

**People v Montanez**

2008 NY Slip Op 32202(U)

April 28, 2008

Supreme Court, Kings County

Docket Number: 0004729/2001

Judge: John G. Ingram

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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF KINGS : CRIMINAL TERM, PART 21

-----X  
 THE PEOPLE OF THE STATE OF NEW YORK,

-against-

**DECISION AND ORDER**  
 Kings County  
 Indictment Number 4729/01

ANTHONY MONTANEZ,  
 Defendant.

-----X  
**JOHN G. INGRAM, J.S.C.**

Defendant pro se moves pursuant to CPL 440.10 to vacate the judgment which convicted him, upon a guilty plea, of assault in the first degree. Defendant claims that his constitutional right to the effective assistance of counsel was violated, and that his plea was invalid. Defendant's motion is denied because it is, in part, procedurally barred, and, in part, without merit.

**FINDINGS OF FACT**

On June 6, 2001, Defendant attempted to shoot Juan Rivera. After a second attempt to shoot Juan Rivera, Defendant instead shot Claudio Rivera, Juan's brother, during the same incident. For these acts, Defendant was charged by a Kings County grand jury with attempted murder in the second degree, attempted assault in the first degree, two counts of assault in the first degree, assault in the second degree, and criminal possession of a weapon in the second and third degrees.

On June 19, 2002, after lengthy plea negotiations, Defendant plead guilty to assault in the first degree in return for a promised sentence of 15 years and 5 years post-release supervision. During the plea proceedings, Defendant acknowledged that the only promise made to him in return for his plea of guilty was a sentence of 15 years incarceration followed by 5 years of post-release supervision.

At the sentencing proceeding on July 9, 2002, the court asked what the promised sentence

was. The clerk of the court responded that it was 15 years and five years post release supervision. The court stated its belief that the post-release supervision portion of the promised sentence would be imposed by operation of law, obviating the need for the court to orally pronounce that portion of the sentence. The court then stated "Based upon the promise that Judge Marrero made and the plea that was taken by Judge Marrero, this court will now sentence you to 15 years."

Defendant did not file a notice of appeal.

By motion dated December 29, 2004, Defendant moved pursuant to CPL 440.10 to vacate the judgment on the grounds that (1) he was entitled to youthful offender treatment; (2) his sentence was harsh and excessive; (3) a judge unfamiliar with the facts sentenced him; and (4) his counsel was ineffective when he (a) failed to advise the court that Defendant was eligible for youthful offender treatment; (b) did not object to the new judge at sentence; (c) advised Defendant to accept a plea that was excessive and disparate to others similarly situated; and (d) advised Defendant to waive his right to appeal. Defendant's motion was denied by Decision and Order dated March 23, 2005 (Silverman, J.).

Defendant's motion pursuant to CPL 440.20 to set aside the sentence on the ground that it was not an authorized sentence for assault in the first degree was denied by Decision and Order dated October 9, 2007 (Chambers, J.).

By his present motion, Defendant seeks to vacate the judgment on two grounds. First, he claims that his counsel was ineffective in two ways. First, counsel failed to object when, at sentence, the court did not dismiss the attempted murder count of the indictment. Second, counsel did not ask that Defendant be examined pursuant to CPL 730.30, nor did he consult with an expert, in aid of a defense that Defendant contends should have been presented: namely, Defendant should not be held

liable for his actions because of his educational deficiencies. In support of his contention Defendant alleges that counsel knew that Defendant could not read or write. Defendant has also submitted, as exhibit C of his motion, a copy of a Department of Corrections document containing information regarding his academic progress in school while in prison.

Defendant's second ground for the present motion is his claim that his plea was invalid because the sentence imposed was illegal in that the court did not impose the promised post-release supervision portion of the sentence.

### CONCLUSIONS OF LAW

#### I. Ineffective Assistance of Counsel

##### A. Dismissal of Attempted Murder Count

"If it appears by conceded or uncontradicted allegations of the moving papers or of the answer, or by unquestionable documentary proof, that there are circumstances which require denial [of a motion to vacate judgment] pursuant to subdivision two of section 440.10 . . . the court must summarily deny the motion" (CPL 440.30 [2]).

CPL 440.10 (2) (c) mandates denial of a motion to vacate a judgment when:

[a]lthough sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon an appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the Defendant's unjustifiable failure to take an appeal during the prescribed period.

"The purpose of [this] provision is to prevent CPL 440.10 from being employed as a substitute for direct appeal when Defendant . . . could readily have raised [an issue] on appeal but failed to do so (CPL 440.10[2][c]) [citations omitted]" (*People v Cooks*, 67 NY2d 100, 103 [1986]).

Thus, where the alleged deficiencies in counsel's performance appear on the record, and therefore could have been raised on direct appeal, summary denial of the motion is mandated (*People v Baxter*, 262 AD2d 1068 [4<sup>th</sup> Dept 1999], *lv denied* 93 NY2d 1014 [1999]; *People v Pachay*, 185 AD2d 287[2d Dept 1992], *lv denied* 82 NY2d 757 [1993]).

Defendant's ascription of error regarding dismissal of the attempted murder count is based solely on facts which appear in the record. Defendant contends that counsel was ineffective in failing to ask the court to dismiss the attempted murder count. In his affidavit, and in his memorandum of law, Defendant refers solely to facts in the trial record in support of his contention. The People have not alleged nonrecord facts in opposing Defendant's motion to the extent it is based on this contention.

Defendant did not take an appeal during the prescribed period. He offers no justification for failing to do so. "[W]here the question of justification for failure to raise the issue when it could have been dealt with on direct review is relevant . . . sworn allegations of fact must directly address [that matter] or the motion is subject to summary denial" (Preiser, Practice Commentaries [McKinney's Cons Laws of NY, Book 11A. CPL 440.30 at 47, *citing, e.g., People v McDonald*, 1 NY3d 109, 115 [2003] and *People v Friedgood*, 58 NY2d 467, 471-472 [1983]).

Thus, "it appears by conceded or uncontradicted allegations of the moving papers [and] of the answer . . . that there are circumstances which require denial thereof pursuant to subdivision two of section 440.10" (CPL 440.30 [2]). Summary denial of the motion, to the extent it is based on this contention, is thus mandated by statute

#### B. Defendant's Mental Condition at the time of Trial

"If it appears by conceded or uncontradicted allegations of the moving papers or of the

answer, or by unquestionable documentary proof, that there are circumstances . . . authorizing denial [of a motion to vacate judgment] pursuant to subdivision three of section 440.10 . . . the court may in its discretion deny the motion” (CPL 440.30 [2]).

CPL 440.10[3] [c] authorizes summary denial of a motion to vacate judgment when “[u]pon a previous motion made pursuant to [CPL 440.10], the Defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.” A CPL 440.10 motion raising an ineffective assistance of counsel claim may properly be denied on this ground (*People v Dover*, 294 AD2d 594 [2d Dept 2002]; *People v Dominguez*, 257 AD2d 511 [1<sup>st</sup> Dept 1999], *lv denied* 93 NY2d 872 [1999]). However, CPL 440.10 (3) authorizes the court to grant the motion nonetheless, in the interest of justice and for good cause shown, if the motion is otherwise meritorious.

In his previous CPL 440.10 motion, Defendant did not raise counsel’s failure to prepare a defense based on Defendant’s educational deficiencies. Defendant has not offered any explanation for his failure to raise this claim in his prior motion. He has therefore not demonstrated that there was good cause for his failure, or why it would be in the interest of justice to consider the merits of his claim.

## II. Invalid Plea

Defendant’s contention that the alleged illegality of the sentence imposed requires vacatur of the plea is wrong. An illegal sentence “does not affect the validity or status of the underlying conviction” (CPL 440.20 [4]). Failure to impose the statutorily required period of post-release supervision simply results in a sentence that does not include a period of post release supervision (*see e.g. People v Thompson*, 39 AD3d 572 [2d Dept 2007]).

A plea must be vacated where the court does not advise a Defendant during the plea proceeding that the promised sentence includes a period of post release supervision (*People v Catu* NY3d 242 [2005]). Here, Defendant was so advised, and does not claim otherwise.

In any event, the court did impose five years of post release supervision as part of Defendant's sentence. While the court also stated its belief that the period of post release supervision was imposed by statute, it nonetheless made clear its intention that Defendant's sentence include five years of post release supervision.

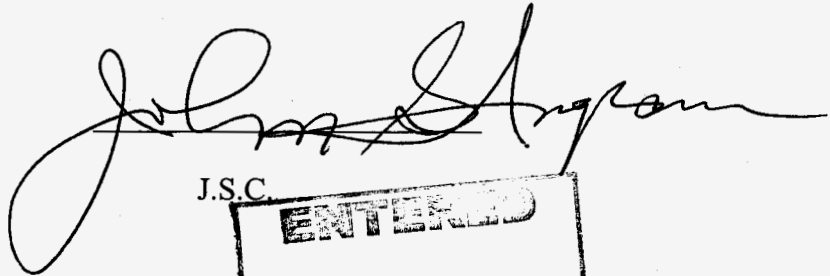
For the foregoing reasons, Defendant's motion to set aside the sentence is denied.

This constitutes the decision and order of the court.

The Defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, NY 11201 for a certificate granting leave to appeal from this determination. This application must be made within thirty days of service of this decision. Upon proof of financial inability to retain counsel and to pay the costs and expenses of the appeal, the Defendant 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. Application for poor person relief will be entertained only if and when permission to appeal or a certificate granting leave to appeal is granted (22 NYCRR 671.5).

Dated: April 28, 2008

ENTER



J.S.C

ENTERED  
APR 30 2008  
NANCY T. SUNSHINE  
COUNTY CLERK