

People v Sheppard

2010 NY Slip Op 32887(U)

October 7, 2010

Supreme Court, Kings County

Docket Number: 2458/00

Judge: John G. Ingram

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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

By: Hon. John Ingram

DECISION & ORDER

-against-

Ind. No. 2458/00

KARIFF SHEPPARD,

Defendant.

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Defendant moves, *pro se*, pursuant to Criminal Procedure Law § 440.10 for an order vacating the judgment of his conviction

On March 9, 2000, Defendant engaged in a verbal argument with Anthony Littles. Mr. Littles punched Defendant in the mouth. Defendant pulled a gun out from his pocket. When Mr. Littles rushed Defendant, Defendant fired the gun, striking Mr. Littles in the chest, resulting in his death. For these acts, defendant was charged with two counts of Murder in the Second Degree (P.L. § 125.25[1],[2]), one count of Criminal Possession of a Weapon in the Second Degree (P.L. § 265.03[2]), and one count of Criminal Possession of a Weapon in the Third Degree (P.L. § 265.02[4]).

On September 7, 2000, Defendant pled guilty to Murder in the Second Degree (P.L. § 125.25[2]) in exchange for a promised sentence, as a juvenile delinquent, to an indeterminate term of imprisonment of five years to life (Rivera, J., at plea and sentence).

On October 19, 2009, Defendant moved, *pro se*, pursuant to C.P.L. § 440.10 to vacate his judgment of conviction, alleging that he was denied effective assistance of counsel and his guilty plea was unknowing and involuntary because his counsel was unprepared for trial, she misadvised him about when he would be paroled, that she erroneously told him that he would

never be released from prison if he were to be convicted after trial and that she failed to explain to him the nature of the charges pending against him. In addition, Defendant claims that the Court should not have accepted his guilty plea because his plea allocution showed that he was not guilty of depraved indifference murder and he had a viable justification defense.

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 allegation that the court should not have accepted his guilty plea because his allocution showed that he was not guilty of depraved indifference murder is denied because Defendant's claim relies on facts appearing on the record. Defendant clearly relies on the record to support his claim. 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 N.Y.2d 100 (1986).

Defendant's claim that he was denied the effective assistance of counsel is also denied. Defendant's claim rests on counsel (1) failing to be prepared for trial; (2) misadvising him about when he would be paroled; (3) erroneously telling him that he would never be released from prison if he were convicted after trial; and (4) failing to explain to him the nature of the charges

pending against him. “Statements made during a plea allocution are presumptively true absent credible reason[s] justifying departure from their apparent truth.” Holbdy v. U.S., 2008 U.S. Dist. LEXIS 52441 (2008). In this case, Defendant’s claim that his plea was not voluntary and knowing “are belied by the record and are contrary to his express representations at the plea allocution.” Oyague v. Artuz, 274 F. Supp.2d 251, 261-62 (2003). The court record clearly reflects that the Court asked Defendant if he wanted to enter a plea of guilty to Murder in the Second Degree. After responding that was what he wished to do, Defendant then affirmatively replied that he had an adequate opportunity to speak with his attorney and that he understood the plea. Judges are not required to “conduct a pro forma inquisition in each case on the off-chance that a defendant who is adequately represented by counsel and who admits the underlying facts may nevertheless not know what he is doing.” People v. Francis, 38 N.Y.2d 150, 154 (1975). Defendant’ plea colloquy establishes that he admitted his guilt, stated that he understood his rights and the terms of the plea agreement, was not threatened or forced to plead guilty and had enough time to discuss the matter with his attorney. Therefore, the record is devoid of any evidence that establishes Defendant’s plea was involuntary and unknowing. People v. Branton, 35 A.D.3d 1035, 1036 (2006).

In addition, the record is clear that no promise or statement was made regarding any recommendation of parole. In this case, the record indicates that the only promise made was a sentence of incarceration of five years to life. No promise was made regarding the recommendation of the Court or the People or defense counsel for parole. “The Court cannot recognize any consideration the defendant may have had in his mind regarding parole eligibility.” People v. Palumbo, 171 Misc.2d 734, 736 (Kings County 1997). “ In addition, the plea could not

have been “induced” by any expectation of parole release or court recommendation. In New York the decision to release a sentenced prisoner on parole rests solely with the Parole Board.”

Palumbo, 171 Misc.2d at 736. Even if a defendant is a model prisoner, parole release is not guaranteed. Tarter v. State of New York, 68 N.Y.2d 511, 517 (1986). Neither the judge, the defendant, nor defense counsel can estimate when the defendant will be released. Therefore, Defendant has no legal expectation as to when he would have been released from parole and his plea could not have been influenced by any parole consideration.

Defendant’s remaining claims, that counsel coerced him to plead guilty and was unprepared for trial, are made solely by him and are unsupported by any other evidence. As there is no reasonable possibility that the claims are true, they are also rejected. C.P.L. § 440.30(4)(d). Additionally, Defendant fails to provide sufficient sworn allegations to support his claim that his plea was coerced and that his trial counsel was not prepared for trial. See C.P.L. § 440.10(4)(b). Defendant does not state how he was coerced to take the plea or the reasons he believes counsel was not prepared for trial. Therefore, the claim is procedurally deficient, as Defendant makes only bare, conclusory allegations which are unsupported by the record. Furthermore, Defendant’s trial counsel, Julie Clark, Esq., provided an affirmation stating that she never forced Defendant to plead guilty and never misled Defendant as to when he would be released from parole. His allegations are unsupported as well as rebutted by former counsel’s affirmation. C.P.L. § 440.30(4)(d).

Finally, defendant’s credibility is undermined by the ten year delay in filing the instant motion. In People v Nixon, 21 N.Y.2d 338 (1967), the Court held that a lengthy delay in filing a post-judgment motion 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..." Nixon, 21 N.Y.2d at 352 . 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 is denied in its entirety.

This opinion constitutes the Decision and Order of this 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: October 7, 2010
 Brooklyn, New York

ENTERED
 OCT 14 2010
 NANCY T. SUNSHINE
 COUNTY CLERK

John G. Ingram
 JOHN G. INGRAM
 J.S.C.