

People v Gavin

2011 NY Slip Op 31177(U)

March 29, 2011

Sup Ct, Kings County

Docket Number: 3749/2005

Judge: Patricia DiMango

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This opinion is uncorrected and not selected for official publication.

The defendant, an inmate at the Riverview Correctional Facility in Ogdensburg, is seeking to defer payment, in whole or in part, of his mandatory surcharges and the other imposed fees on the ground that he has insufficient income and property to presently pay these charges and that the current collection of same from inmate funds is working an unreasonable hardship on him and his immediate family. While these moneys are typically collected at the rate of 20% from inmate earnings and 50% from any outside funds given to the inmate,² the defendant states that these figures are 30% and 100%, respectively, in his case. (These percentages would appear to be more or less accurate, given that the defendant is charged with paying off two sets of surcharges and fees here.)

In his sworn affidavit submitted in support of his deferment application, the defendant states that he has an infant child to whose support he wishes to contribute, however because he must make payments towards his surcharges and the other fees and these moneys are taken from him, he is unable to contribute anything for his son's care, nor is he able to help out his family and repay them for having taken care of him. Without these compulsory deductions from his prison earnings for the mandatory fees, the defendant would be in a position to financially help his son and family.

Thus, because he has very limited funds and no other income, assets, or sources with which to pay off these charges, and yet he would like to help support his son and his family, the defendant maintains that the present deduction of payments toward the surcharges and fees from his prison earnings is working an unreasonable hardship on him and his family "over and above the ordinary hardship suffered by other indigent prisoners." The defendant additionally avers that he does not have anyone who can pay these charges for him. It is for these reasons that the defendant is requesting a deferral herein, so that he may send money to help take care of his son and his family now, and then pay off his surcharges and fees three months after his release from incarceration.

² It is apparently the policy of the Department of Correctional Services ("DOCS") to deduct 20% from an inmate's earnings, and 50% from funds given to the inmate from family and friends, and to apply same towards the surcharge and other fees (see, People v Hazel, 13 Misc3d 728, 730 [Sup.Ct. Bronx Co. 2006]). However, where an inmate has what DOCS terms two "encumbrances" (namely, a deduction for the surcharge and any other second deduction, such as for other inmate fees or a second set of fees and surcharge, or to pay down advances made on the inmate's account), then 40% of an inmate's weekly earnings and 100% of his/her outside receipts may be collected and applied to these fees and charges as well as towards any other encumbrance incurred by the incarcerated defendant (see, Matter of Begun v. Goord, 249 AD2d 861 [3rd Dept 1998]; New York State DOCS Directive No. 2788 [IV] [B] [3] [b]).

The People have opposed the defendant's motion, urging that he has not made the requisite demonstration of "unreasonable hardship" with "credible and reliable information" as might warrant the granting of a deferment. In particular, the People note that while the defendant indicates that he wishes to use his prison wages to help support his son and to cease being a burden upon his family, the defendant does not indicate that he has provided financial support to his child while incarcerated and he also does not claim to be responsible for the support of any immediate family member.

In the People's view, Mr. Gavin's assertions are insufficient to support his application in that he failed to substantiate any allegations of unreasonable hardship upon himself or his immediate family or to demonstrate that such hardship was greater than that suffered by other similarly situated indigent inmates.

In further support of their position that the defendant did not demonstrate hardship caused by the payment of his surcharges and the other mandatory fees, the People additionally contend that it may be assumed that, as is the case with all inmates, Mr. Gavin is regularly provided with items deemed necessary to maintain proper standards of hygiene, as well as with stationery supplies.

Accordingly, the People urge denial of the motion due to the mandatory nature of these fees and the defendant's failure to establish that the installment payments towards these fees from his inmate funds effected an unreasonable hardship upon himself or his family, specifically one which is "over and above the ordinary hardship suffered by other indigent inmates."

Discussion

While some courts have held to the contrary with regard to a defendant sentenced to a period of incarceration greater than 60 days (see, e.g., People v Hopkins, 185 Misc2d 312 [Kings Co. 2000]), this court is of the view that it is permissible, pursuant to CPL 420.40, to defer payment, in whole or in part, of the mandatory surcharge and other fees (see, People v Kistner, 291 AD2d 856 [4th Dept. 2002]; accord, People v Camacho, 4 AD3d 862 [4th Dept. 2004], lv. denied, 2 NY3d 761; People v Smith, 309 AD2d 1282, 1283 [4th Dept. 2003]; see also, People v Domin, 13 AD3d 391, 392 [2nd Dept. 2004 -- citing with approval, People v Huggins, 179 Misc2d 636, 638 (Greene County Ct. 1999)], lv. denied, 4 NY3d 830 [2005]; People v Pierce, 16 Misc3d 1126(A) [Sup.Ct. NY Co. 2007]).

Nevertheless, this does not mean that a defendant is entitled to deferral merely for the asking. Rather, in order to obtain deferral of the surcharge and other mandatory fees, the

defendant must establish, by credible and verifiable information, that present (installment) payment of such fees would work an “unreasonable hardship on defendant over and above the ordinary hardship suffered by other indigent inmates” (Kistner, *supra*, 291 AD2d at 856; People v Rodriguez, 292 AD2d 646, 647 [3rd Dept. 2002], *lv. denied*, 98 NY2d 654; People v Abdus-Samad, 274 AD2d 666, 667 [3rd Dept. 2000], *lv. denied*, 95 NY2d 862; People v Parker, 183 Misc2d 737, 738 [Sup. Court, Kings; 2000]).

Notwithstanding the defendant’s alleged and apparent financial constraints, this court finds that the defendant here has failed to establish any particular hardship which is out of the ordinary and would warrant court intervention and, hence, deferment of the payment of the statutorily mandated charges.

In particular, the court notes that Mr. Gavin did not even submit any supporting proof or make any sworn representations that he was in fact indigent or devoid of other assets; nor did he otherwise elaborate upon his personal or financial situation. Furthermore, the People are correct to note that the defendant does not allege that he is charged with the support of his son or any other family member and that they would suffer or do without necessities if he were unable to send them any moneys while incarcerated. Additionally, he does not indicate that he himself has any unusual expenses or special requirements which are not being provided to him while incarcerated.

Accordingly, on the present record and papers, this court finds that the defendant has not met his burden to establish by credible and verifiable information that present payment of these charges is working an “unreasonable hardship” on him or his immediate family, or on any other person who is dependent on him for financial support. On the contrary, it appears that Mr. Gavin is not situated any differently from any other incarcerated, indigent defendant of limited means.

Meanwhile, as noted by the People, it is also the court’s understanding that all inmates are regularly provided with the essentials necessary for hygiene (*see*, People v Hazel, *supra*, at 730-731; People v Parker, *supra*, 183 Misc2d at 738) and are apparently also given stationery items and supplies, and that, therefore, it is not necessary to use inmate funds to purchase any such items, nor has the defendant cited to any extraordinary necessary expenses or other obligations which would need to be paid from his inmate funds.

In conclusion, this court finds that the defendant has not alleged the requisite “unreasonable hardship” that payment of the surcharges and other fees is imposing upon him or his immediate family, as would provide a basis for deferment, or even require a hearing thereon.


Therefore, the motion to defer the mandatory surcharges and other fees is, respectfully, denied, without a hearing.

The foregoing constitutes the decision and order of the court.

The 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 from this determination. This application must be made within 30 days of service of this decision. 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.)

Dated: Brooklyn, New York
March 29, 2011

E N T E R ,



J.S.C.

ENTERED

APR 11 2011

NANCY T. SUNSHINE
COUNTY CLERK