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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 24

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

MARVIN STEWARTSON

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By: Hon. Thomas J. Carroll

Date: November 23, 2009

DECISION & ORDER

IND No. 2979/99

Defendant moves, *pro se*, pursuant to Criminal Procedure Law § 440.10 for an order vacating the judgment of his conviction. Specifically defendant alleges that his attorney failed to properly advise him to plead guilty rather than to proceed to trial and to explain his potential sentencing exposure if convicted after trial.

On March 12, 1999, defendant, who was dressed as a United Parcel Service delivery agent, entered the complainants' residence pretending he was delivering a package. At the time, defendant was accompanied by three other individuals. Defendant and the three men tied up the complainants, shoved onions into their mouths and then taped their eyes and mouths shut with duct tape. They then ransacked the apartment and took jewelry, money, clothing, electronics and other items. During the incident, defendant and the men repeatedly threatened to kill the couple and then stabbed one of the complainant's in the arm and stomped on the other complainant's body. For these acts, defendant was charged with three counts of robbery in the first degree (PL §§ 160.15[3],[4]), four counts of robbery in the second degree (PL §§ 160.10[1], [2][a]), and numerous other charges.

On March 16, 2000, defendant was convicted upon a jury verdict of two counts of robbery in the first degree (PL § 160.15[4]). On April 10, 2000, defendant was sentenced to

consecutive terms of imprisonment of fifteen years on each of the robbery counts (Harkavy, J., at trial and sentence).

On appeal, defendant made several claims, among them that (1) the court improperly denied suppression of the lineup identifications made; (2) the court's *Sandoval* ruling was prejudicial; (3) the prosecutor engaged in misconduct during summation; and (4) the court improperly imposed consecutive sentences for his two convictions of robbery in the first degree. The Appellate Division disagreed, and on January 17, 2006, affirmed the judgment of conviction (*People v Stewartson*, 25 AD3d 629 [2d Dept 2006]). The Court of Appeals denied defendant leave to appeal (*People v Stewartson*, 6 NY3d 839 [2006]).

Defendant next moved to vacate the judgment of his conviction and to set aside his sentence on the ground that the sentencing court failed to expressly pronounce the post-release supervision ("PRS") component of his sentence. On July 25, 2007, defendant's motion was denied, and he was subsequently resentenced to the same consecutive terms of imprisonment he originally received, plus two concurrent five-year periods of PRS.

Defendant appealed the resentence, arguing that because the original sentences did not include PRS, the resentencing court should have reconsidered the propriety of the imprisonment component of the sentence. The Appellate Division disagreed, and on June 16, 2009, denied defendant's appeal of the resentence (*People v Stewartson*, 63 AD3d 966 [2d Dept 2009]). The Court of Appeals denied defendant leave to appeal (*People v Stewartson*, 13 NY3d 749 [2009]).

He then moved for a second time to vacate the judgment of his conviction, claiming that the indictment was jurisdictionally defective. On May 2, 2008, defendant's motion was denied

pursuant to CPL § 440.10(2)(c). The Appellate Division denied defendant leave to appeal on August 20, 2008.

Defendant next petitioned the United States District Court for the Eastern District of New York for *habeas corpus* relief. That petition was denied on March 17, 2009.

Defendant now moves for a third time to vacate the judgment of the conviction on the ground that he received ineffective assistance of counsel. Defendant claims that "trial counsel did not sit down with the defendant to explain the pros and cons of accepting or rejecting the five (5) year offer" and "did not explain to his client that if the jury convicted him after trial of two violent class B felonies he could face fifty (50) years. . . ." He further alleges that "[h]ad trial counsel explained to the defendant that he faced fifty (50) years for two class B violent felonies, the defendant would have accepted the flat five (5) years instead of going to trial in a case where, arguably without a concrete alibi, the proof of guilt, contradicted was strong."

The People present in their response an affidavit from defense counsel detailing aspects of his representation of defendant. Counsel asserts that the court offered defendant a sentence of five years imprisonment in exchange for a plea to the indictment. He also states that he pushed defendant to accept the five-year offer and recalls asking defendant, "How do you expect to win this," as he believed the witness testimony was strong and that defendant did not have a credible alibi. Counsel further recalls that the court warned defendant that if he was convicted after trial, he could get "a lot" more time. Counsel asserts that it is his practice to work out dispositions. However, defendant in this instance would not consider a plea, was adamant in his refusal to plead guilty and arrogant in his ability to win the case.

Pursuant to CPL § 440.10(3)(c), a court may deny a motion to vacate a judgment when "[u]pon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so." Since defendant was in a position to raise the allegations against his attorney in his first CPL § 440.10 motion and failed to do so, the claims may be summarily denied (CPL § 440.10[3][c]).

Defendant's credibility is also undermined by the substantial period of time that passed before submitting this motion. Defendant waited over nine years to make the present allegations against his attorney. The weakness of defendant's position is further compounded by his failure to offer a reason for the extremely long delay after having submitted a number of other post-judgment motions. In light of the absence of any explanation and given that the relevant facts should have been long known to defendant, the delay is unjustifiable (*see People v Cuadrado*, 9 NY3d 362, 365 [2007] (CPL § 440.10[2][c] barred review of claim that defendant could have raised on direct appeal, where defendant delayed for twelve years in raising claim in motion to vacate judgment; "[i]t would be at best difficult and at worst impossible for the People to revive the case against him now, and there is no good reason to require them to do so"); *People v Nixon*, 21 NY2d 338, 352 [1967] ("In stale cases, defendants have all to gain by reopening old convictions, retrial being so often an impossibility"), *cert denied*, 393 US 1067 [1969]; *People v Degondea*, 3 AD3d 148, 160-61 [1st Dept 2003] (denial of motion pursuant to CPL § 440.10[3][a] " draws significant additional support" from fact that defendant waited six years to bring the motion); *People v Melio*, 304 AD2d 247, 252 [2d Dept 2003] (defendant's delay in bringing motion to vacate judgment, on the ground that he had not been informed about PRS, undermined his claim that he would not have pleaded guilty had he been aware of such

supervision); *People v Hanley*, 255 AD2d 837, 838 [3d Dept 1998] (defendant's claim, that his guilty plea was involuntary, was undermined by his "substantial" delay in moving to vacate the judgment).

Turning to the merits of defendant's claim, he has failed to establish 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]). Defendant contends that his attorney failed to explain the "pros and cons of accepting or rejecting the five (5) year offer" and his potential exposure of fifty years if convicted of the most serious counts. Defendant's complaints about his attorney, however, when examined in the context of the record, do not establish ineffective assistance of counsel because the record establishes that trial counsel provided meaningful and competent representation (*People v Washington*, 184 AD2d 451 [1st Dept 1992]), and that defendant has not proven his attorney's performance had a prejudicial effect on the outcome of the case (*Strickland v Washington*, 466 US 668).

Moreover, "[t]o prevail on a claim of ineffective assistance of counsel based upon the defense counsel's failure to advise the defendant with respect to an offer of a plea agreement, a defendant must demonstrate that a plea offer was made, that defense counsel failed to inform him of that offer, and that he would have been willing to accept the offer" (*People v Goldberg*, 33 AD3d 1018, 1019 [2d Dept 2006] [internal quotation marks and citations omitted]). Defendant has failed to meet that burden. Here, he proffers nothing to substantiate his claim that he would have accepted the plea. Defendant only submits his own self-serving statement, made over nine years after his conviction, to establish that counsel failed to adequately explain the benefit of accepting the People's plea offer and that had counsel done so, he would have willingly accepted

the offer. Defendant's self-serving statement that he would have accepted the plea, without more, is insufficient to warrant a hearing (*People v Goldberg*, 33 AD3d 1018).

Defendant's claim of ineffectiveness is also contradicted by the record which reflects that counsel advised defendant about an early plea offer and about his potential exposure if convicted after trial. On February 15, 2000, during an on-the-record discussion prior to the suppression hearing, defense counsel indicated that defendant was not interested in any offer conveyed by the People. This colloquy took place after counsel had an off-the-record discussion with defendant concerning the matter. Then, in a later proceeding on March 8, 2000, while defense counsel urged the court to permit alibi witness evidence, he reminded the court that defendant was "facing 75 years in prison" if convicted after trial. It is, therefore, apparent from these two instances that defendant was involved with plea negotiations and was aware of his potential exposure to incarceration. Accordingly, there is no reasonable possibility that defendant's allegations regarding his attorney are true (CPL § 440.30[4][d]).

With respect to defense counsel's affidavit detailing aspects of his representation of defendant, the court credits counsel's assertion that defendant was uncooperative and unwilling to accept a plea offer. This view is supported by defendant's change of attorney for sentencing; his refusal to cooperate with the Department of Probation; and the court's colloquy at sentencing, where it indicated that defendant's "actions have been very defiant from the day he walked into [the] courtroom" and that defendant " thinks he is the law, and he's going to do what he wants, and everyone else can get lost on the way." Moreover, the court further credits counsel's assertion that he advised defendant of the plea offer and warned defendant "he could receive a tremendous amount of jail time" if he did not plead guilty because the record reflects discussions between counsel and defendant of plea offers and potential sentencing exposure.

Accordingly, defendant's motion is denied.

This decision constitutes the order of the court.

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.

Thomas J. Carroll, J.S.C.
HON. THOMAS J. CARROLL

ENTERED
NOV 24 2009
NANCY T. SUNSHINE
COUNTY CLERK