

**People v Cooper**

2010 NY Slip Op 31290(U)

April 21, 2010

Sup Ct, Kings County

Docket Number: 1848/2007

Judge: Patricia DiMango

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM, PART PD 85

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THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Patricia M. Di Mango

-against-

Date: April 21, 2010

CARL COOPER

DECISION & ORDER

Indictment No. 1848/2007

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The defendant moves, *pro se*, for an order vacating his judgment of conviction pursuant to CPL § 440.10, and for an order setting aside his sentence pursuant to CPL § 440.20 on the ground that he was denied a hearing prior to being sentenced to prison.

In deciding this motion, the court has considered all of the submissions by both parties and all attached exhibits including the plea and sentencing minutes, and has further reviewed the official court file for this case. For the following reasons, the motion is denied.

On April 30, 2007, the defendant entered a drug treatment plea of guilty to Burglary in the Third Degree (PL § 140.20) and Petit Larceny (PL § 155.25). Under the terms of this plea, the defendant agreed to complete an 18-24 month residential drug treatment program under the supervision of TASC (Treatment Alternatives to Street Crime; hereafter, "TASC"). Upon successful completion of this program, the defendant was to receive a conditional discharge. Alternatively, if he failed to complete his treatment program, the defendant would be sentenced to a net term of incarceration of two and one-third to seven years.

At the plea allocution, the defendant stated on the record that he understood that if he failed to complete the treatment program, he would be sentenced to a term of imprisonment of

two and one-third to seven years. The defendant also waived his right to appeal and confirmed on the record that both his plea and waiver of appeal were knowing, voluntary and intelligent.

Mr. Cooper entered his first residential treatment facility on May 24, 2007, but he was discharged from that facility on June 22, 2007 for "non-compliance." Thereafter, he was admitted to another program. However, on March 19, 2008, prior to the completion of his drug treatment, the defendant left this program "against clinical advice" and subsequently absconded to North Carolina. A bench warrant was issued for his arrest the same day.

Documentation from Argus Community, Inc. ("Argus"), the drug treatment program, indicates that the defendant was informed by Brooklyn TASC on March 19, 2008 that he had to go to court, but that defendant refused and separated from his escort. The defendant returned to Argus several hours later only briefly to retrieve his belongings. In light of the defendant's actions, TASC informed the court that the defendant had violated the conditions of his plea. However, the defendant now claims that he was discharged from Argus because of his inquiry into whether the program was properly handling his Social Security checks, and that he wanted to get his money before he returned to court.

On March 16, 2009, the defendant appeared in court after being extradited from North Carolina, where he had been residing. The court reviewed the probation report and submissions from the People and TASC, and the defendant explained that he had left because he had taken issue with the way the drug treatment program was handling his "SSI" checks from the Social Security Administration as he believed that Argus was withholding his money. Conceding that he had left the program prior to completing the required term, the defendant told the court that he was waiting in North Carolina to get his money and that he had stayed there, in North Carolina, because he knew he would get "picked up one on one" if he returned to New York.

The court found that defendant had violated the terms and conditions of his plea, and accordingly sentenced him to concurrent imprisonment terms of two and one-third to seven years on the burglary conviction, and one year on the petit larceny conviction. The court also issued an order of protection in favor of the custodian of the property which the defendant had burglarized, which order had an expiration date of March 16, 2024.

Defendant now seeks to have his plea and conviction vacated pursuant to CPL § 440.10 because he claims he was not afforded a hearing before being discharged from the TASC program and sentenced to prison; he also moves to set aside his sentence pursuant to CPL § 440.20(1) on the ground that the accompanying order of protection was harsh and illegal.

The court must deny a motion to vacate judgment when sufficient facts appear on the record to permit review on appeal, but no such review has occurred owing to the defendant's unjustifiable failure to raise the issue on appeal (CPL § 440.10[2][c]). Here, the defendant's assertions are based on matters appearing on the record. Therefore, the defendant had a full opportunity to raise them on appeal, and his failure to do so is unjustified. A motion to vacate the judgment of conviction is not a substitute for an appeal (*People v Cooks*, 67 NY2d 100, 102-104 [1986]). Nor may a defendant who has waived his right to appeal use a motion to vacate the judgment as a substitute for a direct appeal (*People v Alexander*, 256 AD2d 349 [2d Dept. 1998]). Accordingly, the defendant's claim is procedurally barred from collateral review.

“[W]ith regard to alleged violations of plea agreements, . . . to satisfy due process, a sentencing court must, prior to imposing the prison alternative pursuant to a plea agreement, conduct an inquiry sufficient to conclude that a violation of the plea agreement occurred” (*People v Valencia*, 3 NY3d 714, 715 [2004]). A hearing is not warranted when there is no issue of fact, as where the defendant admits that he committed acts that violated his plea agreement (*id* at 716;

*People v Purvis*, 48 AD3d 595 [2d Dept 2008], *lv. denied*, 10 NY3d 843; *see also*, *People v Freese*, 303 AD2d 690 [2d Dept 2003], *lv. denied*, 100 NY2d 594). When a drug treatment program discharges a defendant for misconduct, the court must carry out an inquiry to establish a legitimate basis for the program's decision, but due process does not require that an evidentiary hearing be held prior to the imposition of sentence (*People v Fiammegta*, 14 NY3d 90, 96-99 [2010]).

At sentencing, the court relied on in-court statements by a TASC official, written reports from TASC and Argus, and documentation regarding the defendant's extradition from North Carolina. This information established that Cooper left the program against clinical advice, thus failing to complete the terms of his plea agreement. The defendant was given ample opportunity to refute the allegations that he had absconded from the TASC program, yet he did not challenge them in any way before the court. Rather, he admitted that he was told to go back to court, that he went to North Carolina, and that he stayed there because he knew he would be "picked up" if he returned to New York. The defendant's allegation of misconduct with respect to his benefit checks is irrelevant to the fact that he left the drug treatment program before its completion. Here, a full evidentiary hearing was unnecessary and defendant was not deprived of due process when the court proceeded to impose sentence. As defendant failed to raise any issue of fact in the instant case, no further inquiry or hearing was warranted.

Moreover, the defendant was properly sentenced to a term of incarceration here given that he failed to fulfill the terms of his plea agreement (*see generally*, *People v Outley*, 80 NY2d 702 [1993], *habeas corpus denied*, 1995 WL 505558, *aff'd*, 84 F.3d 100, *cert. denied*, 519 U.S. 964). The court's decision was based on the defendant's well-documented failure to successfully complete a drug treatment program. Also, at the plea allocution in 2007, the defendant stated on

the record that he understood that his plea was conditioned upon the successful completion of a drug treatment program, and he acknowledged that he would be sentenced to a jail term of two and one-third to seven years if he failed to complete the drug treatment program. After finding that the defendant had indeed violated the plea agreement, which defendant conceded himself, the court properly sentenced him to the agreed-upon term of imprisonment of two and one-third to seven years (*see, People v Floyd*, 306 AD2d 496 [2d Dept 2003], *lv. denied*, 100 NY2d 620).

With respect to that branch of the defendant's motion seeking vacatur of the sentence, the defendant has failed to state any grounds constituting a legal basis for the motion (*see*, CPL § 440.30[4][a]); and CPL § 440.20 is not the appropriate vehicle for a claim that a sentence was harsh and excessive. Rather, such a claim should be raised on direct appeal from the judgment (*People v Cunningham*, 305 AD2d 516, 517 [2d Dept 2003 -- a motion to set aside sentence generally does not encompass excessive sentence claims, which must be raised on direct appeal]). However, a valid waiver by a defendant of his right to appeal precludes a challenge to the severity of the sentence (*People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Winchester*, 38 AD3d 1336, 1338 [4<sup>th</sup> Dept 2007], *lv. denied*, 9 NY3d 853). Furthermore, there is no indication that defendant's previously agreed-upon sentence was otherwise unauthorized, illegally imposed or invalid as a matter of law (CPL § 440.20[1]); and, to the extent the defendant is specifically attacking the duration of the order of protection here, the court notes that its term is authorized by statute (*see*, CPL § 530.13[4][ii]).

Accordingly, the defendant's motion is, respectfully, denied in its entirety.

This decision shall constitute 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.

ENTER:

  
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PATRICIA M. DI MANGO, J.S.C.

**ENTERED**  
  
MAY - 4 2010  
  
NANCY T. SUNSHINE  
COUNTY CLERK