SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 26

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

DECISION AND ORDER
INDICTMENT NO. 10638/09

ROY CAZEAU,

April 15, 2011

DEFENDANT.

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MARK DWYER, J.:

Defendant was charged in the instant indictment with three counts of criminal possession of a weapon in the second degree (PL § 265.03 [1] [b]), one count of criminal possession of a weapon in the third degree (PL § 265.02 [5] [i]), three counts of criminal possession of a weapon in the fourth degree (PL § 265.01[1]), criminal possession of marihuana in the second and third degrees, and unlawful possession of marihuana.

Defendant entered a plea of guilty on September 16, 2010, to attempted criminal possession of a weapon in the second degree (PL § 110/265.03 [1] [b]) under Count 5 of the indictment and to criminal possession of a weapon in the fourth degree (PL § 265.01 [1]) under Count 9. Defendant was sentenced on February 25, 2011, in accordance with the promise. A related misdemeanor case against defendant's wife, Belinda Hill, who was also charged with possession of the firearm recovered from defendant's home, was dismissed on February 28, 2011, as promised in the plea agreement.

Prior to sentence, defendant made two applications to withdraw his plea of guilty. Both motions were denied by this court in written decisions issued on January 20, 2011, and February 22, 2011. Both of defendant's previous motions assert that defendant would not have pled guilty had he been properly advised by counsel of the specific elements of the crime to which he was pleading.

On his first motion to withdraw his plea of guilty, defendant claimed that his

former attorney never advised him that, "in order to be guilty of the offense charged in the indictment, I would have had to possess that firearm outside of my home and/or residence on the date of the alleged possession." Defendant states that had he been so advised he would not have entered the plea of guilty to Count 5.

Defendant asserted on his second motion that his former attorney did not inform him that in order to be guilty of the offense, he would have had to possess the firearm with the intention of "using against someone else." Defendant states that had he been so advised he would not have entered the plea of guilty, asserting that at no time did he ever have any intention of using the firearms for any reason other than to protect his family and business.

Defendant now moves to vacate his judgment of conviction pursuant to CPL 440.10 (1) (b) and (h), and for an order admitting the defendant to bail pending the disposition of his motion to vacate the judgment.

On defendant's current motion he again argues that he did not receive effective assistance of counsel. Defendant contends that several factors contributed to his receiving ineffective assistance of counsel and rendered his plea involuntary. Defendant asserts that had his former attorney not advised him that possession of the firearm for personal protection was only a sentencing factor and did not bear on the elements of the offense, he would not have entered the plea of guilty, but would have gone to trial and been acquitted. He further asserts that his attorney's failure to discuss the specific intent element with defendant prior to counseling him to enter a plea of guilty to an offense that was not committed, as well as his attorney's failure to move to dismiss that count, which was associated with other counts that were dismissed against defendant, violated defendant's right to effective assistance of counsel.

Defendant clearly received effective assistance of counsel. In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she

receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel. See People v. Ford, 86 NY2d 397 (1995).

The minutes of the plea proceeding establish that defendant received the benefit of an advantageous plea bargain and that his guilty plea was entered voluntarily, knowingly and intelligently. During the plea colloquy, the court several times referenced the language of the Penal Law section to which defendant was pleading under Count 5, that is, that he possessed the firearm with intent to use the same unlawfully against another. Defendant acknowledged that he was pleading guilty to such possession. The record indicates that defendant and his attorney conferred extensively before the guilty plea was entered. Significantly, during the colloquy, defendant objected to pleading guilty to Count 10, one of the two counts to which defendant had originally agreed to plead guilty. When the court read the language of Count 10, possession of three or more firearms under Penal Law section 265.02 [5] [i], defendant indicated that he was not guilty of that charge. Thereupon the plea agreement was modified so that in addition to pleading to Count 5, per the original agreement, defendant entered his guilty plea to Count 9, Penal Law section 265.01 [1], rather than Count 10. The modification of the original plea agreement at defendant's behest indicates that defendant was alert, attentive and fully aware of the legal implications of the agreement he was entering into. Defendant stated that he was satisfied with his legal representation, that he had fully discussed the plea agreement with his attorney and that he understood that he was giving up certain rights. Defendant acknowledged that he understood everything the court had said to him, that he had not been forced or threatened and that he was pleading guilty because he was guilty.

Defendant's new claim that the count to which he pled guilty was associated with an address which had been found by the court to have an insufficient nexus to defendant is mistaken, since the dismissed counts related to contraband at 13 Putnam Avenue, and the firearm charged in the count to which defendant pled was recovered inside 13R

Putnam Avenue, defendant's place of business. The counts relating to 13R Putnam Avenue were not dismissed. Defendant has not raised any meritorious new arguments on his post- conviction motion that he did not raise prior to sentence.

Defendant filed a notice of appeal on March 14, 2011 in the Kings County Criminal Term Appeals Bureau, and served the notice upon the Kings County District Attorney's office on the same date. Upon application of a defendant who has taken an appeal to an intermediate appellate court from a judgment of the supreme court, an order staying the execution of the judgment pending the determination of the appeal may be issued by a justice of the appellate division of the department in which the judgment was entered or by a justice of the supreme court. CPL 460.50 (1) and (2).

This court is authorized under CPL 530.50 and CPL 460.50 to issue an order of recognizance or bail pending defendant's appeal. The criteria upon which a bail application is to be determined are set forth in CPL 510.30 (2) (a) and (b). The criteria in CPL 510.30 (2) (a) include (i) the principal's character, reputation, habits and mental condition; (ii) his employment and financial resources; (iii) his family ties and the length of his residence if any in the community; (iv) his criminal record if any; and (vi) his previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution.

In addition the court must take into account, in the case of an application for bail or recognizance pending appeal, the merit or lack of merit of the appeal (CPL 510.30 [2] [a] [vii]). CPL 510.30 (2) (b) provides that where the principal is a defendant-appellant in a pending appeal from a judgment of conviction, the court must also consider the likelihood of ultimate reversal of the judgment. A determination that the appeal is palpably without merit alone justifies, but does not require, a denial of the application, regardless of any determination made with respect to the factors specified in paragraph (a). (CPL 510.30 [2] [b]).

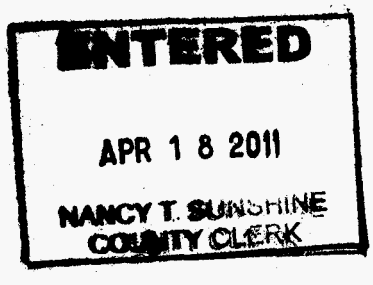
Defendant argues that he was previously released on bail in this case and obeyed the conditions of release and that he has not attempted to evade responsibility for his criminal conduct. The court might be inclined to hear further argument and consider granting a bail application if the only factors to be considered were those set forth in CPL 510.30 (2) (a) (i), (ii), (iii), (iv), (v) and (vi). However, in considering the merit or lack of merit of the appeal and the likelihood of ultimate reversal of the judgment, which the court is obliged to consider under CPL 510.30 (2) (a) (vii) and CPL 510.30 (2) (b), the court is constrained to deny defendant's bail application. In the opinion of this court, defendant's appeal is without merit. As stated in this court's two previous written decisions, and in this opinion, defendant's plea was entered voluntarily, knowingly and intelligently, with effective assistance of counsel, and defendant has not provided any basis for this court to hold otherwise.

Defendant's motion to vacate his judgment is denied, as is his application for bail pending his appeal.

This constitutes the decision and order of the court.

ENTER:

MARK DWYER
Justice of the Supreme Court



Dated: April 15, 2011