

**People v Marcel**

2009 NY Slip Op 32498(U)

October 9, 2009

Supreme Court, Kings County

Docket Number: 8427/2003

Judge: William E. Garnett

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: CRIMINAL TERM PART 11

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THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. William E. Garnett

Date: September 30, 2009

-against-

DECISION & ORDER

DANIEL MARCEL,

SCI # 8427/2003

Defendant.

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The defendant moves, *pro se*, pursuant to Criminal Procedure Law § 440.10, for an order vacating the judgment of his conviction and, pursuant to CPL § 210.40, for an order dismissing the Superior Court Information in furtherance of justice.

On November 16, 2003, the defendant twice sexually assaulted the complainant, his girlfriend and the mother of his child. In the first incident, the defendant grabbed the complainant by her throat and threatened to cut her with a boxcutter if she did not have sexual intercourse with him. When she refused, he threatened to cut the baby. The victim removed her clothing and the defendant then subjected her to forcible sexual intercourse. That same night, the defendant took the victim to a park where he grabbed her by the neck and forced her to have sexual intercourse. For these acts, the defendant was charged with two counts of Rape in the First Degree (PL § 130.35[1]), *et. al.*

On November 26, 2003, the defendant waived indictment and agreed to be prosecuted under Superior Court Information #8427/2003. The defendant was convicted upon a guilty plea to Sexual Abuse in the First Degree. In his allocution, the defendant admitted to sexually assaulting the complainant by forcible compulsion. As part of the negotiated plea, the Court agreed to sentence the defendant to ten-years probation provided he: (1) cooperate with the Department of Probation;

(2) successfully attend and complete a treatment program recommended by Probation; (3) abide by an order of protection in favor of the complainant; (4) not get arrested between the date of the plea and the date of sentence; and (5) appear in court on the scheduled sentencing date. Depending on the defendant's progress, the Court would also consider granting youthful offender status. The Court warned that if the defendant violated any of these conditions, he would face two and one-third (2 1/3) years to seven years in prison. As part of the plea bargain, the defendant also waived his right to appeal.

Prior to sentencing, the defendant was arrested for assaulting his sister and for violating the order of protection in favor of the complainant in this case. In light of those arrests, the Court adjourned the sentence and placed the defendant on interim supervision probation for the defendant to demonstrate that he could succeed on probation and that he was entitled to a youthful offender finding. The defendant responded to supervision by failing to report to probation on various occasions and by failing to attend the treatment program. Accordingly, on December 21, 2004, the defendant was sentenced to a one-year term of imprisonment and youthful offender treatment was denied (Garnett, J., at plea and sentence). The defendant did not appeal the judgment of his conviction.

On July 27, 2005, pursuant to Article 6-C of the Correction Law, the Court conducted a Sex Offender Registration Act ("SORA") hearing where it designated the defendant a sexually violent offender and classified him as a level three sex offender. This SORA designation triggered the defendant's level of community notification and status as a lifetime registrant (*see* Correction Law Article 168).

In the instant motion, the defendant claims that: (1) his plea was not knowingly, voluntarily and intelligently made because it was procured by the duress, misrepresentation and fraud of the prosecutor, police and defense counsel and because he suffered from Attention Deficit Disorder and a learning disability at the time of the plea; (2) the Grand Jury proceeding was defective because the evidence presented to the Grand Jury was insufficient and because he was denied the opportunity to testify; and (4) his post-arrest statements, physical evidence recovered and lineup identification should have been suppressed. The defendant further moves to vacate his guilty plea on the ground that the victim has recanted her prior statements. He also makes various claims against his attorney for alleged ineffective representation.

The defendant's allegations regarding the alleged defects in the Grand Jury proceeding and various suppression claims are barred from this Court's review and must be denied. The record reflects that the defendant signed a waiver of indictment and acknowledged his understanding that he was giving up his right to have the matter reviewed and considered by a Grand Jury. By waiving indictment and agreeing to be prosecuted by the Superior Court Information, the defendant waived his right to challenge any defects in the Grand Jury proceeding. Moreover, the defendant pleaded guilty and, as part of his plea bargain, also waived his right to appeal. That waiver barred review of the defendant's contentions that he was denied the right to appear before the Grand Jury (*People v Bajramaj*, 54 AD3d 769 [2d Dept 2008]), that the evidence presented to the Grand Jury was not legally sufficient (*People v Taylor*, 65 NY2d 1 [1985]) and that the use of his post-arrest statements, the physical evidence recovered and lineup identification should have been suppressed (*People v Kemp*, 94 NY2d 831 [1999]). Accordingly, given the defendant's plea and valid appeal waiver, this Court is now foreclosed from reviewing his claims.

The defendant's assertion that his plea was not knowingly, voluntarily and intelligently made is contradicted by the court record (CPL § 440.30[4][d]). The record reflects that, during the lengthy plea proceedings, the Court thoroughly explained the plea agreement and sentencing promise to the defendant who answered all of the Court's questions confirming that he was freely taking the plea and that he understood all of the rights that he was forfeiting as a consequence of his guilty plea. The defendant acknowledged that he was physically and mentally able to proceed with the plea and appeared lucid and coherent.

Neither the defendant nor his attorney, at the time of the plea, alerted this Court to his present claim that he did not knowingly, voluntarily and intelligently enter into the plea agreement because he was unable to understand the plea proceedings due to Attention Deficit Disorder and a learning disability. The defendant's self-serving statements in his affidavit are belied by the record of the plea. This Court engaged in an extensive plea colloquy which did not, in any way, suggest that the defendant had any inability to understand the plea proceedings. In fact, the defendant's answers to the Court's inquiries were clear, unequivocal and responsive.

Moreover, with regard to the specific claim of duress, the Court asked the defendant if anyone had made any promises to get him to plead guilty and if anyone had threatened or forced him, in any way, to plead guilty. The defendant answered "No" to each question and agreed that he was pleading guilty of his own free will. The defendant had discussed all of the matters with his attorney and stated that he was satisfied with the representation of his attorney. After the Court's inquiry, the defendant admitted his guilt and admitted the factual allegations of the charged crime. Thus, the record of the plea establishes that he was fully advised of the consequences of pleading guilty,

understood those consequences and knowingly, voluntarily and intelligently pled guilty (*see People v Blair*, 246 AD2d 308 [1<sup>st</sup> Dept 1998]; *People v Garcia*, 216 AD2d 36 [1<sup>st</sup> Dept 1995]).

The defendant has not established that he was denied the effective assistance of counsel under either the federal or state standard (*Strickland v Washington*, 466 US 668 [1984]; *People v Benevento*, 91 NY2d 708, 713 [1998]). The defendant's claim rests on counsel's alleged failure to investigate, file motions to dismiss, suppress evidence, seek a competency hearing and to prepare an alibi defense. The defendant also alleges his attorney was ineffective because counsel jointly represented the defendant and the victim.

In the context of a guilty plea, a defendant has been afforded meaningful representation when he receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel (*People v Ford*, 86 NY2d 397 [1995]). Where "a defendant, on the advice of counsel, has entered a plea of guilty and reaped the benefits of a favorable plea bargain which substantially limits his exposure to imprisonment, he has received adequate representation." (*People v McClure*, 236 AD2d 633 [2d Dept 1997]). Here, it is clear from the record that counsel worked on the defendant's behalf to procure a favorable result. Having been charged with Rape in the First Degree, a class "B" violent felony, the defendant was exposed to a potential sentence of up to twenty-five (25) years. PL §70.02(3). In exchange for his plea to Sexual Abuse in the First Degree, a class "D" felony, the defendant was promised a sentence of probation with the possibility of youthful offender treatment. It was only the defendant's inability to meet the requirements of the plea agreement and his lack of cooperation that led to his one-year sentence and to the denial of youthful offender status. Thus, nothing has been raised before this Court which casts doubt on the effectiveness of counsel (*see People v Ford*, 86 NY2d 397).

As for the defendant's conclusory assertion that he was prejudiced by the alleged joint representation, the claim "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]).

Finally, the defendant contends that he is entitled to vacatur of his conviction based upon a post-judgment letter from the complainant who asserts that she was not sexually assaulted by defendant; that she informed the prosecutor of the defendant's innocence when the defendant was arrested; that she was pressured into cooperating with the authorities in order to prevent the removal of her daughter by the Administration for Children Services; and that she and the defendant have attempted to maintain an intimate relationship throughout the years.<sup>1</sup> The complainant further alleges that the prosecutor advised her to convince the defendant to plead guilty and pressured her into not disclosing information about the recantation.

It is well-settled that recantation evidence is inherently unreliable and insufficient, alone, to justify setting aside a conviction (*see People v Shilitano*, 218 NY 161, 170 [1916]; *People v Mortensen*, 60 AD3d 971 [2d Dept 2009]; *People v Baxley*, 194 AD2d 681 [2d Dept 1993]). Indeed, this Court was already aware of the unreliability of the recantation, noting, at the sentencing proceeding, that the victim's recantation was highly suspicious because of her living situation and her economic dependence on the defendant's family. Moreover, after sentencing, the complainant acknowledged that the defendant "made a bad decision by turning to drugs which led him to make

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<sup>1</sup> The defendant also submits a character reference from the victim's mother and a letter from a friend who did not witness the incident but observed the defendant and the complainant shortly thereafter. Neither of the letters, however, are exculpatory or newly-discovered evidence and are, therefore, not relevant to a resolution of this CPL § 440.10 motion.

a mistake he will never forget.” Now, five years later, the long-term consequences of that decision cannot be avoided by simply having a change of heart or by submitting a dubious recantation.

The credibility of the letter is further undermined by the fact that it features accusations of gross misconduct committed by the prosecutor, which under the circumstances, were highly improbable and are specifically denied by the former prosecutor in a detailed affirmation. Also noteworthy is the fact that, although the recantation was known to the defendant at the time of the plea, he nonetheless freely and voluntarily admitted his guilt and admitted the factual allegations of the charged crimes. Under all the circumstances, the recantation evidence is unreliable and insufficient to justify setting aside the conviction.

The defendant further moves, pursuant to CPL § 210.40, for an order dismissing the Superior Court Information in furtherance of justice. The defendant’s motion, made approximately five years after he was sentenced, is untimely and is therefore denied on procedural grounds. *People v Rahmen*, 302 AD2d 408 (2d Dept 2003); *People v Pittman*, 228 AD2d 225 (1<sup>st</sup> Dept 1996) .

On the merits, CPL §210.40(1) provides that an indictment or, as in this case an SCI, or a count thereof may be dismissed in furtherance of justice when “such dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such accusatory instrument or count would constitute or result in injustice.” In determining whether dismissal is appropriate, ten factors must be considered: (a) the seriousness and circumstances of the offense; (b) the extent of harm caused by the offense; (c) the evidence of guilt, whether admissible or inadmissible at trial; (d) the history, character and condition of the defendant; (e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the

defendant; (f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense; (g) the impact of a dismissal on the safety or welfare of the community; (h) the impact of a dismissal upon the confidence of the public in the criminal justice system; (i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion; and (j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose.

After examining and considering the above factors, this Court finds no indication of the existence of any compelling factor, consideration or circumstance that demonstrates that the defendant's conviction constituted an injustice. Rather, what has been demonstrated is that defendant was convicted of a serious offense that inflicted considerable harm. It is thus highly inappropriate to consider the defendant's case under CPL §210.40(1) for dismissal in furtherance of justice.

Accordingly, the defendant's motion is denied.

This decision constitutes the order of the court.

The defendant is hereby advised pursuant to 22 NYCRR § 671.5 of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York 11201 for a certificate granting leave to appeal from this determination. This application must be made within 30 days of service of this decision. Upon proof of his 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 certification granting leave to appeal is granted.

*William E. Garnett*  
William E. Garnett, J.S.C.

**ENTERED**  
  
OCT - 9 2009  
  
NANCY T. SUNSHINE  
COUNTY CLERK