

People v Polite

2011 NY Slip Op 31273(U)

May 12, 2011

Sup Ct, Kings County

Docket Number: 2771/99

Judge: Thomas J. Carroll

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 24

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PEOPLE of the STATE of NEW YORK,

By: Hon. Thomas J. Carroll

- against -

Dated: May 12, 2011

MARK POLITE,

DECISION & ORDER

Defendant.

Indictment No. 2771/99

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The defendant moves pursuant to CPL § 440.20 to set aside his sentence based on the sentencing court's failure to follow the procedure set forth by CPL § 400.20 for sentencing him as a persistent felony offender. In deciding this motion, the court has considered the motion papers, the affirmation in opposition, the defendant's reply, the court file and the transcripts of the pleas related to Indictment 178/79 and 2489/79.

On October 6, 1999, defendant was convicted, after a jury trial, of one count of attempted murder in the second degree. The People allegedly, prior to trial, filed with the Court a predicate felony statement dated September 3, 1999. The statement in the court file does not bear a court date stamp. The defendant acknowledges the filing of this statement, but affirms that it was dated September 13, 1999, yet attaches a copy of the predicate statement which conforms to the court's copy and bears the date September 3, 1999. Affirmation of defense counsel, p. 2, ¶ 4, and Exhibit A.

In a letter dated October 15, 1999, which was three days before sentence, Assistant District Attorney Karen Bennett, who prosecuted the instant case, requested the Court to adjudicate the defendant a persistent felony offender and sentence him to a term of imprisonment

of twenty-five years to life. Although the letter makes no reference to CPL § 400.20, the letter does set forth a summary of the facts of the trial case and the facts underlying the defendant's predicate crimes as listed on the previously referenced predicate statement (less so for the 1987 drug conviction than for the two 1979 convictions). The People affirm that a copy of this letter was faxed to the defendant's trial attorney. Defense counsel affirms that the letter was not contained in the court file, but obtained a copy of it from the District Attorney's Office.

On October 18, 1999, a sentencing proceeding was held before this Court. The defendant participated with the aid of counsel. The Court made findings including the history and character of the defendant and the nature and circumstances of the defendant's conduct and his prior convictions and concluded that extended incarceration and lifetime supervision were warranted in the public interest. Sentencing minutes of October 18, 1999. At the sentencing proceeding, the defendant did not raise any procedural infirmities. The Court went on to sentence the defendant as a persistent felony offender to a term of incarceration of 20 years to life. Carroll, J., at trial and sentence.

On February 19, 2002, the defendant's judgment of conviction was affirmed. *People v. Polite*, 291 AD2d 511 (2d Dept). On June 14, 2002, the defendant's application for leave to appeal to the Court of Appeals was denied. *People v. Polite*, 98 NY2d 679 (2002).

The defendant petitioned for a writ of habeas corpus in the United States District Court for the Eastern District of New York. On April 8, 2004, the petition was denied and the defendant was denied a certificate of appealability. *People v. Duncan*, No. 03-CV-2405 (EDNY, 2004) (Ross, J.). In August, 2004, the United States Court of Appeals for the Second Circuit denied the defendant's application for a certificate of appealability. *People v. Duncan*, No. 04-3864-pr (2d

Cir. 2004).

The defendant now moves under CPL § 440.20 to set aside his sentence based on the sentencing court's failure to follow the procedures set forth by CPL § 400.20 for sentencing him as a persistent felony offender. The defendant asserts that the procedure was deficient in that (1) the prosecutor initiated the proceedings, an order with at least 20 days notice was not filed and the clerk did not provide notice; (2) he was not advised of his right to controvert the predicate convictions; and (3) he was not asked if he wished to present evidence on his own behalf.

The People, while conceding there was not full compliance with CPL § 400.20, oppose the motion claiming the court "substantially complied" with that statute.

The People concede that there was not full compliance with the procedures set forth in CPL § 400.20 in that: 1) the Court did not issue an order directing a hearing to determine whether the defendant should be sentenced as a persistent felony offender, CPL § 400.20(3); 2) the defendant was not given 20 days notice, *id.*; 3) the clerk did not send notice, CPL § 400.20 (4); and 4) that the defendant was not asked if he wished to controvert the prosecutor's allegations regarding his prior convictions or background, CPL § 400.20 (7). People's Memorandum of Law, p. 1, fn 1. Nevertheless, they argue that there was substantial compliance with the statute and, thus, the defendant's motion should thus be denied.

In support of their claim of substantial compliance, the People assert that the filing of the predicate statement dated September 3, 1999, and ADA Karen Bennett's letter three days before sentencing, satisfied the notice provision of the statute, and that there was substantial compliance with the remaining requirements. As noted above, the defendant acknowledges the filing of a predicate felony statement setting forth prior convictions. The People urge the court to consider

People v. Harris, 61 NY2d 9 (1983) and *People v. Bouyea*, 64 NY2d 1142 (1985).

In *Harris*, the primary issue was “whether a prior felony conviction . . . may constitute a predicate felony” The Court of Appeals in the *Harris* case found that the defendant’s argument that the People failed to file a felony statement was “unpersuasive.” However, the Court also found that the sentencing court had the minutes of the prior plea, the defendant admitted his prior convictions and acknowledged that he was subject to sentencing as a second felony offender. *Harris*, at 20.

In *Bouyea*, the Court of Appeals found that the People’s “failure to file a predicate statement was harmless, and remanding for filing and resentencing would be futile and pointless. (citations omitted.)” However, in *Bouyea*, the defendant admitted “the existence, nature and time of his prior felony conviction” He also “informed the court that he understood and intended to accept the plea agreement on the present felony which included imposition of the sentence in question.”

Thus, both *Bouyea* and *Harris* are distinguished from the case in front of this court.

It is uncontested that the order and notice were not filed and served. In addition, the defendant was not arraigned on the predicate statement or asked if he wished to controvert any allegation made in the statement. Furthermore, the defendant was not asked if he wished to present evidence on the issue of whether he is a persistent felony offender or on the question of his background and criminal conduct.

Consequently, there is insufficient evidence to support a finding of substantial compliance with the statutory requirements. The claim that the court substantially complied with the procedure mandated by CPL § 400.20(7) is unpersuasive.

Based on the above, the defendant's motion to set aside his sentence pursuant to CPL § 440.20 is granted. The defendant is hereby remanded for resentencing. The Court hereby directs the People to file with the court, and serve upon the defendant, a current predicate felony statement that complies with CPL § 400.20 on or before May 25, 2011, and that a persistent felony offender hearing be held on June 28, 2011.

This constitutes the decision and order of the Court.

ENTER:

ENTERED
MAY 13 2011
NANCY T. SUNSHINE
COUNTY CLERK

Thomas J. Carroll
THOMAS J. CARROLL
Thomas J. Carroll
J. S. C.