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

PEOPLE OF THE STATE OF NEW YORK

-against-

JOSE CRUZ,

DECISION AND ORDER
Indictment No: 526/99
5757/98

Miriam Cyrulnik, J:

The defendant moves pro se to vacate his judgment of conviction, pursuant to Criminal Procedure Law ("CPL") 440.10, alleging that his guilty plea was involuntarily made, and that he was denied the effective assistance of counsel. The People oppose.

On May 10, 1999, the defendant pled guilty under Indictment No. 5757/98 to Criminal Sale of a Controlled Substance in the Third Degree. He also pled guilty to Criminal Sale of a Controlled Substance in or near School Grounds under Indictment No. 526/99. On May 20, 1999, he was sentenced to a period of three to nine years incarceration on both cases to run concurrently. The defendant did not file an appeal from his conviction or sentence.

The defendant now claims that he involuntarily pled guilty in this case, and never waived several of his rights, including the right to confront his accusers and the right to a jury trial. He also contends that he was not advised that his guilty plea would classify him thereafter as a predicate felon. Finally, the defendant argues that he was deprived of defense counsel at the time of his plea, and if there was an attorney representing him, then his counsel did so ineffectively.

The People respond that the defendant's claims regarding the voluntariness of his guilty plea are procedurally barred, as they could have been raised on direct appeal, or are summarily resolved through documentary evidence or official court records. They also contend that his arguments regarding his counsel are meritless based on the defendant's advantageous plea, as is evidenced by

the court record. The court agrees with the People.

DEFENDANT'S ARGUMENTS REGARDING THE VOLUNTARINESS OF HIS PLEA ARE PROCEDURALLY BARRED

The records surrounding both the defendant's guilty plea and his sentencing are clear and complete. Any issues now raised by the defendant pertaining to those events are fully explained by the court record and transcripts. Indeed, there was a lengthy allocution, during which time the presiding judge asked the defendant numerous questions about his comprehension of the proceedings, and his intention to plead guilty. See Plea Allocution Tr., p. 4-12, May 10, 1999. The record clearly shows the defendant responded affirmatively, and took the opportunity to discuss the plea with his defense counsel (see discussion below).

Accordingly, as the defendant's claim regarding the voluntariness of his plea is readily reviewable from the record, it is not subject to review in the context of a CPL 440 motion. Rather, the defendant should have undertaken a direct appeal from his judgment, an avenue which he failed to pursue. As such, under CPL 440.10(2)(c), the defendant is procedurally barred from attempting to circumvent that designated process by filing a motion to vacate the judgment. See People v. Kwok, 2008 NY Slip Op 4536, 1 (2d Dept 2008) (holding that since "facts sufficient to have permitted adequate review of these claims on a direct appeal from the judgment appear on the record of the plea proceedings," defendant is "barred from raising them on a motion to vacate the judgment" without showing that his "failure to take an appeal and raise these claims was justifiable"); see also People v. Mackey, 2007 NY Slip Op 50477U, 2 (Sup Ct, Kings County 2007).

The court notes that the defendant's waiver of his right to appeal as a component of his guilty plea does not forfeit his right to contest certain aspects of the case, including constitutional issues,

or the voluntariness of his plea. See People v. Mosquera, 2004 NY Slip Op 50187U, 3 (Dist Ct, Nassau County 2007) (noting that "the defendant always retains the right to challenge the legality or the voluntariness of the plea" despite a waiver of appeal composing "an enforceable condition of a plea bargain"); see also People v. Mackey, supra (holding that "[a] challenge to the voluntariness of a pleas [sic] survives a waiver of the right to appeal"); People v. Seaberg, 74 NY 2d 1 (1989).

However, as the People correctly point out, the defendant's claims are also procedurally barred. The abovementioned official court transcripts constitute "unquestionable documentary proof" under CPL 440.30(4)(c)[1], as well as "court records or other official documents" under CPL 440.30(4)(d), that permit the court to deny the defendant's motion without conducting a hearing if:

> "An allegation of fact essential to support the motion is (ii) contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true."

Here, the defendant informed that court that he knew what was happening, that he was "entering these pleas of guilty of [his] own free will," that he understood that he was giving up the right to have a trial, to have his attorney question prosecution witnesses, to call his own witnesses, to testify on his own behalf, or to remain silent. See Plea Allocution Tr., p. 6, 8-9, May 10, 1999. The defendant was also advised by the court regarding his qualifying status as a predicate felon in the future, and that he would be waiving his right to appeal. Id. at 9-10, 11. Based on that record, it is clear that there is no reasonable possibility that the defendant's allegations are true and they are, thus, without merit. See People v. Sayles, 17 AD 3d 924, 924-5 (3rd Dept 2005), lv denied 5 NY 3d

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[1] CPL 440.30(4)(c) reads "Upon considering the merits of the motion, the court may deny it without conducting a hearing if: An allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof."

794 (2005) (holding that the "defendant's self-serving and conclusory affidavit is directly contradicted by the record evidence before Supreme Court, including his unequivocal affirmations to the court during his plea allocution that he was entering the plea of his own free will, fully understood its consequences . . . and was satisfied with the services of counsel").

Finally, the court notes that all of the defendant's claims must fail, as they "do not contain sworn allegations substantiating or tending to substantiate all the essential facts" in support of the his arguments, pursuant to CPL 440.30(4)(b). The defendant simply does not specify how his plea was involuntary, other than through conclusory allegations of his being deprived of various rights. Accordingly, his motion to vacate his judgment of conviction on the abovementioned grounds is denied.

DEFENDANT'S CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IS PROCEDURALLY BARRED AND WITHOUT MERIT

The defendant alleges that he received ineffective assistance from his defense counsel at the time of his guilty plea, yet he has made no specific allegations as to how defense counsel ineffectively represented him. Indeed, the defendant, in his motion, is unclear whether or not he was even represented by counsel at the time of his plea.[2] See Defendant's Motion, p. 7.

To the extent that the defendant argues that he was ineffectively assisted by his attorney, that claim is procedurally barred under CPL 440.30(4)(c),(d). The defendant was pointedly asked by the court whether he was satisfied with his legal representation, and he made no mention of any dissatisfaction with his attorney:

[2] The court notes that the defendant is also mistaken about when his case was resolved, claiming it was 24 years ago when, in fact, it was 11 years ago.

"THE COURT: Mr. Cruz, is Mr. Lazzaro, who is standing next to you your attorney?
THE DEFENDANT: Yes.
THE COURT: Have you had enough time to discuss this matter with him, and are you satisfied with his representation in this matter?
THE DEFENDANT: Yes.
(Plea Allocution Tr., p. 5, 9, May 10, 1999)

The record further shows that the defendant acknowledged that his attorney had discussed with him the matter of giving up the aforementioned rights. Thus, for the reasons discussed above, based on the clear allocution record, the defendant's arguments regarding ineffective assistance of counsel are procedurally barred.

Moreover, even on their merits, the defendant's claims must fail. The defendant has not demonstrated to the court any indication that with different legal representation he would have decided instead to proceed to trial. Particularly given the serious nature of the two felony offenses to which the defendant pled guilty, the court finds that he received the benefit of an advantageous plea deal. See People v. Brown, 235 AD 2d 563 (3rd Dept 1997), lv denied 89 NY 2d 1032 (1997) (denying defendant's ineffective assistance of counsel claim based on his "extremely advantageous plea" and a record "devoid of any evidence which would cast doubt on the effectiveness of counsel").

Having reviewed the record and the pertinent transcripts of the proceedings, the court finds that defense counsel in this case more than adequately represented the defendant, providing substantial and "meaningful representation" to the defendant. See People v. Caban, 5 NY 3d 143 (2005).

Accordingly, the defendant's motion to vacate his judgment 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.

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 opinion constitutes the decision and order of the Court.

Dated: April 6, 2011
Brooklyn, New York

Miriam Cyrulnik
A.J.S.C.