

**People v Sattan**

2008 NY Slip Op 30564(U)

February 4, 2008

Supreme Court, Kings County

Docket Number: 0006728/1987

Judge: Cheryl E. Chambers

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM PART 18

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

HAROLD SATTAN

By: Hon. Cheryl Chambers

Date: February 4, 2008

DECISION & ORDER

Indictment No. 6728/1987

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Defendant was convicted by guilty plea of assault in the second degree. He had been facing charges that included one count of attempted murder in the second degree, two counts of assault in the second degree, two counts of criminal possession of a weapon in the second degree, and three counts of criminal possession of a weapon in the third degree. On November 11, 1988, defendant was sentenced as promised to two months in jail and five years probation (Fertig, J. at plea and sentence). He never perfected an appeal but upon his subsequent conviction on an unrelated case his probation was revoked and he was re-sentenced on August 1, 1991 to a term of imprisonment of two and one-third to seven years.

Defendant now moves, pro se, to challenge the validity of his initial sentence under CPL §440.20 and seeks the withdrawal of his guilty plea and to be restored to his pre-plea status. Specifically, defendant claims that his 1988 sentence was unlawful because its components of incarceration and probation were imposed consecutively rather than concurrently. He contends that had he been aware that his guilty plea would have resulted in the imposition of an illegal sentence he would have insisted on proceeding to trial and would thus have avoided the enhanced sentence he is presently serving as a predicate felon. Defendant also maintains that he

was denied effective assistance of counsel by his attorney's failure to properly advise him about his prospective sentence before pleading guilty. The consequence of the failure to inform him of the illegality of his sentence, according to defendant, is that his plea was not knowing and voluntary.

The court finds defendant's claims to be without merit.

Although defendant has moved pursuant to CPL§440.20, his reliance on that provision is misplaced. By virtue of the remedy that defendant seeks and because of his challenge to counsel's performance, he has effectively moved to vacate the judgement of conviction rather than merely to set aside or modify his sentence. Under the circumstances, were an order setting aside defendant's sentence to be granted it would not affect his underlying conviction or his predicate status and could only result in a correction of the sentence that defendant has long since completed (see CPL §440.20[4]). Accordingly, defendant's motion must be addressed within the framework of CPL §440.10 and must be recast as a challenge to the voluntariness of his plea based on an unsound sentence and inadequate advice.

Defendant's motion is complicated by the unavailability of any official court record that would have easily resolved the issues before this court. Despite their well-documented efforts, the People could not recover the stenographic minutes of the proceedings and were unable to unearth the court file or any official notations of the structure of defendant's sentence. Fault for the unavailable record thus cannot be laid at the feet of the People.

To the extent that the passage of time and defendant's decision not to perfect an appeal have contributed to the absent records, the seriousness of defendant's motion must be questioned (see *People v Powell*, 197 AD2d 544 [2d Dept 1993]). In *People v Nixon*, 21 NY2d 338,352

[1967], the Court of Appeals held that a delay of more than a decade was an important factor to be considered in evaluating the seriousness of the defendant's claim. The Court further held that a defendant has everything to gain from the passage of time that can lead a case to become stale. Thus, a lengthy delay can be considered in evaluating the validity and legitimacy of a post-judgement claim (see *People v Melio*, 304 AD2d 247, 252 [2d Dept 2003]; *People v Hanley*, 255 AD2d 837, 838 [3d Dept 1998]).

With regard to the underlying legality of defendant's sentence, a presumption of regularity and validity attaches to all judgements of conviction (*People v Bell*, 36 AD2d 406, 408 [2d Dept 1971], *affd.* 29 NY2d 882 [1972]); *People v Andrino*, 183 AD2d 834 [2d Dept 1992]) and the unavailability of stenographic minutes or court documents will not alone rebut that presumption (*People v Harrison*, 85 NY2d 794 [1995]; *People v Cameron*, 219 AD2d 662, 664 [2d Dept 1995]). Rather, a defendant must come forward with substantial evidence that controverts the presumption (*People v Harris*, 61 NY2d 9 [1983]; *People v Toro*, 186 AD2d 603 [2d Dept 1992]). Furthermore, defendant must demonstrate that he was prejudiced by the missing or inadequate record (*People v Carr*, 229 AD2d 446 [2d Dept 1996]; *People v Cameron* at 663).

Defendant has failed to meet his burden. Under PL §60.01[2][d], when a court imposes a split sentence "the sentence of imprisonment shall be a condition of and run concurrently with the sentence of probation". Thus even without an express pronouncement by the sentencing court as to the concurrent relationship of the two components of the sentence, they run concurrently by "operation of law" (*People v Beaner*, 219 AD2d 827 [4<sup>th</sup> Dept 1995]). In this instance, defendant was only able to present evidence confirming the respective periods of time

about which there is no disagreement. The presumption of regularity that attached to the linkage of those periods remains unchallenged and undisturbed.

While defendant may have been hampered by the unavailability of the records, he was not prejudiced by the fact that they were unattainable. Even if his sentence was illegal, his underlying conviction was unaffected and the immediate remedy would have been to merely reduce his probation by two months. Instead, defendant squandered the benefit of his probation by his subsequent conviction that led to its revocation within three years.

The distinct benefit derived from defendant's minimal sentence undermines his credibility with regard to the voluntariness of his guilty plea. According to the record of defendant's criminal career, his conviction in this case was his first and he was seventeen years old at the time. It is inconceivable, under the circumstances, that he would have forfeited a sentence of time served and probation to proceed to trial in order to avoid the distant prospect of an enhanced sentence. The risk of exposure to a substantial period of incarceration was too great to warrant such a decision on defendant's part.

Moreover, the failure to alert defendant to the possibility of future enhanced punishment does not render the plea constitutionally defective. "That defendant is subject to an enhanced sentence for a crime he may commit in the future is a collateral consequence of his plea and not the type of consequence about which he must be advised." (*People v Depeyster*, 115 AD2d 613 [2d Dept 1985], quoting *People v Sirianni*, 89 AD2d 775 [4<sup>th</sup> Dept 1982]; see *People v Mayers*, 74 NY2d 931 [1989]; *People v Zayas*, 23 AD3d 683 [2d Dept 2005]).

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Defendant's claim of ineffective assistance of counsel is procedurally barred. CPL §440.30(4)(b) authorizes a court to exercise its discretion in denying a motion to vacate a


judgment without a hearing if the moving papers fail to contain sworn allegations substantiating or tending to substantiate all essential facts (*People v Lake*, 213 AD2d 494, 495-496 [2d Dept 1995]; *People v Lawson*, 191 AD2d 514, 515 [2d Dept 1993]). Conclusory allegations of unsubstantiated facts are insufficient (*People v Hickey*, 277 AD2d 511 [3d Dept 2000]; *People v Lake, supra*). Here, defendant has failed to submit in support of his claims affidavits from persons having actual or personal knowledge of the facts of the case (*see People v Ford*, 46 NY2d 1021, 1023 [1979]).

Finally, “[i]n the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel.” (*People v Ford*, 86 NY2d 397, 404 [1995]). Thus, where “a defendant, on the advice of counsel, had entered a plea of guilty and reaped the benefits of a favorable plea bargain which substantially limits his exposure to imprisonment, he has received adequate representation.” (*People v McClure*, 236 AD2d 633 [2d Dept 1997]). In this instance, it has been well recognized by this court that defendant profited from an extremely generous plea bargain. He was thus well served by counsel.

Accordingly, defendant’s motion is denied in its entirety.

This decision shall constitute the order of the court.

**ENTERED**  
 FEB 6 2008  
 NANCY T. SUNSHINE  
 COUNTY CLERK

ENTER:  
  
 CHERYL CHAMBERS  
 J.S.C.