

People v Rivera

2008 NY Slip Op 33546(U)

November 24, 2008

Supreme Court, Kings County

Docket Number: 3564/95

Judge: Jill Konviser

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 26

-----X
THE PEOPLE OF THE STATE OF NEW YORK :
 :
 :
 -against- :
 :
 JOSE RIVERA, :
 :
 :
 Defendant. :
-----X

DECISION AND ORDER
IND. No. 3564/95

JILL KONVISER, JUSTICE:

On November 14, 1995, the defendant pleaded guilty to robbery in the second degree with the understanding that he would be sentenced as a persistent violent felony offender to a prison term of seven years to life. On December 11, 1995, the defendant was adjudicated a persistent violent felony offender and the promised sentence was imposed. The defendant did not file a direct appeal of his conviction.

On April 7, 2008, this Court denied the defendant's pro se motion to set aside the sentence under C.P.L. §440.20. The defendant has now filed a pro se motion to reargue this Court's decision denying his motion to set aside the sentence. He also appears to have raised additional claims that were not included in his original motion, including a claim challenging the voluntariness of his guilty plea. The People oppose the defendant's motion. The defendant filed papers in response to the People's opposition. The defendant's motion to reargue is granted. The defendant's motion to set aside the sentence is denied.¹

¹The defendant's request for the assignment of counsel in connection with this collateral motion is denied. See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); People v. Leonard Ramsey, 2001 N.Y. Slip. Op. 50142(U), 2001 WL 1875965 (Sup. Ct. Bronx Co. Feb. 9, 2001) (Hunter, J.);

Procedural History

The Defendant's First Motion to Set Aside the Verdict

The defendant raised the following five claims in his pro se motion to set aside the sentence under C.P.L. §440.20 that was denied by this Court on April 7, 2008: (1) the sentencing court failed to comply with the requirements of C.P.L. §§440.15, 400.16 when adjudicating him a persistent violent felony offender; (2) the persistent violent felony offender adjudication was illegal as it was premised upon convictions that were unconstitutionally obtained; (3) the persistent violent felony offender adjudication was improperly premised upon a youthful offender conviction; (4) trial counsel provided him with ineffective representation at the time of sentence; and, (5) the persistent violent felony offender statute is unconstitutional. Each of these claims was considered and rejected by the Court. See Decision and Order of April 7, 2008.

The Motion Before the Court

The defendant, in his current motion, claims that the sentence should be set aside on the following grounds: (1) that he was improperly adjudicated a persistent violent felony offender as his New York State Criminal History Record shows that Kings County Indictment 622/84, one of the convictions upon which his persistent violent felony offender adjudication was premised, was a youthful offender conviction; (2) that he was provided with ineffective representation by the attorneys who represented him in connection with all of the felony convictions upon which his persistent violent felony offender adjudication was premised; (3) trial counsel in this case provided him with

People v. Richardson, 159 Misc.2d 167, 168 (Sup. Ct. Kings Co. 1993).

ineffective representation; (4) that he was not provided with a copy of the pre-sentence report ten days prior to the date he was sentenced; and, (5) the persistent violent felony offender statute is unconstitutional. The defendant also claims, on various grounds, that the judgment of conviction should be vacated as he did not plead guilty voluntarily.²

Discussion

The Defendant's Motion to Set Aside the Sentence.

The defendant has filed a motion to set aside the sentence pursuant to C.P.L. §440.20. C.P.L. §440.20 provides that “[a]t any time after the entry of a judgment, the court in which the judgment was entered may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law.” The five arguments raised by the defendant in support of his current motion to set aside the sentence have been considered and rejected by the Court.

The Defendant's Claim that his Persistent Violent Felony Offender Adjudication was Premised upon a Youthful Offender Conviction.

The defendant, in his first pro se motion to set aside the sentence, claimed that his sentence was illegal as his status as a persistent violent felony offender was improperly premised upon a 1984 conviction for criminal possession of a weapon in the third degree (Kings County Ind. No. 622/84), for which he received youthful offender treatment. This Court, however, rejected the defendant's claim and ruled that a certified copy of the defendant's New York State Criminal History Record showed that the defendant was not afforded youthful offender treatment in connection with his conviction under Kings County Indictment No. 622/84.

²Although the defendant does not specifically raise this claim under C.P.L. §440.10, this Court has interpreted the defendant's claim as one that has been raised under that statutory provision.

The defendant, in the instant motion, reasserts his claim that he was adjudicated a youthful offender under Kings County Ind. No. 622/84. Not only is the defendant's claim belied by the certified copy of his New York State Criminal History Record, but it is also contradicted by the Sentence and Order of Commitment prepared in connection with Kings County Ind. No. 622/84, which shows that the defendant was not sentenced as a youthful offender under that indictment.³ Indeed, the defendant could not have been sentenced as a youthful offender under Kings County Ind. No. 622/84 as he was ineligible to receive youthful offender treatment, having been previously adjudicated a youthful offender two years earlier under New York County Ind. No. 5395/82. See C.P.L. §720.10(2)(b) (A defendant may not receive a youthful offender adjudication if he or she has been previously adjudicated a youthful offender.).⁴

As the defendant's claim that his conviction under Ind. No. 622/84 was a youthful offender adjudication is "conclusively refuted by unquestionable documentary proof" -- the certified copy of his New York State Criminal History Record and the Sentence and Order of Commitment prepared under Kings County Ind. No. 622/84 -- his motion to set aside the sentence on the ground that he received youthful offender treatment under Kings County Ind. No. 622/84 is denied without a hearing. See C.P.L. §440.30(4)(c).

³A copy of the Sentence and Order of Commitment prepared in connection with Kings County Ind. No. 622/84 is attached to this decision and order.

⁴The defendant's additional claim that because he was re-sentenced on his youthful offender matter (New York County Ind. No. 5395/82) on the same date that sentence was imposed on his adult matter (Kings County Ind. No. 622/94), his adult conviction was somehow converted into a youthful offender adjudication, is without merit. See People v. Malloy, 34 A.D.3d 1046 (3d Dept. 2006), lv. denied, 9 N.Y.3d 847 (2007); People v. Malave, 179 A.D.2d 419 (1st Dept.), lv. denied, 79 N.Y.2d 950 (1992)

The Defendant's Claim that he was Provided with Ineffective Representation by the Attorneys who Represented him in Connection with the Felony Convictions Upon which his Persistent Violent Felony Offender Adjudication is Premised.

The defendant, in his first pro se motion to set aside the sentence, claimed that the convictions underlying his persistent violent felony offender designation were unconstitutionally obtained as those convictions were premised upon defective guilty pleas in that he was not informed, at the time those pleas were entered, of the constitutional rights he was relinquishing by pleading guilty. As the defendant failed to challenge the constitutionality of the convictions underlying his persistent violent felony offender status at the time of sentence in this case and failed to demonstrate good cause for such failure, this Court ruled that the defendant was precluded from challenging the constitutionality of these convictions by way of a motion to set aside the sentence under C.P.L. §440.20. Furthermore, this Court ruled that even if there was good cause for the defendant's failure to challenge the constitutionality of the convictions at the time of his sentence, his claim was nonetheless without merit as it was based only on his own conclusory and self-serving allegations and was not supported "by substantial evidence[], that a prior conviction was obtained in violation of his constitutional rights." See People v. Licea, 309 A.D.2d 947, 948 (2d Dept. 2003), lv. denied, 1 N.Y.3d 630 (2004).

The defendant now claims that the attorneys who represented him in connection with the felony convictions upon which his persistent violent felony offender status is premised were ineffective as they failed to ascertain that his conviction under Kings County Ind. No. 622/84 was in fact a youthful offender adjudication. The defendant's claim is without merit as his New York State Criminal History Record and the Sentence

and Order of Commitment prepared in connection with Kings County Ind. No. 622/84 shows that he was not afforded youthful offender treatment in connection with that conviction. Thus, there is no merit to the defendant's claim that the attorneys who represented him in connection with the felony convictions upon which his persistent violent felony offender status is premised were somehow ineffective for failing to ascertain whether his conviction under Kings County Ind. No. 622/84 was a youthful offender adjudication.

Furthermore, the defendant's claim is rejected as he has failed to overcome the "presumptions of validity and regularity afforded to prior felony convictions" and has not presented this Court with "substantial evidence," or any evidence, for that matter, that any of his prior convictions were "obtained in violation of his constitutional rights." People v. Licea, 309 A.D.2d 947, 948 (2d Dept. 2003), lv. denied, 1 N.Y.3d 630 (2004). Under these circumstances, the defendant has not met his burden of proving that the convictions underlying his persistent violent felony offender adjudication were obtained in violation of his State and Federal constitutional right to the effective assistance of counsel. People v. Licea, 309 A.D.2d at 368; see People v. Harris, 61 N.Y.2d 9, 16 (1983).

The Defendant's Claim that Counsel in this Case Provided Him with Ineffective Representation.

The defendant, in his earlier pro se motion, claimed that counsel in this case, Kings County Ind. No. 3564/95, was ineffective at the time of sentence as he alleged that she failed to: (1) review the probation report; (2) argue that his 1984 conviction for criminal possession of a weapon in the third degree (Kings County Ind. No. 622/84) was

a youthful offender conviction; (3) adequately prepare for the persistent violent felony offender hearing; and, (4) argue that his 1984 conviction for criminal possession of a weapon in the third degree (Kings County Ind. No. 622/84) was a youthful offender conviction. This Court reviewed the merits of the defendant's claims and found them to be without merit.

The defendant, in the instant motion, again claims that counsel in this case, Kings County Ind. No. 3564/95, was ineffective for failing to ascertain that his conviction under Kings County Ind. No. 622/84 was in fact a youthful offender adjudication. As the defendant's New York State Criminal History Record and the Sentence and Order of Commitment prepared in connection with Kings County Ind. No. 622/84 shows that he was not afforded youthful offender treatment in connection with that conviction, there is no merit to his claim that counsel in this case was ineffective for failing to ascertain whether his conviction under Kings County Ind. No. 622/84 was a youthful offender adjudication. See C.P.L. §440.30(4)(c).

Equally without merit is the defendant's apparent claim that counsel was ineffective for failing to explain to him "what it "me[a]nt to challenge the constitutionality of my previous convictions." See Defendant's Motion at 11. This claim is rejected as it is based solely on the defendant's own conclusory allegations, see People v. Coleman, 37 A.D.3d 491 (2d Dept.), lv. denied, 9 N.Y.3d 864 (2007), and is contradicted by the sentencing minutes which show that the clerk of the court fully advised the defendant of his right to challenge the constitutionality of the convictions upon which the persistent violent felony adjudication was based. See Sentencing Minutes at 3-5. In any event, the defendant's claim is without merit as the sole basis of

the constitutional challenge is his meritless claim that he was sentenced as a youthful offender under Kings County Ind. No. 622/84.

The defendant also appears to claim that counsel was ineffective in that she coerced him into pleading guilty by allegedly telling him “to take the 7 years to life or the judge will see to it that I receive more time.” See Defendant’s Motion at 11. As a result, the defendant appears to claim, pursuant to C.P.L. §440.10, that the judgment should be vacated.⁵

This claim is rejected as it is based solely on the defendant’s own conclusory allegations and is contradicted by the transcript of the plea colloquy in which the defendant acknowledged to the Court that no one had forced, coerced or pressured him into pleading guilty. See Plea Minutes at 13; People v. Beasley, 50 A.D.3d 697 (2d Dept.), lv. denied, 10 N.Y.3d 932 (2008); See People v. Coleman, 37 A.D.3d 491 (2d Dept.), lv. denied, 9 N.Y.3d 864 (2007); People v. Robertson, 2 A.D.3d 756 (2d Dept. 2003), lv. denied, 2 N.Y.3d 745 (2004); People v. Fernandez, 278 A.D.2d 241 (2d Dept. 2000), lv. denied, 97 N.Y.2d 655 (2001); People v. Rivas, 260 A.D.2d 583 (2d Dept.), lv. denied, 93 N.Y.2d 1025 (1999).

The defendant’s motion to set aside the sentence and to vacate the judgment of conviction on the ground that he was deprived of his State and Federal right to the effective assistance of counsel is denied without a hearing.

⁵Although not spelled out in his motion papers, the defendant presumably asserts this claim under C.P.L. §440.10 as he appears to assert that his plea was coerced by his trial counsel. Accordingly, this Court has interpreted this claim under C.P.L. §440.10.

The Defendant's Claim That the Sentence Should Be Set Aside as he was Not Provided with a Copy of the Pre-Sentence Report Ten Days Prior to the Date he was Sentenced.

The defendant claims that his sentence should be set aside as he was not provided with a copy of the pre-sentence report ten days prior to the date sentence was imposed. While the Federal Rules of Criminal Procedure impose a ten day rule, see 18 U.S.C. §3552(d), there is no such requirement under New York law. Accordingly, the defendant's motion to set aside the sentence on this ground is denied without a hearing.

The Defendant's Claim that the Persistent Violent Felony Offender Statute is Unconstitutional.

The defendant, in his first motion to set aside the sentence, claimed that the persistent violent felony offender statute, Penal Law §70.08, was unconstitutional as it violated the principles espoused by the United States Supreme Court in Apprendi v. New Jersey, 530 U.S. 466 (2000). This Court, in rejecting that claim, ruled the constitutionality of the persistent violent felony offender statute has been upheld by both State and Federal Courts. See e.g. People v. Rivera, 5 N.Y.3d 61, cert. denied, 546 U.S. 984 (2005) ; People v. Rosen, 96 N.Y.2d 329, cert. denied, 534 U.S. 899 (2001). Brown v. Miller, 451 F.3d 54 (2d Cir. 2006), cert. denied, __ U.S. __, 127 S. Ct. 938 (2007); Brown v. Greiner, 409 F.3d 523 (2d Cir. 2005), cert. denied, 547 U.S. 1022 (2006).

Although it is not entirely clear from his motion papers, the defendant once again appears to claim that the persistent felony offender statute is unconstitutional. He now argues that the statute violates the principles announced by the United States Supreme Court in United States v. Booker, 543 U.S., 220 (2005). See Defendant's Motion at 16. This argument, however, was rejected by the New York Court of Appeals in People v.

Rivera, 5 N.Y.3d at 75. Accordingly, the defendant's motion to set aside the sentence on this ground is denied without a hearing.

The Defendant's Motion to Vacate the Judgment on the Ground That his Guilty Plea was Involuntary.

The defendant has raised various claims with respect to the voluntariness of his guilty plea. Each of these claims has been considered and rejected.

The defendant's conclusory claim that his guilty plea was coerced by the trial court is refuted by the defendant's acknowledgment, at the time of the plea: (1) that no one had forced, pressured or threatened him to plead guilty; (2) that he was pleading guilty because he was in fact guilty; (3) that aside from the promised sentence no one had made him any other promises in order to get him to plead guilty; and, (4) that by pleading guilty he was giving up any defenses to the charges. Plea Minutes at 10-11, 13, 21; see People v. Fiumefreddo, 82 N.Y.2d 536, 546 (1993); People v. Perez, 51 A.D.3d 1043 (2d Dept.), lv. denied, 11 N.Y.3d 740 (2008); People v. Beasley, 50 A.D.3d 697(2d Dept.), lv. denied, 10 N.Y.3d 932 (2008); People v. O'Brien, 134 A.D.2d 376 (2d Dept. 1987), lv. denied, 70 N.Y.2d 1009 (1988).

Equally without merit is the defendant's vague, conclusory and unsubstantiated claim that he did not understand the plea proceedings as he was under the care of "the Office of Mental Health Services." See Defendant's Motion at 10, 11. As this claim is supported only by the defendant's own self serving allegations and is not buttressed by any evidence, it does not provide this Court with a basis to find that the defendant's plea was involuntarily given. People v. Wager, 34 A.D.3d 505 (2d Dept.), lv. denied, 7

N.Y.3d 929 (2006); People v. D’Orio, 210 A.D.2d 424 (2d Dept. 1994), lv. denied, 85 N.Y.2d 972 (1995).

Moreover, the defendant’s claim is rejected as the transcript of the plea proceedings does not give “the slightest indication that defendant was uninformed, confused or incompetent” at the time the plea was taken.” People v. Alexander, 97 N.Y.2d 482, 486 (2002); see People v. Wager, 34 A.D.3d at 505; People v. Matthews, 21 A.D.3d 499 (2d Dept. 2005), lv. denied, 5 N.Y.3d 830. To the contrary, the record shows that the defendant informed the trial court during the plea proceedings that he understood everything that the trial court had said to him. Plea Proceedings at 12.

The defendant also claims that his plea was involuntary as he indicated to the trial court during the plea proceedings that he did not have enough time to speak with his attorney and that he was not satisfied with her representation. The record of the plea proceedings, however, shows that although the defendant initially stated that he did not have enough time to speak with his attorney, upon further questioning by the trial court, the defendant confirmed that he did have enough time to speak with his attorney prior to entering his guilty plea. See Plea Proceedings at 6-8. Furthermore, the record of the plea proceedings also shows that at no time did the defendant ever state that he was dissatisfied with his attorney’s representation. Rather, he affirmatively informed the Court that he had agreed to accept the advice that his attorney had given him even though he did not “like it.” See Plea Proceedings at 8-9. This record does not support the defendant’s claim that his was plea was involuntarily given.

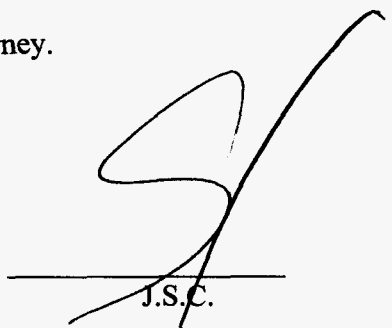
The defendant’s motion to vacate the judgment on the ground that his plea was involuntarily given is denied without a hearing.

Conclusion

The defendant's motion to set aside the sentence pursuant to C.P.L. §440.20 and to vacate the judgment under C.P.L. §440.10 is denied without a hearing.

This constitutes the Decision and Order of the Court. The Clerk of the Court is directed to mail copies of this Decision and Order to the defendant at his place of incarceration and to the Kings County District Attorney.

Dated: Brooklyn, New York
November 24, 2008



J.S.C.

ENTERED
NOV 25 2008
NANCY T. SUNDHANE
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK

SENTENCE & ORDER OF COMMITMENT

Part B County Kings

IND. NO. 622-84 YEAR

The People of the State of New York

vs.

Joel Ruweil

Date: Dec. 18, 1984

Present: Police
Honorable: JUSTICE

DEFENDANT

<u>M</u>	<u>19</u>	<u>49</u>	<u>11</u>	<u>5</u>	<u>11</u>	<u>N</u>
SEX	AGE	NYSID NUMBER				

The above-named defendant having been convicted of the crime(s) of:
CPW 3^o

IT IS ORDERED that the said defendant be and hereby is sentenced to an indeterminate term of imprisonment which shall have a maximum term of: 3 YRS.

and a minimum term of: 1 YR.

- as a second felony offender
- as a persistent felony offender
- as a youthful offender
- a definite term of imprisonment of _____
- pay a fine of _____ or a term of _____ until fine is satisfied
- second violent felony offender
- as a persistent violent felony offender

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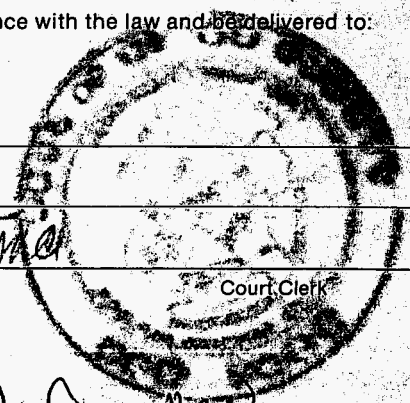
and that the sentence herein shall run concurrent with 5395/82 (N.Y. Co. V.O.P.) and that the said defendant be and hereby is committed to the custody of the:

- Department of Correctional Services of the State of New York until released in accordance with the law, and the Commissioner of Corrections of the City of New York is directed to deliver him/her to the
- Ossining Correctional Facility, Ossining, NY (males 21 yrs. or older)
- Elmira Reception Center, Elmira, NY (males 16 to 20 yrs.)
- Bedford Hills Correctional Facility, Bedford Hills, NY (females 16 yrs. and over)
- Department of Correction of the City of New York until released in accordance with the law and be delivered to:
- New York City Correctional Institution for men/women

REMARKS:

Anthony J. Dura
Clerk of Court

Paul [Signature]
Signature



A true extract from the minutes

THIRD COPY FORWARDED TO BOARD OF ELECTIONS.

C.O. N. [Signature]