

**People v Duran**

2009 NY Slip Op 31488(U)

June 1, 2009

Supreme Court, Kings County

Docket Number: 10474/06

Judge: Jill Konviser

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

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THE PEOPLE OF THE STATE OF NEW YORK, :

-against- :

Ind. No. 10474/06

JESUS DURAN, :

Defendant. :

----- X

JILL KONVISER, JUSTICE:

On February 1, 2007, the defendant pleaded guilty to attempted criminal sale of a controlled substance in the third degree under Penal Law §110/220.39, with the understanding that he would be sentenced, as a second felony offender, to a three year prison term and a three year term of post-release supervision.<sup>1</sup> On February 15, 2007, the defendant was adjudicated a second felony offender and the promised sentence was imposed. The defendant has not filed a direct appeal his conviction.

The defendant has now filed a pro se motion in which he seeks to: (1) vacate the judgment of conviction pursuant to Criminal Procedure Law §440.10; and, (2) obtain, without cost, transcripts and all discoverable police documents prepared in connection with this case. The People have filed an Affirmation and Memorandum of Law in Opposition to the defendant's motion. For the reasons that follow, the defendant's motion is denied.

**The Defendant's Motion to Vacate the Judgment of Conviction under C.P.L. §440.10**

The defendant, in a hodgepodge of sworn and unsworn documents, consisting of undated, unsworn and unsigned letters affidavits, notices of motion and random statutory and case law

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<sup>1</sup>The plea agreement specified that this sentence was to run concurrently with the two year prison term and two year term of post-release supervision that had yet to be imposed under indictment 7374/06. At the time of the plea in this case, the defendant had pleaded guilty to attempted criminal sale of a controlled substance in the fifth degree under indictment 7374/06 but had not yet been sentenced.

citations and annotations, claims that his judgment should be vacated under C.P.L. §440.10. Each of the defendant's claims has been considered and rejected.

### **The Defendant's Challenge to the Voluntariness of his Guilty Plea**

The defendant claims that his guilty plea was involuntary as he was "force[d]" by the Court to plead guilty. Specifically, the defendant maintains in two undated, unsigned and unsworn letters attached to his motion papers that this Court forced him to plead guilty by telling him that he "should just take the plea" because he was "going to get time anyway" and that he would get the "maximum time." This claim is rejected as the plea minutes show that the defendant acknowledged under oath, at the time of the plea, that no one had forced him or threatened him to plea guilty, that he was pleading guilty voluntarily, and that he was pleading guilty as he was in fact guilty. See Plea Minutes of February 1, 2007 at 5. The defendant's sworn statements at the time of the plea belie his current claim that he was forced by this Court, or by anyone else for that matter, to plead guilty. See 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. Robertson, 2 A.D.3d 756 (2d Dept. 2003), lv. denied, 2 N.Y.3d 745 (2004); People v. Khan, 201 A.D.2d 586 (2d Dept. 1994).

Moreover, the defendant's claim that this Court forced him to plead guilty by allegedly telling him that he "should just take the plea" because he was "going to get time anyway" and that he would get the "maximum time" is contradicted by the plea minutes which show that no such statements were ever made to the defendant. As an allegation of fact essential to support the defendant's motion is contradicted by a court record and the defendant's claims are supported only by his own conclusory and unsworn allegations, there is no "reasonable possibility" that his allegations with respect to the plea proceedings are "true." See C.P.L. §440.30(4)(d). Accordingly, the defendant's

motion to vacate the judgment of conviction on the ground that he was forced to plead guilty is denied without a hearing.<sup>2</sup>

Equally without merit is the defendant's apparent claim that the judgment should be vacated as he was suffering from a "mental defect," was "mentally sick," and was unable to understand the proceedings and "participate in his own defense." Aside from these conclusory and speculative allegations, the defendant's has not set forth any sworn allegations of fact to support this claim. As such, his claim is rejected as procedurally deficient. C.P.L. §§440.30(4)(a), (b); see People v. Session, 34 N.Y.2d 254, 256 (1974); People v. Coleman, 37 A.D.3d 491 (2d Dept.), lv. denied, 9 N.Y.3d 864 (2007); People v. Montalvo, 258 A.D.2d 353 (1<sup>st</sup> Dept.), lv. denied, 93 N.Y.2d 974 (1999). Moreover, the defendant's claim is rejected for the additional reason that neither the plea nor the sentencing minutes give "the slightest indication that defendant was uninformed, confused or incompetent" during either of those proceedings. See People v. Alexander, 97 N.Y.2d 482, 486 (2002).

The defendant's motion to vacate the judgment of conviction on the ground that he was suffering from a "mental defect" is rejected.

The defendant also emphasizes in his undated, unsigned and unsworn letters the lack of evidence that he committed the crime for which he pleaded guilty. To the extent that the defendant may be arguing that the judgment should be vacated as he is actually innocent of any crime, such claim is rejected. As a threshold matter the defendant's apparent claim that he is actually innocent

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<sup>2</sup>The defendant also suggests that he was forced to plead guilty because this Court is racist and "didn't like" him. As these self-serving and conclusory allegations are not supported by sworn allegations of fact and are in no way supported by the plea and sentence minutes, the defendant's motion to vacate the judgment of conviction on this ground is denied. See C.P.L. §§440.30(4)(b),(d).

is procedurally deficient as he makes only bare and conclusory allegations in support of this claim. See People v. Session, 34 N.Y.2d at 256; People v. Coleman, 37 A.D.3d at 491. Due to the defendant's failure to set forth any sworn allegations of facts to explain his apparent claim of innocence, his motion to vacate the judgment of conviction on this ground is denied. C.P.L. §440.30(4)(a), (b).

Moreover, the defendant's conclusory allegation of innocence is contradicted by the record which shows that during the plea colloquy the defendant acknowledged, under oath, that he was pleading guilty because he was in fact guilty. See Plea Minutes of February 1, 2007 at 5. In addition, the defendant fully allocuted to the crime and admitted that on the date in question he knowingly and unlawfully attempted to sell crack/cocaine. As the defendant's bare assertion of innocence is contradicted by the plea minutes, his motion to vacate the judgment on this ground is denied. People v. Molloy, 28 A.D.3d 681 (2d Dept.), lv. denied, 7 N.Y.3d 792 (2006); People v. Solis, 302 A.D.2d 542 (2d Dept.), lv. denied, 99 N.Y.2d 658 (2003); People v. Potter, 294 A.D.2d 603 (2d Dept.), lv. denied, 98 N.Y.2d 771 (2002).<sup>3</sup>

**The Defendant's Claim That he was Deprived of his Right to Testify Before the Grand Jury.**

The defendant claims that the judgment should be vacated as this Court, the District Attorney and defense counsel deprived him of his right to testify before the grand jury. The law is well-settled however that by pleading guilty, the defendant forfeited his claim that he was deprived of his right to testify before the grand jury. People v. DeLuca, 45 A.D.3d 777 (2d Dept. 2007), lv. denied, 10 N.Y.3d 933 (2008); People v. Beaton, 303 A.D.2d 593 (2d Dept. ), lv. denied, 100 N.Y.2d 578

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<sup>3</sup>The defendant's claim that he was not provided with a copy of the indictment is refuted by the record. See Plea Minutes of February 1, 2007 at 2.

(2003); People v. Standley, 269 A.D.2d 614 (2d Dept.), lv. denied, 94 N.Y.2d 925 (2000); People v. Lyde, 247 A.D.2d 555 (2d Dept.), 91 N.Y.2d 974 (1998); People v. Franklin, 232 A.D.2d 577 (2d Dept. 1996), lv. denied, 89 N.Y.2d 985 (1997); People v. Ferrara, 99 A.D.2d 257 (2d Dept. 1984). As the defendant's guilty plea was knowingly and voluntarily entered, his claim that was deprived of his right to testify before the grand jury must be denied.

#### **The Defendant's Ineffective Assistance of Counsel Claim**

The defendant claims that he was provided with the ineffective assistance of counsel. While it is not entirely clear from his motion papers, the defendant appears to be claiming that counsel was ineffective for failing to effectuate his intent to testify before the grand jury. The law is well-settled, however, that "defense counsel's failure to effectuate the defendant's intention to testify before the grand jury, standing alone, does not constitute the denial of effective assistance of counsel." People v. Sherrod, 306 A.D.2d 503 (2d Dept.), lv. denied, 100 N.Y.2d 624 (2003); see People v. Owens, 43 A.D.3d 1185, 1186 (2d Dept.), lv. denied, 9 N.Y.3d 1008 (2007); People v. Venable, 3 A.D.3d 647, 648 (2d Dept.), lv. denied, 3 N.Y.3d 682 (2004); People v. DiGabriele, 262 A.D.2d 631 (2d Dept.), lv. denied, 93 N.Y.2d 1017 (1999). As this Court cannot discern from the defendant's motion papers any other ground upon which he claims, with sworn allegations of fact, that counsel was ineffective, his motion to vacate the judgment of conviction on the ground that counsel failed to safeguard his right to testify before the grand jury is denied.

In any event, this Court finds that the defendant was provided with effective representation. The Court of Appeals has held that "[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 effectiveness of counsel." People v. Ford, 86 N.Y.2d 397, 404 (1995). In this

case, the defendant was provided with meaningful representation as he received an advantageous plea -- he pleaded guilty to a lesser count, received less than the maximum sentence and, as a result of counsel's advocacy, the sentence in this case was permitted to run concurrently with the sentence that had not yet been imposed under indictment 7374/06. *Id.* at 404; People v. Browning, 44 A.D.3d 1067 (2d Dept 2007); *see* People v. Lee, 51 A.D.3d 1217 (3d Dept. 2008); People v. Brown, 49 A.D.3d 1028 (3d Dept. 2008). As the defendant received an advantageous plea agreement and there is nothing in the record that casts doubt on counsel's effectiveness, the motion to vacate the judgment on the ground that the defendant received the ineffective assistance of counsel is denied.

#### **The Defendant's Motion to Obtain Free Copies of the Transcript**

The defendant has filed a pro se motion to obtain, without cost, transcripts prepared in connection in the above-referenced case. The defendant's motion for a free copy of the transcripts is denied as this Court does not have the statutory authority to grant such a request. Only a court in which an action is triable or to which an appeal has been taken has the authority to grant a defendant permission to proceed as a poor person. C.P.L.R. §1101(a). The defendant has no triable matters before this Court and there are no matters for which he can take an appeal to this Court. In addition, the only statutory authority for providing a free transcript in a criminal proceeding vests an appellate court with the power to provide a free transcript to an indigent defendant when an appeal is taken. C.P.L. §460.70(1).

Furthermore, neither the State nor Federal Constitutions mandate that a defendant pursuing a post-conviction motion receive a free copy of a transcript. Pennsylvania v. Finley, 481 U.S. 551 (1987); People v. Bogle, 17 Misc.3d 1134(A), 2007 WL 4207788 (Sup. Ct. Bronx co. Nov. 27, 2007) (Dawson, J.); People v. Gonzalez, 7 Misc.3d 1026(A), 2005 WL 1215960 (Sup Ct. Queens

Co. May 23, 2005) (Rotker, J.); People v. Largo, 6 Misc.3d 1028(A), 2004 WL 320534 (Sup Ct. Queens Co. Dec. 1, 2004) (Roman, J.).

The defendant's motion to obtain as free copy of the transcripts prepared in connection with this case is denied.

#### **The Defendant's Motion to Obtain Discovery of Police Documents**

The defendant has filed a pro se motion for discovery of certain police documents for the apparent purpose of furthering his application to vacate the judgment of conviction under C.P.L. §440.10. Discovery is a statutory and not a constitutional right. Weatherford v. Busey, 429 U.S. 545, 559 (1977); Miller v. Schwartz, 72 N.Y.2d 869, 870 (1988). As "[t]here are no discovery provisions under the Criminal Procedure Law for motions under 440 of the CPL," the defendant's motion to obtain discovery of the police documents is denied. People v. Torres, 185 Misc.2d 108 (Sup. Ct. Kings Co. 2000) (Leventhal, J.); see People v. Jabbar Collins, 16 Misc.3d 11331(A), 2007 WL 2492171 (Sup. Ct. Kings Co. September 5, 2007) (Holdman, J.) ("Neither Article 240 of the Criminal Procedure Law, nor any other statutory provision permit post-conviction discovery[.]"); People v. Samuels, 14 Misc.3d 1240(A), 2006 WL 4050815 (Sup. Ct. Bronx Co. Dec. 21, 2006) (Sonberg, J.) ("[T]here are no discovery provisions under the Criminal Procedure Law for motions under § 440 of the Criminal Procedure Law.").

The defendant's motion to obtain post-conviction discovery of police documents is denied.<sup>4</sup>

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<sup>4</sup>The 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.); People v. Richardson, 159 Misc.2d 167, 168 (Sup. Ct. Kings Co. 1993).

**Conclusion**

The defendant's motion to vacate the judgment of conviction pursuant to C.P.L. §440.10 is denied without a hearing. The defendant's motion to obtain free copies of the transcripts prepared in connection with this case is denied. The defendant's motion to obtain post-conviction discovery of police documents is denied.

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  
June 1, 2009

  
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J.S.C.  
HON. J. KONVISER

**ENTERED**  
JUN - 3 2009  
NANCY T. SUNSHINE  
COUNTY CLERK