

People v Perez

2011 NY Slip Op 30911(U)

March 4, 2011

Supreme Court, Kings County

Docket Number: 11991-07

Judge: Joseph Kevin McKay

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
COUNTY OF KINGS - CRIMINAL TERM : PART 33

-----X
THE PEOPLE OF THE STATE OF NEW YORK

v

BY: McKay, J.

DATE: MARCH 4, 2011

IND. NO.: 11991-07

LESLIE PEREZ,

DECISION AND ORDER

DEFENDANT

-----X

Defendant Leslie Perez has submitted a January 31, 2011 pro se motion pursuant to CPL 440.20 seeking to dismiss his plea conviction for attempted assault in the second degree (Penal Law § § 110.00/120.05-6). Defendant contends that his plea to this lesser included count was fatally defective because he was not properly allocuted regarding the element of physical injury. Defendant does not, however, challenge his contemporaneous plea to endangering the welfare of a child (Penal Law § 260.10). The People have submitted a response dated March 1, 2011 in opposition to defendant's motion. For reasons addressed below defendant's motion must be denied on mandatory and permissive statutory procedural grounds and, in any event, it is entirely meritless.

Defendant has previously filed a November 4, 2009 CPL 440.10/ 440.20 motion seeking to set aside his judgment of conviction on a myriad number of grounds, all of which were found to be without merit. That motion was denied by this Court in a March 1, 2010 written decision and the procedural history set forth in that Decision and Order is incorporated by reference herein. Suffice it to say that defendant was charged in a 28 count indictment with mostly sex-related charges, including statutory rape. He fathered the 15 year old victim's child. He pleaded guilty on May 28, 2009 before me to the attempted assault in the second degree and endangering the welfare of a child counts and was sentenced by Justice Elizabeth Foley in accordance with the negotiated

plea agreement to an indeterminate term of imprisonment of two to four years as a predicate felon on the attempted assault count and one year on the endangering count to run concurrently. Defendant waived his right to appeal and no notice of appeal has been filed.

Although defendant has labeled his pro se motion as brought pursuant to CPL 440.20 this Court now deems it to be brought pursuant to CPL 440.10. See People v Hill, 9 NY3d 189, 191 (2007) cert denied 533 US 3444 (2008). CPL 440.20 relates to setting aside an illegal, unauthorized or invalid sentence, which are not the grounds raised in defendant's current papers. Even though defendant argues that the plea was improper and therefore the resulting sentence was also improper, his labeled 440.20 motion is insufficient since it does not raise any of the grounds set forth in the 440.20 statute.

The claim raised by defendant, that the allocution was insufficient on the plea to attempted assault in the second degree under count 17, questionable as it is, is nevertheless a matter of record that could and should have been raised on direct appeal. See CPL 440.10(2)(c); People v Cuadrado, 9 NY3d 362 (2007); People v Angelakos, 70 NY2d 670 (1987); People v Cooks, 67 NY2d 100 (1986). Therefore this Court is mandatorily barred from entertaining this motion. Moreover, defendant has previously filed a CPL 440.10 motion which was decided by this Court on March 1, 2010 and therefore he could and should have raised the present allocution issue in that motion. See CPL 440.10(3)(c); People v Cochrane, 27AD3d 659 (2d Dept 2006), lv denied 7 NY3d 787 (2006), cert denied 549 US 976 (2006); People v Dover, 294 AD2d 594 (2d Dept 2002), lv denied 98 NY2d 767 (2002); People v Dominguez, 257 AD2d 511 (1st Dept 1999), lv denied 93 NY2d 872 (1999), error coram nobis denied 275 AD2d 1044 (1st Dept 2000), habeas corpus denied sub nom. Dominguez v Portuondo, 2004 WL 2002930 (SDNY Sept 8, 2004); People v Sanchez, 212 AD2d 487 (1st Dept 1995), lv denied 85 NY2d 980 (1995); People v Moolenaar, 207 AD2d 711 (1st

Dept 1994), lv denied 84 NY2d 1013 (1994), lv denied on reconsideration, 85 NY2d 864 (1995); People v Thomas, 147 AD2d 510 (2d Dept 1989), lv denied 74 NY2d 669 (1989), lv denied on reconsideration 76 NY2d 866 (1990), error coram nobis denied 307 AD2d 329 (2d Dept 2003), lv denied 100 NY2d 646 (2003). Accordingly, I now apply the permissive statutory bar to defendant's motion. CPL 440.10(3)(c)

Were this Court to have jurisdiction and reach the merits of defendant's claim, it would still be DENIED. This plea was an accommodation to defendant, sought by the defense to avoid SORA requirements and agreed to by the People in order to spare the complainant, who at 15 years of age bore defendant's child, from testifying at trial. Moreover, the defense never disputed any elements of the plea during that proceeding nor at sentence to trigger the Court's need to probe further. See People v Ingram, 80 AD3d 713 [2011]. Indeed it is well-settled that there is no "uniform mandatory catechism" for taking a plea. See People v Seeber, 4 NY3d 780, 781 (2005); People v Fiumefreddo, 82 NY2d 536, 543 (1983); People v Luster, 45 AD3d 866 (2d Dept 2007), lv denied 9 NY3d 1035 (2008); People v Dixon, 41 AD3d 861 (2d Dept 2007), lv denied 9 NY3d 922 (2007). Defendant's reliance on People v Serrano, 15 NY2d 304 (1985) is misplaced. As the People correctly note the Court of Appeals, in People v Lopez, 71 NY2d 662 (1988), held that insofar as Serrano may be construed as holding that a court has an enhanced duty to inquire where a pleading defendant fails to recite every element of the offense "it should not be followed." People v Lopez, 71 NY2d at 666. Furthermore, actually causing "physical injury" is not an essential element of attempted assault in the second degree (Penal Law § 110.00/120.05-6).

In any event, defendant's claim about his allocution on the element of physical injury is belied by the May 28, 2009 plea minutes where this Court expressly asked: "By your plea, are you admitting that in the course of the commission of a felony for sexual assault, you caused physical injury to [complainant]?" and defendant responded "Yes" [plea minutes at 5]. Finally, to the extent defendant is claiming that his plea was not knowing, intelligent and voluntary because he was "confused" by the legal "jargon" during the plea allocution, this claim is belied by the record. See People v Miranda, 67 AD3d 709 (2d Dept 2009), errum coram nobis denied 76 AD3d 1105 (2d Dept 2010), lv denied 15 NY3d 922 (2010); People v Vazquez, 34 AD3d 855 (2d Dept 2006), lv denied 8 NY3d 850 (2007); People v Matthews, 21 AD3d 499 (2d Dept 2005), lv denied 5 NY3d 830 (2005).

Accordingly, defendant's motion is summarily DENIED in all respects.

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 the denial of defendant's "CPL 440.20," deemed 440.10 motion. This application must be made within 30 days of service of this Decision and Order. 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).

The Clerk of the Court is directed to mail a copy of this Decision and Order to defendant Leslie Perez, DIN # 09-A-3211, Great Meadow Correctional Facility, 11739 State Route 22, P.O. Box 51. Comstock, New York, 12821-0051 and to Assistant District Attorney Bruce

Alderman, Kings County District Attorney's Office, 350 Jay Street, Brooklyn, New York 11201.

IT IS SO ORDERED.

ENTER,

ENTERED
MAR 7 - 2011
NANCY T. SUNSHINE
COUNTY CLERK


J.S.C.

HON. JOSEPH KEVIN MCKAY
J.S.C.