SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 21

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

ALFREDO RODRIGUEZ,

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By: Hon. John Ingram

Date: June 16, 2010

DECISION & ORDER

Ind. No.13943/92

Defendant moves, *pro se*, pursuant to Criminal Procedure Law § 440.10 for an order vacating the judgment of his conviction. In the alternative, defendant requests that the court conduct an evidentiary hearing pursuant to *People v Montgomery*, 24 NY2d 130 (1969) and that he be resentenced in order to extend the time for perfecting an appeal.

On November 28, 1992, defendant sold two glassine envelopes of heroin stamped "Emergency" to an undercover police officer in exchange for twenty dollars of prerecorded buy money. A few minutes later, the police arrested defendant, searched him and recovered a stash of heroin stamped "Emergency," a hypodermic needle and the prerecorded buy money from his person. For these acts, defendant was charged with criminal sale of a controlled substance in the third degree (Penal Law § 220.30[1]), two counts of criminal possession of a controlled substance in the third degree (PL § 220.16[1]), two counts of criminal possession of a controlled substance in the seventh degree (PL § 220.03), and criminal possession of a hypodermic instrument (PL § 220.45).

The People presented defendant's case to a grand jury on December 3, 1992. That same day, the grand jury indicted defendant on all the charged counts. The People never filed the indictment with the court, because defendant subsequently negotiated a plea agreement with their

office. As part of the agreement, defendant waived indictment and agreed to be prosecuted under Superior Court Information 13943/92. Defendant also waived the right to appeal his conviction. On December 4, 1992, defendant plead guilty to criminal sale of a controlled substance in the fifth degree (PL § 220.31). On December 23, 1992, the court sentenced defendant in accordance with the plea agreement, as a second felony offender, to an indeterminate prison term of two to four years (Silverman, J., at plea; Meyer, J., at sentence). Defendant did not appeal his conviction.

On January 23, 2008, defendant moved, *pro se*, pursuant to CPL § 440.10 to vacate his judgment of conviction, alleging that he was improperly prosecuted pursuant to a Superior Court Information and that he should have been released in accordance with CPL § 180.80. This court denied defendant's motion on April 16, 2008, holding that by pleading guilty, defendant waived all non-jurisdictional defects in the proceedings. The court further ruled that defendant's claims were procedurally barred pursuant to CPL §§ 440.10(2)(c) and 440.30(4). The Appellate Division, Second Department, denied defendant's application for leave to appeal the court's order on June 5, 2008.

Defendant next petitioned the United States District Court for the Eastern District of New York ("EDNY") for *habeas corpus* relief, claiming he should have been prosecuted by indictment rather than by superior court information. That petition is still pending in the EDNY.

On August 21, 2009, defendant applied to the Appellate Division for an extension of time to appeal pursuant to CPL § 460.30(1). The clerk's office returned defendant's motion because it was filed more than one year after the time for taking an appeal had expired. Defendant appealed the return of his motion by the clerk's office. On September 29, 2009, the Court of Appeals

dismissed defendant's application for leave to appeal (*People v Rodriguez*, 13 NY3d 799 [2009]).

Defendant now moves, for the second time, to vacate his judgment of conviction, claiming that (1) the court did not have the jurisdiction to accept his plea without a grand jury indictment; (2) the People failed to establish probable cause that he committed a crime at a hearing; (3) the court in its plea allocution failed to apprise him of his *Boykin* rights; and (4) the court and the prosecution failed to explain the waiver process to him before he pleaded guilty. Defendant also makes various claims against his attorney for alleged ineffective representation.

With the exception of defendant's ineffective assistance of counsel allegation, all of his claims are procedurally barred from this court's review and must be denied. CPL § 440.10(2)(c) provides that the court must deny a motion to vacate a judgment when, "although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him." Defendant's claims rely on facts appearing on the record. Although adequate appellate review of these claims was available, defendant failed to perfect an appeal and offers no explanation for this failure. Accordingly, this court is now foreclosed from reviewing his claims (*People v Cooks,* 67 NY2d 100 [1986]).

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]). Defendant's claim rests on counsel (1) improperly

advising him about being prosecuted under a superior court information; (2) allowing him to plead guilty to the "uncharged" crime of criminal sale of a controlled substance in the fifth degree; (3) failing to explain to him the waiver of the right to appeal; (4) failing to request a preliminary hearing on the charges in the felony complaint; and (5) coercing him into pleading guilty by misinforming him that he would be placed in a treatment program in exchange for the guilty plea.

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 defendant's behalf to procure a favorable result where defendant was charged with crimes that exposed him to a potential sentence of up to twenty-five years. In exchange for his plea to the lesser charge of criminal possession of a controlled substance in the fifth degree, defendant was promised a sentence of two to four years in prison. Given the circumstances, it is unlikely defendant would have rejected such an advantageous agreement. Thus, nothing has been raised before this court which casts doubt on the effectiveness of counsel (*see People v Ford*, 86 NY2d 397).

In any event, defendant was properly charged with criminal sale of a controlled substance in the fifth degree. CPL § 200.15 provides that "a superior court information may include any offense for which the defendant was held for action of a grand jury and any offense or offenses

properly joinable therewith pursuant to sections 200.20 and 200.40, but shall not include an offense not named in the written waiver of indictment executed pursuant to section 195.20." In the instant matter, the written waiver of indictment specifically named the crime of criminal sale of a controlled substance in the fifth degree. Moreover, this crime was joinable with the offenses charged in the felony complaint because it arose from the same criminal transaction as the other crimes in the felony complaint. Therefore, defense counsel can not be considered ineffective for failing to make a potentially futile motion (*People v DeFreitas*, 213 AD2d 96, 101 [1st Dept 1995]).

As for defendant's conclusory assertion that his attorney did not properly explain the waiver of his right to appeal, 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][d]). Here, the record reflects that during the plea proceedings defendant signed a written waiver of right to appeal. The signed waiver establishes that defendant was informed of the right to take an appeal and that the court advised him of the nature of the rights being waived. It further establishes that defendant voluntarily, knowingly and understandingly executed the waiver. Other than his own self-serving affidavit, defendant offers no support that counsel inadequately advised him of his right to appeal. Defendant's claim is, therefore, denied as "there is no reasonable possibility that such allegation is true" (CPL § 440.30[4][d]; *People v Toal*, 260 AD2d 512 [2d Dept 1999]).

The claim that counsel failed to request a preliminary hearing is also without merit. While a preliminary hearing is required for a case pending in Criminal Court, defendant's case was heard by the Grand Jury in Supreme Court. It is irrelevant that the People did not file the

indictment with the court. Defendant was properly indicted by the Grand Jury and, as a result, no preliminary hearing was required (*see People v Hodge*, 53 NY2d 313, 319 [1981] [right to preliminary hearing obviated when People present case to grand jury in first instance]; *see also Vega v Bell,* 47 NY2d 543 [1979]). Accordingly, counsel had no reason to seek a preliminary hearing and cannot be considered ineffective for failing to do so.

Defendant's remaining claim that counsel coerced him to plead guilty is made solely by him and is unsupported by any other evidence. As there is no reasonable possibility that the claim is true, it is also rejected (CPL § 440.30[4][d]).

Finally, defendant's credibility is undermined by his eighteen-year delay in filing the instant motion. In *People v Nixon*, 21 NY2d 338, 352 (1967), the Court held that a delay of more than a decade was an important factor to be considered in evaluating the seriousness of the defendant's claim. The Court stated, "revelatory of the seriousness of defendant's present claims, is that defendant waited over a decade before asserting them. In stale cases, defendants have all to gain by reopening old convictions, retrial being so often an impossibility. These are factors to consider in determining how valid the assertions are...". Thus, a lengthy delay can be considered in evaluating the validity and legitimacy of a post-judgement claim (*People v Melio*, 304 AD2d 247, 252 [2d Dept 2003]; *People v Hanley*, 255 AD2d 837, 838 [3d Dept 1998]). The weakness of defendant's position is compounded by his failure to offer a reason for the extremely long delay. 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 Degondea*, 3 AD3d 148, 160 [1st Dept 2003]). Accordingly, defendant's motion to set aside the sentence is denied.

In the alternative, defendant requests that the court conduct an evidentiary hearing pursuant to *People v Montgomery*, 24 NY2d 130 (1969) and that he be resentenced, *nunc pro tunc*, in order to extend the time for taking an appeal. To be entitled to such relief, a defendant whose conviction resulted from a plea of guilty must dispute the validity of the judgment of conviction and demonstrate a "genuine appealable issue which, but for ignorance of or improper advice as to his rights, he might have raised on appeal" (*People v Melton*, 35 NY2d 327, 330 [1974]). Moreover, applications seeking *Montgomery* relief are encompassed by CPL § 460.30. That statute provides for an extension of time for taking an appeal and eliminates the necessity of resentencing. An application is made to an intermediate appellate court and that court may extend the time for taking an appeal if the failure to take a timely appeal resulted from the "improper conduct" of a defendant's attorney. Failure to advise a defendant of his right to appeal may be considered "improper conduct" (*People v Corso*, 40 NY2d 578 [1976]). If the intermediate appellate court determines that there are factual issues to be resolved in order for the motion to be decided, it must order the court, which entered or imposed the judgment, to conduct a hearing and to make findings of fact essential to the determination of such motion (CPL § 460.30[5]). Finally, a motion pursuant to CPL § 460.30 must be made with due diligence and may not be made more than one year after the time for taking an appeal has expired CPL § 460.30(1).

In this instance, defendant has not sought *Montgomery* relief in the manner prescribed by CPL § 460.30. More importantly, defendant has failed to establish that he was not properly advised of his right to appeal. Contrary to defendant's assertions, the record reflects that defendant signed a waiver explaining the right to take an appeal and the rights being waived, and

that he executed the waiver voluntarily, knowingly and understandingly. Accordingly, a hearing is not warranted as there are no factual issues to be determined.

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.

Dated: August 31, 2010
Brooklyn, New York

John Ingram, J.S.C.