

People v Isakov

2009 NY Slip Op 31514(U)

July 10, 2009

Supreme Court, Kings County

Docket Number: 3591/1983

Judge: Raymond Guzman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 9

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

DECISION AND ORDER

Indictment # 3591/83

-against-

Superior Court No.: 3285/83

AURYDA ISAKOV,

Defendant,

----- X
RAYMOND GUZMAN, J.S.C.

INTRODUCTION

On June 9, 1983 defendant, armed with a handgun and with an armed accomplice, entered a store owned by Shayef Said and attempted to commit a robbery therein. Defendant and his accomplice both held their weapons to the head of Mr. Said and demanded money. Mr. Said fought back against the pair, chasing them from his establishment. After the men left his store Mr. Said immediately called the police. Defendant and his accomplice were stopped by police about four blocks from the store and held for twenty minutes until Mr. Said came and identified them as the men who attempted to rob him. A loaded .38 revolver was recovered by the police about ten feet from where defendant was stopped and arrested.

For these crimes, defendant was charged by felony complaint with Attempted Robbery in the First Degree (Penal Law § 110/160.15[2]); Criminal Use of a Firearm in the Second Degree (Penal Law § 265.08[2]); and Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03). On June 15, 1983, defendant waived indictment and pleaded guilty under Kings County Supreme Court Information Number 3285/83, to Attempted Robbery in the Second Degree in exchange for a sentence of five years probation.

On June 23, 1983, defendant was a passenger in a vehicle driven by Vladimir Kronshinsky. At approximately 7:00 a.m., a police officer made a routine traffic stop of the vehicle in which defendant rode. When Mr. Kronshinsky was unable to produce the vehicle's registration, the police checked the car's license plate and discovered it was stolen. A search of the stolen vehicle recovered a jacket containing a .38 semi-automatic pistol. The search also yielded a holster and 42 rounds of ammunition from the glove compartment. Testing revealed that both the gun and ammunition were operable. Defendant was subsequently charged by Supreme Court Indictment Number 3591/83 with Criminal Possession of a Weapon in the Third Degree (formerly Penal Law § 265.02[4]); Criminal Possession of Stolen Property in the First Degree (formerly Penal Law § 165.50); Criminal Mischief in the Third Degree (Penal Law § 145.05); and Unauthorized Use of a Vehicle in the Third Degree (Penal Law § 165.05[1]).

Two months following this arrest, on August 31, 1983, defendant appeared with his attorney Joel Dranov, Esq., for sentencing on Supreme Court Information 3585/83 – the Attempted Robbery in the Second Degree charge. Also present at this sentencing were Michael Drobenare, Esq., defendant's attorney on Indictment 3591/83, and Arkaey Sahlamov, a court-provided Russian interpreter. Defendant was sentenced, pursuant to the earlier plea agreement, to five years probation. When asked by the sentencing court if he would like to make a statement defendant, through the interpreter, declined.

On October 31, 1983, following pre-trial motions being filed and defendant's request for a suppression hearing, defendant appeared in court on indictment 3591/83 and pleaded guilty to Criminal Possession of a Weapon in the Third Degree. Following this plea of guilty, defendant was sentenced on December 19, 1983. At his sentencing on Indictment 3591/83, defendant was

represented by Mr. Drobenare, and provided with a Russian interpreter. Defendant was twice asked at this sentencing, by the court, if he would like to make a statement, and he declined. Defendant was sentenced to a period of six months incarceration, with five years probation on Indictment 3591/83, and he was also resentenced on Supreme Court Information 3285/83 to a concurrent period of six months incarceration and five years probation.¹ Defendant was notified of his right to appeal following the sentencing.

By papers dated July 1, 2008, defendant moved this Court to vacate his judgment of conviction pursuant to CPL § 440.10 on the grounds that his guilty pleas were involuntarily made as a result of not being provided with a Russian interpreter at either of the two court appearances where he pleaded guilty. Defendant claims that he was unaware of what was happening, and that had he been provided an interpreter he would not have entered a guilty plea to either charge. The People filed opposition to defendant's motion on January 9, 2009. Defendant filed a reply to the People's opposition papers on April 15, 2009.²

For the following reasons, defendant's motion is denied.

LEGAL ANALYSIS

Upon a motion to vacate a judgment of conviction, defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion. *See, People v Gurley*, 197 AD2d 534 (2d Dept 1993); CPL § 440.30(6).

¹Defendant was re-sentenced on Supreme Court Information 3285/83 on December 19, 1983, because he violated his probation by failing to report to his probation officer as required.

² The Court extended the briefing schedule in the instant matter to afford the People time to try and locate the minutes from the two court appearances where defendant pleaded guilty. The Court extended the time for defendant to file his reply due to an unforeseen problem with his representation on this matter.

In this motion, defendant has raised for the first time an allegation that he was not provided with a Russian interpreter when he pleaded guilty on June 15, 1983 to Superior Court Information 3285/83, and on October 31, 1983, when he pleaded guilty to Indictment 3591/83. Defendant further alleges that he was never told by his attorneys on the two cases that a guilty plea could result in his deportation from the United States, and that such a failure constitutes ineffective assistance of counsel. Defendant maintains his innocence with respect to both matters, arguing that each time he was arrested it was a matter of his being at the wrong place at the wrong time.

Defendant asserts that he would not have waived his right to trial and entered a plea of guilty had it not been for the fact that he could not communicate with his attorney at his first arraignment when he pleaded guilty to Attempted Robbery in the Second Degree.³ Defendant does acknowledge that he was provided an interpreter at his sentencing on the attempted robbery plea on August 31, 1983.

Defendant claims that he was once again denied a Russian interpreter on October 31, 1983, when he entered a guilty plea to Criminal Possession of a Weapon in the Third Degree.⁴ Again, defendant acknowledges that a Russian interpreter was provided for him at sentencing on this matter, which also constituted a re-sentence on the attempted robbery plea, on December 19, 1983.

The great disadvantage this Court faces in addressing the allegations that no interpreter was present at either arraignment is that, because this motion was filed twenty-five years following the guilty pleas, the minutes of both those arraignments are unavailable. Essentially, defendant is now

³Hereinafter, defendant's guilty plea to Superior Court Information 3285/83 will be referred to as the "attempted robbery plea."

⁴ Hereinafter, defendant's guilty plea on Indictment 3591/83 will be referred to as the "weapon possession plea."

alleging a constitutional defect with his guilty pleas where the only conclusive evidence that could support or refute his claims is unavailable.

Defendant's claim concerning the attempted robbery plea is not supported by the facts that are available in the file. On the New York City Criminal Justice Agency paperwork, titled "Interview Report," for the June 9, 1983, arrest, it notes that defendant had a limited comprehension of English, but spoke Russian fluently.⁵ Additionally, on the clerk's action sheet concerning the attempted robbery plea, in the area designated "arraignment," it is noted that defendant spoke limited English and spoke Russian.

Without the minutes of the attempted robbery plea allocution, the Court must rely on the documents in the record in evaluating defendant's credibility. The Court cannot overlook the plain evidence that defendant's limited ability to understand English was known to the arraignment court on June 15, 1983. The Court finds that this fact alone casts doubt on defendant's assertion. However, the Court must also consider this allegation in conjunction with defendant's other allegation that he was not provided an interpreter on October 31, 1983.

Defendant withdrew his previously entered plea of not guilty and entered a plea of guilty to Criminal Possession of a Weapon in the Third Degree on October 31, 1983. Defendant was arraigned on this matter on July 29, 1983, where Michael Drobenare was assigned to represent him. Defendant, with his Mr. Drobenare, made a subsequent court appearance on August 17, 1983. In the interim, defendant was sentenced the attempted robbery plea on August 31, 1983, with an interpreter present. Defendant made three more court appearances on September 7, 1983, September 27, 1983, and October 11, 1983. Defendant asserts that on the date he entered the weapon possession plea, October

⁵The CJA Interview Report is attached to the People's opposition papers as part of Exhibit A.

31, 1983, he was not provided an interpreter and did not enter the weapon possession plea voluntarily, knowingly and intelligently.

Like the attempted robbery plea, the minutes for the weapon possession plea are unavailable due to the passage of time. However, like the attempted robbery plea, the sentencing minutes for the weapon possession plea are available. With respect to the weapon possession plea, this Court is being asked to believe that defendant made several court appearances, yet the court which took his plea failed to recognize his limited ability to speak and comprehend English and provide an interpreter for the plea allocution.

Between the entry of the attempted robbery plea and sentencing on August 31, 1983, defendant was arraigned and pleaded not guilty to the weapon possession charge. Following the arraignment on the weapon possession charge, defendant was sentenced on the attempted robbery plea. At the first sentencing, defendant was represented by Mr. Dranov and Mr. Drobenare. Additionally, a Russian interpreter was present at the sentencing. At the sentencing on August 31, 1983, with two attorneys and an interpreter, defendant failed to raise an objection to the attempted robbery plea or make any motion to withdraw the plea.

Two months later, on the eve of trial, defendant avers he was again not provided an interpreter when he changed his plea from not guilty and pleaded guilty to the weapon possession charge. Both of these assertions lack any credibility, and this Court finds, based on the facts available in the record, that there is no reasonable possibility that defendant's allegations are true.

The Court has reviewed the sentencing minutes from August 31, 1983, and December 19, 1983.⁶ The August 31, 1983, minutes note the appearance of both Mr. Dranov and Mr. Drobenare

⁶A complete copy of both sets of minutes is attached to the People's opposition papers as part of Exhibit A.

on behalf of defendant. The Court cannot overlook the fact that Mr. Drobenare represented defendant on October 31, 1983, some two months after this appearance with an interpreter.

Based on all of the direct and circumstantial evidence available at this time, the Court finds that defendant's allegation that he was not provided an interpreter on June 15, 1983, is without merit. Additionally, the Court finds defendant's allegation that he was not provided an interpreter on October 31, 1983 is also without merit.⁷ Accordingly, defendant has failed to establish by a preponderance of the evidence the necessary elements of his motion to vacate on the grounds that the plea was not voluntarily, knowingly and intelligently entered.

As provided for in the Criminal Procedure Law, when considering the merits of the defendant's application, the Court may deny it, without conducting a hearing, if an allegation of fact essential to support the motion is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence and under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true. CPL § 440.30(4)(d). Accordingly, defendant's application for a hearing on this matter is denied.

Finally, defendant raises an additional claim that he was denied the effective assistance of counsel when Mr. Dranov failed to ask for an interpreter at the attempted robbery plea. Curiously, despite alleging that he was not provided an interpreter at the weapon possession plea (Defendant's Affidavit, ¶ 8), defendant does not raise this allegation as to Mr. Drobenare. Because the Court finds no merit to the claim defendant was denied the services of an interpreter at the attempted robbery

⁷Tellingly, defendant did not seek a reconstruction hearing with respect to the two dates for which the minutes were not available. In any event, the Court does not find a reconstruction hearing would be necessary based on the facts available in the record which show that there is no reasonable possibility that defendant's allegations are true.

[* 8]
plea, this basis for the ineffective assistance of counsel claim is denied.

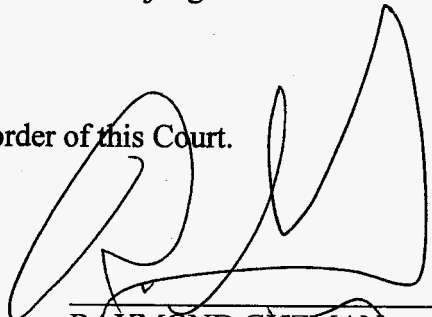
Defendant also asserts that he was denied the effective assistance of counsel because both Mr. Dranov and Mr. Drobena failed to inform him that deportation was a potential collateral consequence of taking a guilty plea. The law in New York State is crystal clear, the immigration consequences of a plea of guilty are collateral, and defense counsel's failure to inform a defendant of the deportation consequences of a plea does not constitute ineffective assistance of counsel. *See, People v. McDonald*, 1 NY3d 109 (2003); *People v. Ford*, 86 NY2d 397 (1995); *People v Argueta*, 46 AD3d 46 (2d Dept 2007); *People v Hernandez*, 208 AD2d 951(2d Dept 1994). Therefore, defendant's claim of ineffective assistance of counsel on this ground is denied.

CONCLUSION

For the foregoing reasons, defendant's motion to vacate his judgment of conviction pursuant to CPL § 440.10 is denied.

This opinion shall constitute the decision and order of this Court.

Dated: July 10, 2009
Brooklyn, New York



RAYMOND GUZMAN
Justice of the Supreme Court

ENTERED
JUL 13 2009
NANCY T. SUNSHINE
COUNTY CLERK