

People v Powell

2010 NY Slip Op 33618(U)

July 7, 2010

Sup Ct, Kings County

Docket Number: 6077/2002

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

By: Hon. Patricia M. Di Mango

-against-

Date: July 7, 2010

DECISION & ORDER

FRANKLIN POWELL

Indictment No. 6077/2002

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Defendant moves for an order vacating his judgment of conviction pursuant to CPL § 440.10, or in the alternative, vacating his indeterminate sentence of five years to life imprisonment and resentencing him to a determinate sentence in accordance with Penal Law § 70.71. Defendant claims that he is entitled to such relief because he was denied the effective assistance of counsel when his attorney failed to file for resentencing under the 2005 Drug Law Reform Act ("2005 DLRA").

Background

In 2002, defendant was charged with Criminal Possession of a Controlled Substance in the First, Third, Fifth and Seventh Degrees, and Criminal Possession of a Weapon in the Second, Third and Fourth Degrees. Following his arraignment on the indictment in Supreme Court, defendant absconded in the fall of 2003, and the court issued a bench warrant for his arrest. Defendant was finally returned on the warrant on January 17, 2007 after remaining at large for nearly three years.

On May 31, 2007, defendant, represented by counsel Barry Turner, Esq., pleaded guilty to Criminal Possession of a Controlled Substance in the Second Degree (PL § 220.18[1]), a class A-II felony, in full satisfaction of the indictment. As part of the plea agreement, the People agreed to dismiss all the violent felony offenses charged in the indictment and to forgo any bail jumping charges. Additionally, this sentence would run concurrently with the six-year determinate sentence the defendant was to receive upon his guilty plea to Criminal Possession of a Controlled Substance in the Third Degree under Indictment No. 11087/2006. Defendant stated on the record that he was satisfied with counsel's representation and that he was pleading guilty freely and voluntarily. The court also asked defendant, who acknowledged that he was not a United States citizen, whether he understood that he would be deported as a result of his conviction. Defendant stated "yes." Defendant and his counsel executed a written waiver of appeal.

On June 13, 2007, the court imposed the negotiated sentence of five years to life in prison. The defendant was also sentenced under Indictment No. 11087/2006 on July 27, 2007 before the Hon. Guy Mangano.

Although counsel filed a notice of appeal, defendant never perfected an appeal from his judgement of conviction in the instant case.

Defendant is currently in the custody of the Department of Correctional Services ("DOCS") and will be eligible for parole on February 22, 2012. He has also been ordered deported pursuant to a final order of removal issued on November 26, 2008. When defendant is released from DOCS custody, Immigration and Customs Enforcement ("ICE") will take him into custody for deportation.

Defendant filed a previous motion to vacate the judgment of conviction on April 23, 2009, claiming that the waiver of appeal was invalid, or in the alternative, to vacate his sentence and be resentenced under the 2005 DLRA. Robert DiDio, defendant's counsel for the post-conviction motion, asserted in his affirmation that defendant was more than three years from parole eligibility, an allegation that was directly contradicted by information from DOCS. The People opposed the motion, arguing that the motion was procedurally barred and that defendant was ineligible for resentencing because he was within three years of his parole eligibility date. By decision dated September 17, 2009, the court denied defendant's motion, which it construed as a CPL § 440.10 motion, but nevertheless ordered a hearing to determine defendant's eligibility for resentencing under the 2005 DLRA.

On November 4, 2009, defendant appeared with counsel for the hearing. Defendant failed to provide any information to prove that he had not been within three years of his parole eligibility date when the motion was filed. A timely motion for DLRA resentencing would have had to be filed prior to February 22, 2009. As the motion was filed two months beyond the three-year time period, the court therefore determined that defendant was not eligible for resentencing and denied the motion on November 4, 2009.

In the instant motion defendant Powell, still represented by Robert DiDio, Esq., moves again for an order vacating his judgment of conviction¹, or in the alternative, for resentencing pursuant to the 2005 DLRA. Defendant now claims that Barry Turner, Esq., who represented defendant at plea and sentencing, provided defendant with the ineffective assistance of counsel

¹ He also requests vacatur of his conviction under Indictment No. 11087/2006 as it runs concurrently with the instant sentence. However, that application should have been brought before Justice Mangano and is not properly before this court.

when he failed to move for resentencing on defendant's class A-II felony drug conviction.

Defendant alleges that counsel's failure to move for resentencing under the 2005 DLRA rendered his guilty plea unconstitutional.

In an accompanying affirmation Mr. DiDio states that his was retained by defendant to represent him in his post-conviction proceedings. DiDio also states that he could not have timely moved for resentencing because by the time he was retained in November 2008 he would have had under three months to order minutes from the proceedings, identify viable claims, and prepare and file the required motions. However, according to the People, Mr. DiDio did in fact order and receive the plea minutes in November 2008, and they maintain he had ample time to obtain the sentencing minutes long before February, 2009.

Discussion

Defendant's motion is procedurally barred on account of defendant's failure to raise his claim of ineffective assistance of counsel in his 2009 motion to vacate the judgment. Under CPL § 440.10[3][c], the court may deny a motion to vacate a judgment when, "[u]pon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so." All of the facts alleged in the instant motion were available to defendant when he filed his first motion. Although he was in a position to raise his claim of ineffective assistance of counsel, he nevertheless failed to do so and offers the court no explanation for this failure.

Defendant's claim of ineffectiveness is also meritless. A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel (*Strickland v*

Washington, 466 U.S. 668; *People v Linares*, 2 NY3d 507, 510 [2004]; see U.S. Const., 6th Amend.; N.Y. Const., art. 1, § 6). To prevail on an ineffective assistance of counsel claim under the federal standard, the defendant must be able to show that counsel's conduct was "outside the "wide range of professionally competent assistance" (*Strickland v Washington*, at 690). Defendant also must be able to show that there is a reasonable probability that, but for counsel's errors, the outcome of the trial would have been different (*id.* at 694).

In New York, "[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met" (*People v Baldi*, 54 NY2d 137, 147 [1981]). "This protection does not guarantee a perfect trial, but assures the defendant a fair trial" (*People v Flores*, 84 NY2d 184, 187 [1994], 215 F.3d 293 [reversing and remanding for Rosario violations], *cert. denied*, 531 U.S. 1029). Accordingly, the reviewing court must separate true ineffectiveness from "mere losing tactics" (*People v Baldi* at 146) and the defendant must "demonstrate the absence of strategic or other legitimate explanations" for counsel's conduct (*People v Rivera*, 71 NY2d 705, 709 [1988]). Defense counsel's choice of strategy, even if unsuccessful, does not rise to the level of ineffective assistance as long as it is reasonable under the circumstances (*People v Benevento*, 91 NY2d 708, 712-713 [1998]). Defendant must also show that his right to a fair trial was prejudiced by the unfairness of the proceedings as a whole (*People v Stulz*, 2 NY3d 277, 284 [2004], *rearg. denied*, 3 NY3d 702).

Here, counsel Turner provided meaningful representation. Counsel negotiated a very favorable plea bargain whereby defendant pleaded guilty to a lesser charge of Criminal Possession of a Controlled Substance in the Second Degree and was not convicted of any of the

weapons counts in the indictment (see *People v Ford*, 86 NY2d 397, 404 [1995]; *People v Grimes*, 35 AD3d 882, 883 [2d Dept 2006]; *People v Mobley*, 221 AD2d 376 [2d Dept 1995]).

With this plea bargain, the defendant received a shorter sentence of five years to life imprisonment, whereas he faced a maximum term of eight and one-third years to life, plus additional terms for the dropped weapons charges and potential bail jumping charge. Also, nothing in the record casts doubt on counsel's representation.

The plea minutes further demonstrate that defendant's plea was knowing, voluntary and intelligent. Defendant stated that he was guilty and that he understood the consequences of his plea. He also confirmed that he was satisfied with Mr. Turner's representation and that he was freely pleading guilty because he was in fact guilty.

Moreover, the court rejects the claim that counsel's failure to file a post-conviction motion for resentencing renders defendant's plea unconstitutional because the two matters are simply unrelated. The plea allocution contains no reference to either the future possibility of resentencing or any obligation by counsel to file a resentencing motion. Defendant has not alleged that he ever asked Mr. Turner to file a resentencing motion once he entered prison or that he ever retained him for that purpose. Thus, as defendant has failed to draw a connection between the constitutionality of his plea and former counsel's subsequent failure to file a motion for resentencing, counsel cannot be faulted for failing to file a motion that he was not obligated to file.

Finally, it remains the case today, as it was when defendant filed his 2009 motion to vacate the judgment of conviction, that defendant is ineligible for resentencing under the 2005 DLRA. Because the court has already held a hearing and rendered a decision, it need not

reconsider defendant's eligibility now. In any event, defendant is not eligible for resentencing because he is less than three years away from his 2012 parole eligibility date (see 2005 DLRA, Chapter 643 of the Laws of 2005; *People v DelaTorre*, 48 AD3d 475 [2d Dept 2008]; *People v Nolasco*, 37 AD3d 622 [2d Dept 2007], *lv. denied*, 9 NY3d 848).

Accordingly, the motion is denied in all respects.

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:



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

