

**People v Toribio**

2011 NY Slip Op 33488(U)

September 29, 2011

Supreme Court, Kings County

Docket Number: 6538/2004

Judge: Patricia DiMango

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MEMORANDUM

SUPREME COURT : KINGS COUNTY

(Criminal Term, Part 15)

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PEOPLE of the STATE of NEW YORK,

By: DI MANGO, J.

- against -

Dated: September 29, 2011

ROBERT TORIBIO,

Indictment No. 6538/2004

Defendant.

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The defendant, pro se, has moved for an order granting him a free copy of the court minutes of his second felony adjudication<sup>1</sup> proceeding, and he is perhaps also seeking the minutes of his plea proceedings.

In deciding the motion, the court has considered the moving papers, the People's opposition, and the official court file.

**Background**

By Indictment 6538/2004 the defendant was charged with robbery, larceny, criminal impersonation, and unlawful imprisonment. On November 23, 2004, the defendant accepted a plea offer to plead guilty to the offense of Robbery in the Third Degree in full satisfaction of this indictment, in exchange for a promised sentence of two

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<sup>1</sup> In his moving papers, the defendant describes the stenographic transcripts which he is requesting to be provided to him without charge as follows: "Preliminary Trial Phase after Indictment during cop-out discretionary before having a Second Felony Discretionary Persistent Hearing." The People deem this to constitute a request for the minutes of his second felony offender adjudication proceeding. This court concurs in this assessment, but further finds that the defendant may also be seeking to have the actual plea proceeding minutes provided to him.

to four years' incarceration. The defendant was further promised that this sentence would run concurrently with the sentence he would receive under Kings County Ind. No.

6105/2003. After several intervening adjournments (including two occasions when the defendant was not produced), on April 20, 2005 the defendant was sentenced herein to the promised term of two to four years. On that date Mr. Toribio was also adjudicated a second felony offender<sup>2</sup>. Thus, this adjudication is contained in the sentencing minutes.

Upon form motion papers, the defendant has herein requested to be provided a copy of the transcripts of the afore-described proceedings. As previously indicated, it is unclear precisely what proceeding minutes the defendant wishes to have. However, as will be discussed below, ultimately, the lack of clarity upon this point is of no moment.

Regarding his request for such stenographic transcripts, the defendant asks that these minutes be provided to him without fee, as a poor person pursuant to CPLR Sections 1101 and 1102. In his attached affidavit, the defendant avers that he is an inmate incarcerated at the Attica Correctional Facility and indicates that he has no income and no property of any value and is unable to pay any costs or expenses necessary to obtain the requested transcripts. The defendant has provided nothing else to document or substantiate his financial status.

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<sup>2</sup> Contained in the court file is the People's Statement Pursuant to CPL Article 400, whereby the People were charging that the defendant was previously convicted of Criminal Sale of a Controlled Substance in the Third Degree under Kings County Indictment No. 5856/1992 and was sentenced thereon on June 4, 1992. (It appears that the sentence imposed thereon was an indeterminate period of incarceration of one and one-half years to four and one-half years.)

As for why he requires these transcripts, the defendant states in his supporting affidavit that he "would like these transcripts" in order "to review the lower Court Proceedings and prove [his] factual issue of ineffective assistance of counsel." Beyond this, the defendant has not particularized his request for the minutes of these proceedings or specified the relief he intends to pursue.

The People have opposed the defendant's application for free copies of these transcripts and have raised several grounds for denying this request. Firstly, the People, accurately, observe that the defendant has failed to state with any specificity the nature of his intended pursuits. The People also maintain that this court has no jurisdiction to grant this application because this matter has been concluded and sentence imposed, and no motions or appeals are pending.

Further, to the extent the defendant wishes to have these minutes for use in a collateral attack upon his conviction pursuant to CPL Article 440, the People assert that it is incumbent upon the defendant to demonstrate that the requested transcript is needed for a non-frivolous collateral attack on his conviction, whereas he has failed to do this and has not set forth any of the claims he intends to raise; nor has he provided any factual support for his stated need for the transcripts. Finally, the People also contend that the defendant has failed to provide adequate documentation which is necessary in order to determine his alleged indigent status.

The court finds that People are correct in their observations.

### *Discussion*

A defendant has a constitutional right to have a free transcript in order to effectuate his right to a first appeal.<sup>3</sup> However, a defendant's right to have free transcripts is far more limited when requested for other purposes. Thus, it has been held that a defendant has no federal constitutional right to a free transcript for collateral proceedings unless the defendant can demonstrate, with factual allegations rather than mere conclusory ones, that there is a potentially meritorious claim.<sup>4</sup>

In New York, pursuant to CPLR §§ 1101, 1102, upon a proper application and requisite showing, a person may be granted "poor person" status and accordingly be entitled to free transcripts for trial or appeal purposes. However, the statute does not specify the availability of free transcripts under other circumstances. Thus, it has been held, that where sentencing minutes without cost are sought in the original trial court for unspecified purposes other than for an appeal, the trial court has no authority to grant this relief where there is no triable action pending before the court and the court is not an appellate court<sup>5</sup>.

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<sup>3</sup> *Griffin v Illinois*, 351 US 12, 16-20 (1956), *reh. denied*, 351 US 958 (1956).

<sup>4</sup> *United States v MacCollom*, 426 US 317, 323-327 (1976); *Sistrunk v United States*, 992 F2d 258, 259-260 (10th Cir. 1993); *United States v Losing*, 601 F2d 351, 352-353 (8th Cir. 1979); *Crossley v United States*, 538 F2d 508, 509 (2nd Cir. 1976).

<sup>5</sup> *See, People v Stroman*, 16 Misc.3d 749 [Sup.Ct. Kings Co. 2007].

This court agrees with this reading of the statute and likewise concludes that it does not have the authority to grant the defendant here poor person status and provide free transcripts with respect to defendant's vaguely articulated wish to pursue, post-judgment and post-appeal, some unspecified sort of ineffective assistance of counsel claim. The defendant has not shown, and apparently is not in a position to demonstrate, that any contemplated attempted collateral attack upon the instant judgment would be non-frivolous, when he has not even identified what relief he is seeking. Indeed, this court is hard-pressed to imagine what sort of claims the defendant could raise at this very late point in time with respect to the instant conviction, where it appears that he has completed serving the sentence imposed under this indictment and has less than one year remaining on his three and one-half to seven years concurrent sentence (imposed under Ind. No. 6105/2003), following his return to prison from parole. Aside from the concurrent sentencing, the proceedings under the instant indictment have nothing to do with the defendant's conviction upon Ind. No. 6105/2003.

In any event, even if this court had the authority to grant a free transcript for the defendant's stated use, in addition to demonstrating that the use of the requested minutes was for non-frivolous purposes, the defendant still must make a proper showing of his indigence.<sup>6</sup> The defendant has done neither here.

Accordingly, the court determines that this application must be denied.

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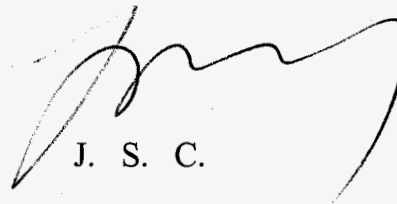
<sup>6</sup> See, *CPLR § 1101 (a)*; see also, *People v Yui Kong Yu*, 158 AD2d 370, 372 [1st Dept. 1990].

As a final note, this court would further observe that there is no indication here that the defendant ever requested any transcripts from the court stenographer; and, in any event, he has not stated what the fee would be for him to obtain same, much less demonstrated that he cannot afford the applicable fee. In this regard, the court notes that the minutes sought, of plea and sentencing proceedings, are typically short and the cost therefor presumably minimal. Thus, if the defendant still wished to obtain these minutes, he could quite possibly pay for them from his prison wages, which wages this court presumes the defendant earns<sup>7</sup>, despite his assertion to the contrary that he has no income.

In conclusion, the motion is, respectfully, denied for all of the above reasons.

The foregoing constitutes the decision and order of the court.

E N T E R ,



J. S. C.

**ENTERED**  
 OCT 13 2011  
 NANCY T. SUNSHINE  
 COUNTY CLERK

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<sup>7</sup> See, Correction Law § 187.