

People v Middleton

2008 NY Slip Op 31091(U)

April 17, 2008

Supreme Court, Kings County

Docket Number: 0007194/2001

Judge: Joel M. Goldberg

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 22**

THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER

- vs. -

**HON. JOEL M. GOLDBERG
IND. NO. 7194/01
DATE: FEBRUARY 27, 2008**

DANA MIDDLETON,

DEFENDANT.

The defendant's motion, pursuant to CPL 440.20, dated November 26, 2007, to set aside his sentence upon consideration of the People's response, dated February 15, 2008, is denied.

The defendant's claims that (1) he was not afforded an opportunity at his sentence to challenge the constitutionality of a prior 1995 robbery conviction, (2) the Court was "vindictive" in its sentence because the defendant expressed a desire to challenge the constitutionality of that conviction, (3) the Court lacked the authority to deny the defendant the opportunity to challenge that conviction, and (4) the Court improperly sentenced the defendant in his absence to five years Post Release Supervision (PRS) are without merit.

CLAIMS 1-3

As more fully set forth in the People's Memorandum of Law, at 1-6, once the defendant expressed a desire to challenge the constitutionality of the 1995 robbery conviction and then denied that he was even convicted of that crime, the Court decided not to spend any further time on the matter and did not make an adjudication that the defendant was a second felony offender. Because that prior conviction was not used to adjudicate the defendant a predicate felon, the defendant had no legal right to challenge the constitutionality of that conviction at his sentencing proceeding.

The defendant's claim that the Court was "vindictive" and improperly enhanced the defendant's sentence because he requested to exercise his right to challenge the constitutionality of his prior 1995 robbery conviction (which he apparently now concedes was, in fact, his conviction) is, as argued by the People, actually a claim that his sentence was unduly harsh or excessive. Such a claim must be raised on direct appeal and cannot be raised on a CPL 440.20 motion. *People v Murphy*, 37 AD3d 976 (3rd Dept 2007)(defendant claimed court's sentence decision was improperly influenced by a separate assault charge that had been dismissed); *People v Cunningham*, 305 AD2d 516 (2d Dept 2003).

Furthermore, the defendant's claim that the Court "penalized" the defendant for expressing a desire to challenge the constitutionality of his prior 1995 robbery conviction is not supported by the record. *See People v Lam*, 226 AD2d 554(2d Dept 1996)(record did not support defendant's claim that Court penalized the defendant for exercising his right to go to trial even though the Court imposed a sentence greater than the plea bargain offered to the defendant prior to trial). *Compare People v Pena*, 50 NY2d 400, 411-412 (1980)(given the *quid pro quo* of the plea bargaining process, it may be anticipated that sentences handed out after trial may be more severe than those proposed in connection with a plea).

Because the defendant's prior 1995 robbery conviction was not a basis of an adjudication that statutorily enhanced the defendant's conviction or designated the defendant as a predicate felon, the Court's refusal to allow the defendant to challenge its constitutionality did not prejudice the defendant. (If the defendant believes his, as yet, unarticulated constitutional challenge to his 1995 robbery conviction has any merit, the defendant, of course, can seek to pursue that challenge before the Court where he was convicted in that case.)

CLAIM 4

The defendant's claim that he was improperly sentenced in his absence to five years PRS is without merit, because his attorney specifically waived his presence for that portion of the sentencing proceeding (Sentencing Minutes at 10). Although the Legislature in CPL

380.40 (1) has stated that a defendant “must be personally present at the time sentence is pronounced,” and in Subdivisions (2) and (3) specify when exceptions to this rule may be made for sentences involving misdemeanors, petty offenses, and corporations, under the circumstances of this case, the defendant’s attorney was permitted to waive the defendant’s presence after all the sentencing proceedings had been concluded except for the Court to note for the record that five years PRS was part of the sentence.

Following the imposition of the prison portion of the sentence, the imposition of the Mandatory Surcharge and Crime Victims Assistance Fee and the defendant’s being advised by the clerk of his right to appeal (Sentencing Minutes at 9), the defendant was taken into custody by the Department of Corrections (Sentencing Minutes at 10). After a period of time had passed, the Court realized it had neglected to impose for the record the PRS portion of the sentence. As reflected in the Sentencing Minutes at 10, the case was called into the record in the presence of defense counsel and, without an Assistant District Attorney being present, defense counsel stated: “I’ll waive my client’s appearance, who was already brought back to Corrections.” The Court then stated: “The record should also reflect five years PRS on each count.”

CPL 380.40(1) states: “In general. The defendant must be personally present at the time sentence is pronounced.” In this case, the defendant was actually present for all of the sentencing proceedings except for the final statement of the Court for which defense counsel expressly waived the defendant’s presence. This waiver was valid and did not result in the defendant’s sentence being “unauthorized, illegally imposed, or otherwise invalid as a matter of law” as described in CPL 440.20(1) so as to require that the sentence be set aside pursuant to that statute.

A defendant’s right to be present at sentencing is statutory and not constitutionally required (*People v Carson*, 104 Misc 2d 281, 284 [Crim Ct, Bronx County 1979]), although due process mandates a defendant’s presence at sentence to the extent necessary for a fair and just proceeding (*Snyder v Massachusetts*, 291 US 97, 105-106 (1934)).

As Justice Cardozo wrote in *Snyder*, due process does not require a defendant’s presence at proceedings where the defendant’s “presence would be useless or the benefit but

a shadow. . . . So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.” *Snyder* at 106-108.

The Court of Appeals has recently reiterated the long-held doctrine that the full panoply of constitutional rights should not be applied to the sentencing process. *People v Leon*, _ NY3d _, 2008 WL 420022 (February 19, 2008)(at a sentencing proceeding to determine defendant’s predicate felony status, the existence of defendant’s prior convictions can be established by an affidavit of the person who compared fingerprint cards) *citing* at n 4, *People v Perry*, 36 NY2d 114 (1975)(sentencing court has discretion to withhold from a defendant information in presentence reports).

An attorney’s waiver of the defendant’s presence for the entire sentencing proceeding would not pass due process scrutiny and clearly violate CPL 380.40 (1), because the defendant’s presence to assist counsel and the defendant’s right to make a personal statement to the Court could only be effectuated by a defendant’s actual presence. *Compare People v Dokes*, 79 NY2d 656 (1992)(defendant has right not waivable by counsel to be present during *Sandoval* hearing to determine admissibility of prior convictions) and *People v Antommarchi*, 80 NY2d 247 (1992)(defendant has similar right to be present when Court questions potential jurors about their ability to objectively weigh the evidence) with *People v Fabricio*, 3 NY3d 402 (2004)(defendant has no right to be present when only legal issues are discussed with the Court during trial); *People v Wiggins*, 89 NY2d 872 (1996)(attorney’s failure to effectuate defendant’s statutory right pursuant to CPL 190.50 to testify before a Grand Jury is not *per se* ineffective assistance of counsel); *People v Venable*, 7 AD3d 647, 648 (2d Dept 2004)(failure to effectuate defendant’s decision to testify before the Grand Jury is not *per se* ineffective assistance of counsel).

In this case, the defendant’s attorney, rather than have the defendant transported back to the courtroom from Corrections after an emotional sentencing proceeding where the defendant was present for all phases up to that point, made a decision to waive the defendant’s presence while the Court made a record of the PRS portion of the sentence. The Court relied on counsel’s waiver and concluded the proceedings with a brief statement.

There was no further argument made on this or any other point, since all parties had already had their opportunities to speak, including the opportunity to speak about the length of PRS although no one chose to speak about it. Counsel's waiver of the defendant's presence was, therefore, not a due process violation nor ineffective assistance of counsel, because the defendant's presence would have contributed nothing.

Even if this was not a valid waiver of the provisions of CPL 380.40(1), it was such a *de minimus* violation that it should be disregarded as not arising to the level of an "unauthorized, illegally imposed, or otherwise invalid" sentence within the meaning of CPL 440.20 (1).

Finally, it may very well be, once the law in this area is settled, that a period of PRS may be validly imposed without any oral pronouncement at all by the sentencing Court if there is a written sentence commitment including such a provision signed by the sentencing judge, or the record otherwise establishes that the period of PRS was imposed by the sentencing judge and not the clerk of the court. *See People v Duncan*, 42 AD3d 470 (2d Dept 2007); *People v Thomas*, 35 AD3d 192 (1st Dept 2006), *lv granted upon renewal*, 9 NY3d 882 (2007); *People v Lingle*, 34 AD3d 287 (1st Dept 2006), *lv granted upon renewal*, 9 NY3d 877 (2007); *People v Sparber*, 34 AD3d 265 (1st Dept 2006), *lv granted upon renewal*, 9 NY3d 882 (2007).

If this is determined by the Court of Appeals to be an acceptable procedure, then even without defense counsel's waiver of the defendant's presence, the PRS portion of the sentence would have been validly imposed in this case.

Accordingly, the defendant's motion is in all respects denied.

SO ORDERED


JOEL M. GOLDBERG
JUDGE

ENTERED

MAR - 7 2008

NANCY T. SULLIVAN
CLERK