

People v Fortune

2011 NY Slip Op 30142(U)

January 18, 2011

Sup Ct, Kings County

Docket Number: 683/05

Judge: Miriam Cyrulnik

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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: Part 38

PEOPLE OF THE STATE OF NEW YORK

-against-

KWEKU FORTUNE,

DECISION AND ORDER
Indictment No: 683/05

Miriam Cyrulnik, J:

The defendant moves to set aside his sentence, pursuant to Criminal Procedure Law (“CPL”) 440.20, alleging that he was denied the opportunity to make a statement before his sentence was pronounced. The People oppose. The defendant also filed a reply to the People’s affirmation in opposition.

In October 2006, while deliberations were taking place during the defendant’s jury trial, he absconded and did not reappear for the course of the trial. The defendant was thereafter convicted *in absentia* of five counts of Grand Larceny in the Third Degree, one count of Scheme to Defraud, one count of Criminal Contempt in the First Degree, one count of Intimidating a Witness in the Third Degree, one count of Menacing in the Third Degree, two counts of Aggravated Harassment in the Second Degree, and one count of Harassment in the First Degree. On October 26, 2006, while still absent from the court, the defendant was sentenced to a total of 13 to 39 years for all of the above counts, with some terms running concurrently, and others consecutively.

In October 2008, the defendant was returned on the warrant, and his sentence was imposed. The defendant then filed a notice of appeal. Subsequently, the Appellate Division, Second Department appointed appellate counsel to represent the defendant. The Appellate Division dismissed the defendant’s appeal on December 11, 2009, and later denied his motion to reargue the dismissal on February 24, 2010. The Court of Appeals then denied the defendant’s application for

leave to appeal that decision, as well as his later application for reconsideration of his application.

DEFENDANT'S CLAIM THAT HE SHOULD
HAVE BEEN AFFORDED AN OPPORTUNITY TO
SPEAK AT SENTENCING IS WITHOUT MERIT

Here, the defendant alleges that he was prevented from making a statement at the time his sentence was executed on October 1, 2008, which he claims should have been his right under CPL 380.50. He contends that had he been permitted to speak, the court could have imposed a lesser sentence than the one he received. The defendant additionally argues that the People produced no evidence to show that he voluntarily absented himself, and that a hearing should now be held, and he be provided with an opportunity to address the court.

The People respond that the defendant forfeited the right to be present, and thus heard by the court, at sentencing. By purposefully absconding, any chance at leniency is waived as well. Additionally, the People argue that as it is the sentencing component of the criminal proceeding that is essential, and not the execution of the sentence, the defendant is not entitled to the representation of counsel at that stage. The People note that defense counsel spoke on his client's behalf at the time of sentencing, even without the defendant being present in court. Therefore, they contend, the defendant's claims are without merit, and the motion should be dismissed. The court agrees.

As expressed in People v. Sanchez, 65 NY 2d 436, 443-4 (1985), one of the cases cited by the People, "if a defendant deliberately leaves the courtroom after his trial has begun, he forfeits his right to be present at trial regardless of whether he knows that the trial will continue in his absence." See also People v. Traylor, 2010 NY Slip Op 5598 (2d Dept 2010), lv denied 15 NY 3d 856 (2010) (finding defendant's failure to reappear to be deliberate and resuming trial in his absence); see also People v. Jenkins, 45 AD 3d 864 (2d Dept 2007); lv denied 10 NY 3d 766 (2008).

Furthermore, the Court of Appeals held that “a defendant who is properly tried *in absentia* may during his continued absence also be sentenced *in absentia*.” People v. Sanchez, *supra* at 444, (noting that defendant Rivera’s whereabouts were unknown by his wife, and undiscovered by the warrant squad, thus his “deliberate absence” at trial similarly “forfeited his right to be present at sentencing”). The deliberateness of a defendant’s actions constitutes “a defiance of the process of law sufficient to effect a forfeiture of his right to be present at sentencing.” People v. Scott, 188 AD 2d 626 (2d Dept 1992), *lv denied*, 81 NY 2d 976 (1993).

In this case, the court has reviewed the trial and sentencing record, and notes first that the defendant was advised of his Parker warnings, a copy of which is in the court file, and signed a waiver acknowledging his forfeiture of rights, including that of addressing the judge at sentencing, if he did not appear in court. Furthermore, an investigation was conducted by the People, whose investigators had been looking for the defendant. They learned from the defendant’s wife that “after his last appearance in court, he dropped off his cell phone and said: I have to get out of here for a while, I’m in a lot of trouble.” (Sentencing Tr., p. 12, October 1, 2008). According to the People, the defendant additionally changed his cell phone number as well. (People’s Pre-Sentence Memorandum, October 18, 2006). Indeed, the defendant’s sentence was only executed two years later, after he was apprehended on allegations of False Personation, and returned on the outstanding warrant. Thus, contrary to the defendant’s contentions in his sur-reply, there is no issue remaining regarding whether the defendant acted deliberately, or without knowledge of the consequences, in failing to reappear for the remainder of his trial or for sentencing.

To the extent that the defendant argues he ought to have been afforded an opportunity to speak, specifically at the execution of his sentence, that claim is also without merit. As the People

correctly point out, it is the sentencing that is “a critical stage of a criminal proceeding which implicates the right to counsel,” not the “subsequent execution of sentence.” People v. Harris, 79 NY 2d 909, 910 (1992). See also People v. Villegas, 146 AD 2d 228, 232 (1989) (dismissing defendant’s claims that his right to counsel and due process rights were violated when he was not given “the opportunity to explain his absence” at the execution of his sentence following his absconding for the “critical stage” of imposing sentence); see also People v. Blas, 192 AD 2d 540 (2d Dept 1993), lv denied, 82 NY 2d 751 (1993). Here, the defendant’s attorney spoke on his behalf at the original sentencing, even without the defendant present, thus representing the defendant’s interests at the important component of sentencing. In any event, even though the defendant himself was not entitled to speak at the subsequent execution of his sentence, the court notes that defense counsel, albeit not the same one who represented the defendant at trial, appeared and argued on his behalf at those proceedings on October 1, 2008.¹

Accordingly, the defendant’s motion to set aside his sentence, or to be granted a hearing, is denied.


The defendant’s right to an appeal from the order determining this motion is not automatic except in the single instance where the motion was made under CPL 440.30 (1)(a) for forensic DNA testing of evidence. For all other motions under article 440, the defendant must apply to a Justice of the Appellate Division for a certificate granting leave to appeal. This application must be filed within 30 days after the defendant has been served by the District Attorney or the court with the court order denying this motion.

¹ The original defense counsel, Helen Wells, was in the process of retiring at this time. The court finds that attorney Jonathan Fink appeared competently on the defendant’s behalf in her stead. See Sentencing Tr. p. 9-11, October 1, 2008.

The application must contain the defendant's name and address, indictment number, the questions of law or fact which the defendant believes ought to be reviewed and a statement that no prior application for such certificate has been made. The defendant must include a copy of the court order and a copy of any opinion of the court. In addition, the defendant must serve a copy of his application on the District Attorney.

This constitutes the decision and order of the Court.

Dated: January 18, 2011
Brooklyn, New York


Miriam Cyrulnik
A.J.S.C.

ENTERED
JAN 20 2011
NANCY T. SUNSHINE
COUNTY CLERK