

People v Ortiz

2010 NY Slip Op 32832(U)

September 29, 2010

Supreme Court, Kings County

Docket Number: 2016/2007

Judge: Patricia DiMango

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years upon the top count. By statute, each sentence would run consecutively¹ to each other, and thus, the defendant faced a total minimum of 10 and one-half years' incarceration, plus a period of post-release supervision.

The defendant, who was given an opportunity to participate in a program, ultimately was deemed to be in violation of the program's conditions by accumulating these three violent felony indictments. Shortly after being arraigned upon his third indictment, the defendant agreed to accept a plea bargain whereby he would plead guilty in all three cases in exchange for three concurrent determinate imprisonment sentences of four years, to be followed by five years of post-release supervision. Thus, on January 21, 2009 the defendant pled guilty to the offenses of Attempted Robbery in the First Degree, Attempted Assault in the First Degree, and Robbery in the Second Degree, respectively, in full satisfaction of each of the captioned indictments.

Insofar as the defendant was 16 years old when he committed the first two offenses to which he pled guilty and was 18 upon the last occasion, he would be eligible for consideration of youthful offender treatment if none of his crimes could be deemed to fall within the definition of an "armed felony" under CPL 1.20 (41) or if the court found "mitigating circumstances" pursuant to CPL 720.10 (3).

On March 18, 2009, the defendant came before this court to be sentenced in these three matters. At that time, the defendant was represented by his assigned attorney, Lawrence E. Wright, Esq., and a David Shernoff of the Osborne Association was also present on Mr. Ortiz' behalf. At the very commencement of these proceedings, even before the court said anything with respect to the matter before it, Mr. Wright immediately began to address the court regarding this sentencing. He presented the court with various letters and articles and urged the court to grant the defense application that the defendant be adjudicated a youthful offender.

After Mr. Wright had concluded, the court inquired as to whether "[a]nybody else want[ed] to be heard." The defendant did not respond to this invitation. However, Mr. Shernoff took the opportunity to address the court and relate his opinion regarding the defendant's lack of maturity and his understanding of his background, based upon his having worked closely with Mr. Ortiz at the Osborne Association. At the close of his statement, he too asked that the defendant be adjudicated a youthful offender.

¹ However, the statute accords the court the discretion to run these sentences concurrently in the interest of justice if the court finds mitigating circumstances (see, Penal Law 70.25[2-b]).

There being no other requests to speak, the court discussed the arguments made by the defense and then proceeded to render its determination upon the youthful offender application, ultimately declining to grant youthful offender treatment to Mr. Ortiz upon the instant convictions, given the escalating violent nature of his crimes.

After making this ruling, the court then asked, "ready for sentence?" The defendant remained silent and no one else, neither from the defense or the prosecution, responded to the court's question.

Hearing no objection to the sentencing going forward, the court next noted that the defendant had admitted his guilt in all three matters upon his Probation interview. With that, the court proceeded to sentence the defendant to the negotiated three concurrent terms of four years' incarceration, to be followed by five years' post-release supervision. After sentence had been rendered in all three matters, Mr. Wright presented the court with a final application, namely a request that the defendant be accorded a certificate of relief from civil disability, which application, however, was denied by the court. The sentencing proceedings were then concluded.

The defendant, moving pro se, now brings the instant application for an order directing that his sentences be set aside and a re-sentencing take place in order to accord the defendant his right, pursuant to CPL § 380.50 (1), to make a statement prior to sentence, at such new sentencing proceeding.

In response to the defendant's motion, the People urge that this application is meritless, that the defendant had been accorded his statutory right to speak on his own behalf and simply did not take advantage of the opportunity at the time, and that, accordingly, this motion should be summarily denied.

Discussion

Reviewing the sentencing minutes herein it may be concluded that there was substantial compliance with the statutory mandate that a defendant be accorded the right to make a statement on his own behalf.

The statute provides that a "defendant also has the right to make a statement personally in his or her own behalf, and [that] before pronouncing sentence the court must ask the defendant whether he or she wishes to make such a statement" (CPL § 380.50[1]). However, in applying this statutory mandate, the Court of Appeals has held that a court's failure to literally comply therewith is not necessarily fatal to the sentencing proceeding.

Rather, our High Court has found that there may be "substantial compliance" with the statute, which is sufficient (see, People v. McClain, 35 NY2d 483 [1974], cert. denied, 423 U.S. 852 [1975]). In McClain, a solicitation to speak at sentencing which was "phrased ambiguously without specification of the addressee" was found to be an "inconsequential irregularity" and, accordingly, still in substantial compliance with the statute (*id.* at 491). As the McClain court explains, what the statute really requires is that each defendant "be afforded an opportunity to make a statement personally in his own behalf of whatever character" (*id.*).

Additionally, what the McClain court found significant in the matter presented, which was a consolidation of eight separate appeals, was that none of the eight appealing defendants had asserted that he had anything to say or that he would have addressed the court at all had the allocution followed the statute more closely. Further, in each case, counsel had spoken on behalf of the defendant and none of the defendants had expressed a desire to speak (*id.*). Thus, finding no evidence that any of the defendants appealing in McClain had been denied the opportunity to say anything that he wished to say or that was not said on his behalf by counsel, the court affirmed all of the orders appealed from, which had all affirmed the underlying judgments of conviction and sentences (*id.* at 492).

Upon a review of the relevant case law, the sentencing minutes, and the defendant's motion papers, this court concludes that there need not be a re-sentencing in the instant case.

The transcribed sentencing minutes reveal that the court's solicitation to speak was directed to all, which was why the program representative offered a statement without direct prompting by the court. It is clear that there was an invitation to all to speak, and hence there was "substantial compliance" with the statutory mandate (see, McClain at 491; cf., People v. Torres, 238 AD2d 933, 934 [4th Dept., 1997]). Moreover, and most importantly, Mr. Ortiz was never denied the right to speak prior to sentencing, nor was he excluded from the solicitation to speak.

Furthermore, it should be observed that, in denying relief to all of the appealing defendants, the Court of Appeals found it significant that, in none of the cases before it in McClain, had any defendant asserted that he had anything to say or that he would have addressed the court at all, had the sentencing allocution followed the statute more closely. In the instant matter as well, defendant Ortiz fails to indicate in his moving papers that he had anything to say on his own behalf which he would have stated in court had he been directly asked by the court during the sentencing proceedings on March 18, 2009. Nor does the defendant herein claim that there was anything in particular that he wished to add to or amend from what was argued on his behalf by counsel or the Osborne

representative. Additionally, Ortiz does not explain why he could not have availed himself of the opportunity to speak during the original sentencing proceedings when the court inquired if the was "anybody else" who wished to be heard and had asked all those present if everyone was "ready for sentence." Thus, the omission of any such claims or discussions further militates against setting aside these sentences and holding a re-sentencing proceeding herein, which is the only relief requested and the only potential relief available for such an alleged error.

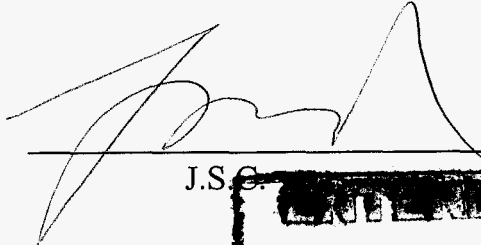
Indeed, in his own moving papers, the defendant seeks no other relief, makes no other claims, and raises no other issues with respect to either his pleas or sentences. Notably, Mr. Ortiz acknowledges that he was sentenced in accordance with his plea agreement and his understanding that he would receive concurrent sentences of four years' incarceration and five years' post-release supervision, and he further recognizes that no appeal lies from his judgments of conviction or sentences.

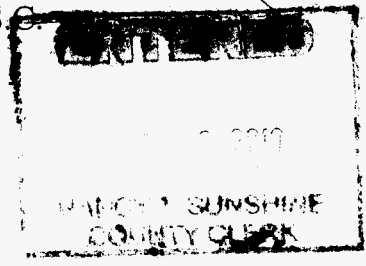
Accordingly, in light of all of the above, this court does not find that a re-sentencing proceeding is here required. Nor is there any basis for holding a hearing thereon, given the absence of any disputed facts. Therefore, the motion to set aside the defendant's sentences and for a re-sentencing proceeding is, respectfully, denied in its entirety, without a hearing.

This constitutes the decision and order of this court.

The defendant is hereby advised 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 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 certificate granting leave to appeal is granted.²

Dated: Brooklyn, New York
September 29, 2010



J.S.C.


² 22 NYCRR § 671.5.