that negotiated plea bargain.

Based upon the foregoing, the Court finds that the defendant's express knowing and voluntary waiver of his right to challenge the sentencing court's consideration of his alleged predicate felony conviction in an apparent effort to avail himself of a favorable plea bargain constitutes a waiver of his right to challenge his adjudication as a second felony offender following the imposition of his sentence. Accordingly, the defendant's instant application seeking to set aside the sentence imposed under the instant indictment pursuant to CPL 440.20 is summarily denied.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
August 15, 2007



Honorable Richard A. Molea
Acting Justice of the Supreme Court

TO:

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