

People v Wilson

2009 NY Slip Op 30143(U)

January 26, 2009

Steuben County Ct

Docket Number: 65854

Judge: Marianne Furfure

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State of New York County Court
County of Steuben

The People of the State of New York,
Plaintiff

DECISION and ORDER

- against -

Indict #2006-351W
Index # ~~53,268~~
66,854

EARL J. WILSON, JR.,
Defendant

Appearances: John C. Tunney, District Attorney, Bath (Michael D. McCartney
of counsel), for plaintiff

Earl Wilson, defendant pro se

This matter has come before the Court on defendant's Article 78 proceeding in which he requests an order directing the District Attorney to abide by the terms of the alcohol treatment program contract which defendant signed as part of an alternative to prison plea agreement. Defendant claims that the District Attorney violated the terms of the contract in advocating that defendant be sentenced to a term of incarceration different from that set forth in the written contract. Defendant also seeks to have the Court-ordered restitution vacated based on his claim that it was not included in the written contract. The People opposed defendant's application claiming that defendant's application is more appropriately brought as a CPL 440 motion to be resentenced rather than an Article 78 proceeding and the sentence defendant seeks is an illegal sentence. After reviewing the parties' submissions, the Court reserved decision to obtain a transcript of the proceedings. This has been received and reviewed by the Court.

Defendant brought this matter before the Court as an Article 78 proceeding. However, because the issues raised by defendant are in the nature of an application under Article 440 of the Criminal Procedure Law, defendant's application is converted from an Article 78 proceeding to an application for resentencing (see, CPLR 103[c]).

In reviewing an application for resentencing pursuant to Article 440 of the CPL, the Court must determine if the sentence was unauthorized, illegally imposed, or otherwise invalid as a matter of law (CPL Section 440.20[1]). Defendant appeared in court with his attorney on December 11, 2006, to enter a guilty plea to the charge of forgery in the second degree, as a second felony offender. Defendant was given the option of attending a 15-month drug treatment program in lieu of going to prison. He was promised that, if he successfully completed the drug treatment program, he would be returned to court, allowed to withdraw his plea to the felony charge, and be convicted of a misdemeanor charge. He was also promised that he would receive a three-year sentence of probation, which would include restitution payments in the amount of \$495.06. Defendant was also advised on the record that, if he failed to successfully complete the program, he would receive a sentence of three to six years in prison, and he would also be required to pay restitution. The transcript confirms that defendant understood and accepted the terms under which he agreed to plead guilty. He indicated to the Court on the record that he had not been promised anything that was not said in Court. However, the actual written contract was not signed at that time.

Defendant appeared in court, with his attorney, and the Assistant District Attorney on May 7, 2007, to sign the drug treatment program contract. It was later discovered that paragraph two of the contract provided that defendant would receive a sentence of

up to *two to six years* in prison if he did not complete the program. The contract further provided, in the same paragraph, that the District Attorney would recommend a sentence of three to six years. Although the two to six year sentence was not what was previously stated on the record, no one caught the error at the time the contract was signed. However, the Court reiterated the three to six year sentence if defendant did not successfully complete the program. Defendant did not dispute the Court's statement nor raise any question regarding the wording of the contract.

Defendant now argues that the District Attorney and this Court are obligated to honor that part of the written contract that stated a sentence of two to six years, rather than the sentence of three to six years promised at the time of his plea. He also argues that he should be relieved from paying restitution because the written contract did not so state. The District Attorney argues that the error was inadvertent and that defendant was aware that, if he failed to complete the program, he would be sentenced to a term of three to six years. The District Attorney also argues that the sentence defendant seeks is not authorized by law for a second felony offender.

The law provides that when parties to a contract do not dispute the terms of the agreement they reached, and the only mistake is in the reduction of the agreement to writing, such error may be corrected (*Simek v. Cashin*, 292 AD2d 439, 440 [2nd Dept. 2002]). Defendant does not dispute the terms of the plea agreement. Rather, he claims that, because the sentence set forth in the written drug treatment contract is different from the sentence orally promised by the Court, he is entitled to receive the shorter sentence. The transcripts from the plea agreement and the court appearance at which defendant signed the contract clearly state that defendant was advised, and agreed,

that if he did not successfully complete the alcohol treatment program, he would receive a prison term of three to six years. Defendant, with his attorney present on each occasion, accepted these terms. The law clearly establishes that what is stated on the record controls, no matter what was discussed outside the courtroom, except under most unusual circumstances (*People v. McConnell*, 49 NY2d 340, 346 [1980]; *People v. Frederick*, 45 NY2d 520 [1978]). The fact that the written contract did not accurately reflect the agreement is not one of those circumstances.

At a subsequent court appearance, when the discrepancy between the plea agreement and the written contract came to light, the District Attorney offered defendant a modified sentence of two and one half to five years, rather than three to six years, plus restitution. Defendant now claims that he accepted the modified sentence, only because he was threatened, by both his attorney and the District Attorney, that if he did not accept the sentence the Court would impose the maximum sentence of three and a half to seven years. The hearing which defendant waived dealt with the question of whether defendant had violated the drug treatment contract, not whether he was entitled to a two to six year sentence. At sentencing defendant's attorney was allowed to raise this claim and advocated for the lesser sentence. The Court refused to do so because of the previous on-record agreement. Defendant's claim that his attorney threatened him to compel defendant's acceptance of the sentence is without merit as the maximum sentence which the Court could impose, in any event, was the three to six year term as set forth in the contract. Even if defendant's claim is true, the most defendant could be afforded was the right to withdraw his plea, not the sentence he claims he was promised (*People v. Selikoff*, 35 NY2d 227 [1974]).

The sentence defendant argues for is an illegal sentence. Under the facts of this case, defendant cannot be sentenced to a term of two to six years because, as a second felony offender who has pled guilty to a non-violent class D felony, the law requires a sentence wherein the minimum sentence must be one-half of the maximum sentence imposed (PL Section 70.06 [3], [4]). Both the originally promised sentence and the sentence which was actually imposed are legal sentences. Therefore, defendant's application to vacate his sentence of two and one half to five years and be resentenced to a term of two to six years is denied.

Defendant's application to vacate the restitution order is also denied. Defendant's claim that he should be relieved of the obligation to pay restitution because the drug treatment contract left the amount blank is without support. The contract provision on which defendant relies did not apply to his case. Defendant agreed to a sentence that included restitution at the time he pled guilty. The amount of restitution was set forth at that time. At sentencing the Court imposed the amount originally agreed upon, despite the People's request for an increased amount. Defendant did not dispute the amount and merely requested deferral of payment. Defendant has set forth no legal basis to find that portion of the sentence was unauthorized, illegal or otherwise invalid. Based upon the above, defendant's application is denied.

This constitutes the Decision and Order of the Court.

Dated: January 26, 2009.

ENTER,



HON. MARIANNE FURFURE
Acting County Court Judge