

People v Pantoja

2010 NY Slip Op 34052(U)

February 18, 2010

County Court, Westchester County

Docket Number: 07-0265

Judge: Barbara G. Zambelli

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

FILED
AND
ENTERED
ON 2/18 2010
WESTCHESTER
COUNTY CLERK

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X

THE PEOPLE OF THE STATE OF NEW YORK

- against -

RAFAEL PANTOJA,

Defendant.

-----X

ZAMBELLI, J.

DECISION & ORDER

Indictment No.: 07-0265

The following papers numbered 1 to 16 read on these pro se motions pursuant to CPL §§ 440.10 and 440.20:

PAPERS NUMBERED

- Notice of Motion to Vacate Judgment,
- Affidavit in Support & Exhibits A-D
- Affirmation in Opposition, Memorandum of Law & Exhibits 1-5
- Defendant's Reply Affidavit
- Defendant's Reply Declaration in Further Support of 440.10 Motion & Exhibits E-G
- Notice of Motion to Vacate Sentence,
- Affidavit in Support & Exhibits
- Affirmation in Opposition & Exhibit 1
- Reply Affidavit & Exhibits A-D

1-3
4-6
7
8-9
10-12
13-14
15-16

FILED
FEB 18 2010
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

Upon the foregoing papers it is ordered that these pro se motions are denied.

On February 6, 2008, after the commencement of his jury trial, defendant pleaded guilty in this Court (Hubert, J.) to grand larceny in the first degree and grand larceny in the second degree in full satisfaction of the fourteen count indictment against him, which charged him with crimes relating to the sale, purchase or mortgaging of certain real estate properties in Westchester County. The count of grand larceny in the first degree related

to defendant's stealing \$1,186,250 from PHH Mortgage by completing and executing a Banco Popular loan application, which loan was underwritten by PHH, in which defendant falsely stated that he was an attorney¹ and used his father's social security number to obtain the mortgage. The count of grand larceny in the second degree related to defendant's again falsely representing himself as an attorney and using his father's social security number to steal \$600,000 in mortgage proceeds from Countrywide Mortgage. As conditions of his plea, defendant agreed to, inter alia, restitution payments of \$1,186,250 to PHH Mortgage and \$600,000 to Countrywide Mortgage; defendant also waived his right to appeal. On March 14, 2008, defendant was sentenced (Hubert, J.) as a second felony offender to 4 ½ to 9 years on both counts to run concurrently. As relevant to these motions, restitution was ordered to PHH Mortgage and Countrywide Mortgage as set forth above.

Defendant's Motion to Vacate His Judgment of Conviction

Defendant moves pursuant to CPL §440.10 to vacate his judgment of conviction on the grounds that the People introduced an allegedly fraudulent document at his trial which induced him to plead guilty. The allegedly fraudulent document was People's Trial Exhibit 40 - a record of the assignment of the mortgage criminally obtained by defendant from Banco Popular to JP Morgan Chase certified by the Westchester County Clerk (People's Exhibit 2). While defendant was not charged with any crime relating to the assignment itself, as the assignment occurred in 2006 and defendant criminally obtained the mortgage in 2004, the People introduced this document during defendant's trial as proof of the

¹Defendant was disbarred from the practice of law in New York on February 8, 1996.

subject property's foreclosure status at the time of the trial.

Defendant alleges that People's Trial Exhibit 40 was fraudulent because a copy that he alleges that he received in the civil forfeiture action for the subject property (Defendant's Exhibits A-C) bears alleged inaccuracies and is inconsistent with the People's Exhibit 40 introduced at trial (People's Exhibit 2). Defendant also alleges that the assignment of mortgage contained within People's Trial Exhibit 40 (Defendant's Exhibit C) was fraudulent because an individual by the name of Marc J. Hinkle executed the assignment on May 4, 2006 as Vice President of "Mortgage Electronic Registration Systems Inc. as nominee for Banco Popular N.A.", but in an "Affidavit of Computation" submitted in the foreclosure proceeding for the property dated August 5, 2008 (Defendant's Exhibit D), "Marc J. Hinkle" identifies himself as an employee of PHH Mortgage Corporation. Thus, defendant submits, Marc Hinkle must have been lying on either or both of these documents regarding his employment status and further asserts that the People knowingly used these allegedly fraudulent documents at his trial.

Defendant therefore alleges that the use of People's Trial Exhibit 40 constituted a Brady violation because the People were allegedly aware that the document contained alleged false information and failed to inform him of that fact, which could have been used by defendant for impeachment purposes at trial. He asserts that the discovery of the allegedly fraudulent nature of Trial Exhibit 40 is newly discovered evidence entitling him to a vacatur of his judgment of conviction. He alleges that his counsel was ineffective for not using any other impeachment evidence. He also asserts that he would not have pleaded guilty but for the People's use of Trial Exhibit 40.

The People oppose the defendant's motion on procedural and substantive grounds.

They dispute that the Trial Exhibit 40 was fraudulent and deny that any Brady violation occurred. They argue that in any event, Trial Exhibit 40 was not determinative of defendant's guilt, as it had nothing to do with whether defendant falsely represented himself as an attorney and used a social security number issued to another person in order to obtain the mortgage proceeds at issue, and indeed, the assignment did not occur until after defendant had necessarily committed the above acts. The People therefore dispute defendant's allegation that Trial Exhibit 40 made his plea unknowing, involuntary and unintelligently made. The People further submit that as defendant pleaded guilty, as opposed to being found guilty after trial, his motion to vacate based upon newly discovered evidence is procedurally barred. Lastly, the People dispute defendant's allegation of ineffective assistance of counsel, pointing out the favorable plea that defendant received.

Defendant's motion is without merit and is denied. As to defendant's allegations regarding the alleged fraudulent nature of Trial Exhibit 40, it is undisputed that this exhibit was introduced at trial prior to the defendant's plea. Accordingly, as defendant's claim is based upon matters appearing in the record, it can only be reviewed upon direct appeal (see CPL §440.10(2)(c); People v. Boyer, 19 A.D.3d 804, 806 (2005); lv. denied, 5 N.Y.3d 804 (2005)). As defendant failed to appeal his conviction, he may not employ this motion as a substitute for such appeal (People v. Kotler, 271 A.D2d 548, 549 (2d Dept. 2000)). Additionally, the voluntariness of defendant's plea is also a matter of record which could have been raised on direct appeal. Accordingly, defendant's claims in this regard are procedurally barred from being raised in this CPL §440.10 motion.

To the extent that defendant argues that the "newly discovered evidence" of the allegedly fraudulent nature of People Trial Exhibit 40 requires that his conviction be

vacated, defendant's argument is unavailing. The applicability of relief based upon newly discovered evidence is statutorily expressly conditioned upon the existence of a guilty verdict after trial (CPL §440.10(1)(g)). Thus, defendant's guilty plea forecloses the relief he seeks pursuant to that statute (People v. Latella, 112 A.D.2d 321, 322 (2d Dept. 1985), lv. denied, 65 N.Y.2d 983 (1985)).

Similarly, defendant's claim of a Brady violation is also unavailing, because by pleading guilty, defendant forfeited his right to seek review of any alleged such violation (People v. Philips, 30 A.D.3d 621 (2d Dept. 2006), lv. denied, 8 N.Y.3d 949 (2007), reconsideration denied, 8 N.Y.3d 989 (2007)).

As to defendant's ineffective assistance of counsel claim, which is based upon counsel's alleged failure to use other, unspecified, impeachment evidence to demonstrate that "PHH and others committed fraud against [defendant] in the context of the transaction in which the accusations against [defendant] arose" (Defendant's Affidavit, ¶44), it is initially noted the document which defendant alleges is fraudulent relates to an assignment of the mortgage that defendant had already criminally obtained by providing false information regarding his employment and his identity. Thus, defendant has failed to establish how any alleged fraud on this document would provide any impeachment or exculpatory evidence regarding defendant's committing the crimes to obtain the mortgages in the first instance. Defendant's motion further fails to specifically identify any other evidence that he expected his counsel to use for impeachment purposes.

To make out an ineffective assistance of counsel claim, defendant must establish that counsel's performance was deficient, and that the deficient performance prejudiced defendant and thereby deprived defendant of a fair trial (Strickland v. Washington, 466

U.S. 668, 686 (1984)). In New York, the focus is on the fairness of the proceedings as a whole (People v. Stultz, 2 N.Y.3d 277, 284 (2004)) and whether the defendant was afforded meaningful representation (People v. Henriquez, 3 N.Y.3d 210, 230 (2004); People v. Benevento, 91 N.Y.2d 708, 712 (1998), People v. Baldi, 54 N.Y.2d 137, 147 (1981)). The test is one of reasonable competence, not perfect representation (People v. Modica, 64 N.Y.2d 828, 829 (1985)). Moreover, to prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations for counsel's supposed failures. Where a defendant fails to do so, it is "presumed that counsel acted in a competent manner" (People v. Taylor, 1 N.Y.3d 174, 177 (2003)).

Defendant herein has failed to meet his burden in establishing that his counsel was ineffective. Assuming for argument's sake only that People's Trial Exhibit 40 was in some way fraudulent, defendant does not establish how his attorney could have known this at the time of defendant's trial in order to use the information to defendant's advantage. He further fails to establish that there was any other exculpatory evidence for his attorney to use as impeachment purposes. Moreover, it is noted that defendant received a greatly favorable sentence - the minimum available and with concurrent time on both counts - as a result of his plea. As defendant received a more favorable sentence than that to which he was potentially exposed, it cannot be said that he was not afforded meaningful representation from his counsel (see People v. Langhorne, 177 A.D.2d 713, 714 (2d Dept. 1991), lv. denied, 82 N.Y.2d 898 (1993)).

Defendant's Motion to Set Aside His Sentence

Defendant moves pursuant to CPL §440.20 to set aside that portion of his sentence

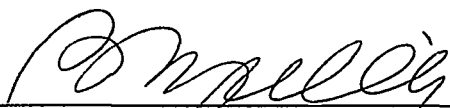
which directed him to pay restitution in the amount of \$1,186,250 to PHH Mortgage Corporation on the ground that the sentencing court allegedly misled him as to the effect of the order and judgment of restitution would have on the foreclosure proceedings for the subject property.

Defendant's motion is without merit. As an initial matter, pursuant to the statute, a sentence can only be set aside if it is "unauthorized, illegally imposed or otherwise invalid as a matter of law" (CPL §440.20(1)). Clearly, sentences of imprisonment and restitution were appropriately imposed upon defendant pursuant to his convictions (see PL §§60.27; 70.06). Moreover, a review of the minutes of the defendant's plea in this case (People's Exhibit 1) establishes that the Court did not mislead defendant as to the effect of the order and judgment of restitution would have on the foreclosure proceedings. Accordingly, defendant's motion is denied (CPL §440.30(4)(d)).

For the above reasons, the defendant's motion is denied in its entirety.

This decision constitutes the Order of the Court.

Dated: White Plains, New York
February 18, 2010


BARBARA G. ZAMBELLI
COUNTY COURT JUDGE

Hon. Janet DiFiore
District Attorney, Westchester County
111 Dr. Martin Luther King Jr. Blvd.
White Plains, New York 10601
Attn: Mark Garetto, Esq.
Assistant District Attorney

Raphael M. Pantoja
MDC (76012-053)
100 29th Street
Brooklyn, New York 11232

Raphael M. Pantoja
764 Lake Street
West Harrison, New York 10604

Donna Minort,
Chief Clerk

Elizabeth Pace,
Deputy Chief Clerk