

**People v Zetto**

2010 NY Slip Op 32888(U)

September 30, 2010

Supreme Court, Kings County

Docket Number: 10072/2008

Judge: Patricia DiMango

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS, CRIMINAL TERM: PART PD85

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THE PEOPLE OF THE STATE OF NEW YORK :

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DECISION AND ORDER

:

-against-

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Indictment No. 10072/2008

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BRIAN ZETTO, aka BRIAN CZETTO,

:

:

Defendant.

:

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HON. PATRICIA M. Di MANGO:

The defendant, pro se, has moved for an order, pursuant to CPL § 420.40, permitting him to defer payment of the mandatory surcharge and other fees imposed upon him at the time of sentencing. Additionally, the defendant indicates that his application may alternatively be deemed one for re-sentencing pursuant to CPL § 420.10(5) and CPL § 420.35(1), to amend the payment provisions for these charges. The defendant has also requested that he be granted a hearing with regard to his application and that counsel be assigned to assist him upon such hearing. The People have opposed the defendant's motion in all respects.

In deciding this motion, the court has considered the defendant's moving papers, the People's opposition, and has reviewed the official court file. Additionally, this court has referred to the official "Directives" of the Department of Correctional Services ("DOCS") and has been in contact with DOCS personnel regarding the interpretation and implementation of these Directives.

The defendant was convicted of Burglary in the Third Degree under the captioned indictment, upon a plea of guilty, and was sentenced thereon, on February 6, 2009, to an indeterminate sentence of two and one-half to five years' incarceration. At sentencing, a Mandatory Surcharge of \$300, a DNA fee of \$50, and a \$25 Crime Victim Assistance Fee were also imposed upon the defendant, for a total of \$375 in charges and fees. Payments towards all of these fees are presently being collected from the defendant's inmate funds.

The defendant, an inmate at Groveland Correctional Facility<sup>1</sup> at the time he brought this motion, is seeking to defer payment, in whole or in part, of his mandatory surcharge and the other imposed fees on the ground that he has insufficient income and property to presently

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<sup>1</sup> According to the New York State DOCS website, it appears that the defendant has since been transferred to the Woodbourne Correctional Facility.

pay these charges and that the current collection of same from inmate funds is working an unreasonable hardship on him and his immediate family. While these moneys are typically collected at the rate of 20% from inmate earnings and 50% from any outside funds given to the inmate,<sup>2</sup> the defendant states that these figures are 40% and 100%, respectively, in his case.

In support of his application, Mr. Zetto has submitted an affidavit in which he asserts his indigence and details how his minimal prison earnings are insufficient to both pay off the surcharge and fees and also to permit him to purchase items he requires for his personal hygiene and for personal correspondence (namely, postage), as well as for his clothing needs.

Specifically, in his supporting affidavit, the defendant avers that, being an incarcerated inmate, his prison wages are his only source of income and the only moneys from which his surcharge and fees can be paid. According to the defendant, he earns approximately \$5.50 "in spendable funds every two weeks," and it is from these funds that he must pay for whatever items he requires which are not issued to him. Insofar as Mr. Zetto's earnings are apparently being garnished at the 40% rate (that is, 40% is being taken therefrom and applied towards his surcharge and other fees and to pay off "advances" and other "encumbrances," leaving him with 60% of his earnings to spend on commissary goods and other items, with no other funds available to him), the defendant maintains that this 60% is insufficient to purchase those items which he finds necessary, such as shampoo and deodorant, as well as stamps for his personal mail. The defendant also indicates that there are other items which he needs or would like to purchase, namely, fingernail clippers, skin lotion, a reading lamp, and a circulation fan for the summer. Additionally, Mr. Zetto claims that it is necessary for him to buy clothing, outerwear, and footwear to supplement that which he is issued, because some of what he is given is inadequate and wears out more quickly than the State has estimated for its duration and replacement, and also because he is not issued appropriate garments for cold and rainy weather.

Thus, the defendant maintains that because his surcharge and fees are being paid off from his inmate funds, and his family is not in a position to send him supplemental clothing which he requires for cold and inclement weather, he is under a "tremendous personal

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<sup>2</sup> It is apparently the policy of the Department of Correctional Services ("DOCS") to deduct 20% from an inmate's earnings, and 50% from funds given to the inmate from family and friends, and to apply same towards the surcharge and other fees (see, People v Hazel, 13 Misc3d 728, 730 [Sup.Ct. Bronx Co. 2006]). However, where a defendant has what DOCS terms two "encumbrances" (namely, a deduction for the surcharge and any other second deduction, such as for other fees or to pay down advances made on the inmate's account), then 40% of an inmate's weekly earnings and 100% of his/her outside receipts may be collected and applied to these fees and charges as well as towards any other encumbrance incurred by the incarcerated defendant (see, Matter of Begun v. Goord, 249 AD2d 861; New York State Department of Correctional Services Directive No. 2788 [IV] [B] [3] [b]).

hardship." Lastly, the defendant further alludes to the fact that he has two young children, namely a 10-year-old son and a 12-year-old daughter, whom he is unable to support because of the surcharge and fees which are being collected.

Accordingly, the defendant requests that he be granted an order permitting him to defer payment of his surcharge and fees, in whole or even in part, until he is released from incarceration. Additionally, the defendant maintains that he must be granted a hearing with regard to this application.

The People oppose the defendant's motion on the ground that he has provided no compelling reason to defer payment of the mandatory surcharge (and other fees), and that his assertions of indigence and inability to purchase certain personal items are insufficient to support a claim of undue hardship upon himself or his immediate family as would warrant such a deferment. Additionally, in opposition to Zetto's claim that he is unable to support his hygienic and mailing needs, the People contrarily contend that, as with all inmates, the defendant is regularly supplied with both clothing and items deemed necessary to maintain proper standards of hygiene, as well as with stationery supplies such as pens, paper, envelopes, and postage.

Therefore, the People urge denial of the motion due to the mandatory nature of these fees and the defendant's failure to substantiate any allegations of unreasonable hardship upon himself or his family, that is, that the defendant has not demonstrated any hardship on him or his family which is "over and above the ordinary hardship suffered by other indigent inmates." Lastly, the People dispute the defendant's assertion that a hearing is required here and that this application cannot be determined solely on the motion papers.

### Discussion

While some courts have held to the contrary with regard to a defendant sentenced to a period of incarceration greater than 60 days (see, e.g., People v Hopkins, 185 Misc2d 312 [Kings Co. 2000]), this court is of the view that it is permissible, pursuant to CPL § 420.40, to defer payment, in whole or in part, of the mandatory surcharge and other fees (see, People v Kistner, 291 AD2d 856 [4th Dept. 2002]; accord, People v Camacho, 4 AD3d 862 [4th Dept. 2004], lv. denied, 2 NY3d 761; People v Smith, 309 AD2d 1282, 1283 [4th Dept. 2003]; see also, People v Domin, 13 AD3d 391, 392 [2nd Dept. 2004 -- citing with approval, People v Huggins, 179 Misc2d 636, 638 (Greene County Ct. 1999)], lv. denied, 4 NY3d 830 [2005]; People v Pierce, 16 Misc3d 1126(A) [Sup.Ct. NY Co. 2007]).

Nevertheless, this does not mean that a defendant is entitled to deferral merely for the asking. Rather, in order to obtain deferral of the surcharge and other mandatory fees, the

defendant must establish, by credible and verifiable information, that present (installment) payment of such fees would work an "unreasonable hardship on defendant over and above the ordinary hardship suffered by other indigent inmates" (Kistner, supra, 291 AD2d at 856; People v Rodriguez, 292 AD2d 646, 647 [3rd Dept. 2002], lv. denied, 98 NY2d 654; People v Abdus-Samad, 274 AD2d 666, 667 [3rd Dept. 2000], lv. denied, 95 NY2d 862; People v Parker, 183 Misc2d 737, 738 [Sup. Court, Kings; 2000]).

Notwithstanding the defendant's limited income and financial constraints, this court finds that the defendant here has failed to establish any particular hardship which is out of the ordinary and would warrant court intervention and, hence, deferment of the payment of the statutorily mandated charges.

Indeed, it seems that Mr. Zetto is situated no differently from any other incarcerated, indigent defendant receiving minimal institutional wages. And, while he mentions certain personal care items he deems to be hygienic necessities, the defendant does not claim to have any unusual, necessary expenses or any special requirements which are not being provided to him while incarcerated or which set him apart from other inmates who also lament the fact that they are unable to purchase items which they would like to have and do not have friends or relatives who are able to supply them with same. Notwithstanding that some inmates may have more funds at their disposal, by having come to the institution with more money or by having family and friends who are able to provide them with additional funds or supplies, this is not the standard for assessing an inmate's hardship. Thus, while it may be unfortunate that Mr. Zetto cannot afford to purchase additional clothing and footwear and does not have anyone who can send him these items, this alleged "tremendous personal hardship" which "more financially capable inmates are not forced to endure" is not a proper basis for granting a deferral of the mandatory charges.

It should further be noted that, despite the defendant's claim to the contrary, it is the court's understanding that inmates are provided with sufficient and weather-appropriate clothing and outerwear (see, Correction Law § 137 [3]; 9 NYCRR 7612.6; DOCS Directive No. 3081 [II], [IV]). Also, to the extent that Mr. Zetto asserts that certain prison-issued items do not last as long as the replacement guidelines expect, according to DOCS directives, such items may be replaced earlier, if determined to be necessary (see, DOCS Directive No. 3081 [V]). If that is not taking place then such should be brought to the attention of the appropriate prison authorities. For example, the defendant states that he is ashamed to be wearing worn out socks. If his socks are sufficiently worn as to be deemed not serviceable, he should be able to have them replaced. According to DOCS' policy, assuming one has not deliberately damaged or misused one's clothing, an inmate is not forced to wear torn or threadbare clothing or required to replace it at his/her own cost, but rather, the facility will replace same. This presumably also holds true for the replacement of prison-issued sneakers which are

expected to last for 9 months but which the defendant asserts do not last that long with "constant wear."

Turning next to the defendant's assertion that he is required to purchase shampoo and deodorant, it is the court's understanding that all inmates are regularly provided with the essentials necessary for hygiene (see, People v Hazel, supra, at 730-731 [it may be presumed that correction officials are providing for defendant's basic needs, "including any essentials for appropriate hygiene in a prison setting"]; People v Parker, supra, 183 Misc2d at 738).

Unfortunately, in the realm of personal care, while there are many items which one might deem or label as "necessary" for one's personal hygiene and grooming, DOCS' definition of "necessary" may vary from what others might find to be so. Thus, while it does not seem unreasonable for inmates to wish that shampoo and deodorant be among the items issued to all inmates, rather than being a commissary item which must be purchased from inmate funds, apparently these items are not considered "necessary" by the New York State Commission of Correction, which sets the minimum standards for confinement in correctional facilities (see, 9 NYCRR 7612.5; DOCS Directive No. 4009 [E], [F]); see also, Correction Law § 45 [6]; People v Hazel, supra, 13 Misc3d at 730-731). That being the case, this court is not in a position to order that these items be supplied to inmates, nor that one's inability to purchase same be ruled a "hardship," even though one might reasonably expect such supplies to be among the "standard issue" items regularly provided to inmates. Accordingly, since all inmates are in the same situation in that such items are not supplied as a matter of course, this court cannot find that this deprivation, if indeed deemed a hardship, is different or greater for this defendant, as compared to any other indigent defendant.

The defendant also asserts that he is required to purchase stamps for his personal correspondence and that if he has insufficient funds, funds will be advanced only to allow the purchase of postage for one domestic first class one-ounce letter per month. This is all true, as confirmed by reference to DOCS directives (see, DOCS Directives Nos. 4422 [III] [D], 2788 [III] [A] [2]) and by DOCS personnel. Thus, while the People contend that an inmate receives free postage stamps, they are mistaken with respect to stamps for personal correspondence, as opposed to legal or other official correspondence which is governed by different guidelines. Nevertheless, in this respect also, the defendant is not alone and stands in the same position as other indigent inmates. Insofar as he does have some spendable income, it is up to the defendant to prioritize how he allocates his funds for commissary purchases, and if sending personal mail to family and friends is important to him, he could purchase a few stamps.

Finally, while the defendant mentions that he has two young children whom he cannot assist financially, he does not allege that their needs are not being met. Moreover, it does not appear that he is legally charged with their support and the defendant has not shown that his

children will suffer or are suffering and doing without necessities because his prison moneys are being garnished for his surcharge and fee obligations.

In conclusion, this court finds that the defendant has not alleged the requisite "unreasonable hardship" that payment of the surcharge and other fees is imposing upon him or his immediate family as would provide a basis for deferment. Nor is a hearing thereon here mandated. Rather, the defendant is mistaken in his assertion that he must be accorded a hearing upon this application. The court has reviewed the cases cited by the defendant in support of his contention that a hearing is here required and the court finds them to be inapposite. Additionally, none of the hearing provisions of CPL § 420.10 (5), CPL § 420.35 (1) or of Penal Law § 60.35 (8) are applicable to the instant defendant's situation or motion. Accordingly, insofar as the defendant here has not made sufficient factual allegations as to create a triable issue as to his possible "financial hardship," this court finds that no hearing need be held and that the motion is determinable upon the parties' papers alone.

Therefore, in light of the defendant's failure to demonstrate the requisite "unreasonable hardship," and further, bearing in mind the mandatory nature of the surcharge and fees and the important goals served by collection of these charges (see, CPL § 420.40 [3]), the motion to defer the mandatory surcharge and other fees is, respectfully, denied, without a hearing.

The foregoing constitutes the decision and order of the 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. (22 NYCRR § 671.5.)

Dated: Brooklyn, New York  
September 30, 2010

E N T E R ,

*[Handwritten signature]*  
J.S. **ENTERED**  
OCT 13 2010  
NANCY T. SUNSHINE  
COUNTY CLERK