

People v Azor
2011 NY Slip Op 33585(U)
December 1, 2011
Sup Ct, Kings County
Docket Number: 11337/2008
Judge: Patricia DiMango
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 15

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THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Patricia M. DiMango

Date: November 14, 2011

-against-

DECISION & ORDER

JEAN AZOR

Indictment No. 11337/2008

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Defendant moves, pro se, to vacate his judgment of conviction and sentence pursuant to CPL §§ 440.10 and 440.20 on the grounds that his plea was not knowingly and intelligently entered into. For the following reasons, the motion is denied.

On the evening of October 16, 2008, defendant was pulled over for making an illegal right turn from the left lane of the street. When asked for his driver's license and registration, defendant did not have a license and produced only photocopies of the insurance information and registration. The police officers asked defendant to turn off the car, and when defendant did so, they saw the ignition cylinder and keys pop out of the steering column. Believing the car to be stolen, the officers asked defendant to step out of the car. One officer frisked defendant and recovered a large knife from his waist area. Another officer approached the hood in order to inspect the VIN number and noticed that the hood was damaged as if it had been crinkled up in a head-on collision. He shined his flashlight into the visible portion of the engine compartment, where he saw what appeared to be the butt of a gun. The officer opened the hood of the car and recovered a loaded .38 caliber revolver, at which point defendant was placed under arrest.

Defendant was indicted and charged with criminal possession of a weapon in the second

degree (PL § 265.03[3]), criminal possession of a weapon in the third degree (PL § 256.02[1]), criminal possession of a weapon in the fourth degree (PL § 265.01[1]), and other related charges. On July 21, 2010, defendant entered a guilty plea to attempted criminal possession of a weapon in the third degree, with a promised sentence of two to four years' imprisonment.

On August 10, 2010, defendant stated in court that he wished to withdraw his plea on the grounds that he was innocent and that he took the plea under duress. He then filed a motion on September 7, 2010, elaborating his claims and alleging that his attorney had unduly pressured, threatened and coerced him to plead guilty. After the People answered defendant's motion, defendant made the additional claim in his reply that he did not understand that the promised sentence of two to four years would run consecutively, and not concurrently, with the time remaining on defendant's parole, and that he should be therefore allowed to withdraw his plea. Defendant's motion was granted on December 17, 2010 (Carroll, J.).

On January 14, 2011, this court offered defendant a plea to attempted criminal possession of a weapon in the third degree with a new promised sentence of one and one half to three years imprisonment. Defendant accepted the offer, pleaded guilty, and was sentenced as a predicate felony offender on that same date. He also waived his right to appeal. Defendant stated on the record that he had discussed the plea with his attorney and that he was satisfied with her advice and assistance. The court did not specify whether defendant's sentence was to run consecutively or concurrently with defendant's other previous, unrelated and undischarged sentence.

On May 3, 2011, the Second Department denied defendant's motion for poor person relief and motion to assign counsel, with leave to renew.

On July 21, 2011, defendant filed the instant motion pursuant to CPL §§ 440.10 and

440.20, again stating that he did not voluntarily enter into the plea and that he was denied the effective assistance of counsel when he was informed that the sentence on his instant conviction would run concurrently with his previously imposed parole time. To support his claim, defendant refers to the court's statement at sentencing that because he had already served sufficient time on the one and one-half to three year sentence, he was "done". He also argues that the Department of Correctional Services ("DOCS") improperly failed to credit him with parole time served for a consecutively imposed sentence. Defendant's reference to CPL § 440.20 is misplaced because his sentence was properly imposed pursuant to PL § 70.25(2-a). Thus, as defendant's claim relates solely to the validity of his plea and subsequent conviction, it shall be addressed only under CPL § 440.10.

Defendant's claim that his plea was not voluntary is without merit. Pursuant to Penal Law § 70.25(2-a), a consecutive sentence is required when an indeterminate or determinate sentence of imprisonment is imposed on a person sentenced as a second or persistent felony offender "and such person is subject to an undischarged indeterminate or determinate sentence of imprisonment imposed prior to the date on which the present crime was committed." Thus, it is statutorily mandated that a sentence imposed upon a defendant run consecutively to the undischarged portion of a prior sentence. Moreover, "[w]hen a court is required by statute to impose a sentence that is consecutive to another, and the court does not say whether its sentence is consecutive or concurrent, it is deemed to have imposed the consecutive sentence the law requires" (*People ex rel. Gill v Greene*, 12 NY3d 1, 4 [2009]). Because the sentencing court does not have any discretion to impose a concurrent sentence, there is no need to state whether the new sentence is to run consecutively or concurrently with a prior undischarged sentence

(*Rivera v Goord*, 24 AD3d 679, 680 [2d Dept 2005]). Here, the failure of the court to inform defendant at the time of his guilty plea of the consecutive sentences did not undermine the constitutionality of his conviction because the requirement that the sentences run consecutively was a statutory mandate and not a part of the plea agreement (*see, e.g., People v Wilson*, 299 AD2d 222 [1st Dept 2002]; *People v Johnson*, 183 AD2d 573 [1st Dept 1992]).

To satisfy due process standards that the plea be both voluntary and intelligent, trial courts must advise defendants of the direct consequences of their plea, but need not iterate every collateral consequence of the conviction (*People v Gravino*, 14 NY3d 546 [2010]). While a direct consequence has a definite, immediate and largely automatic effect on a defendant's punishment (*People v Catu*, 4 NY3d 242 [2005]), collateral consequences are "peculiar to the individual and generally result from the actions taken by agencies [that] the court does not control" (*People v Ford*, 86 NY2d 387, 403 [1995]). Here, the action of DOCS in calculating defendant's sentence is a collateral consequence (*People v Monk*, 83 AD3d 35, 39 [2d Dept 2011] ["the ramifications of violating the conditions of postrelease supervision are subject to the discretion of the Board of Parole, rendering them, by nature, merely collateral to pleas and sentences"]; *see People v Fuller*, 28 Misc.3d 1144, 1152 [Sup. Ct., N.Y. County 2010] ["the consecutive running of the instant sentence is not a direct consequence of his plea and the court's failure to so advise defendant did not violate due process"]). Accordingly, the court was under no obligation to advise defendant that DOCS would calculate his sentence to run consecutively with the undischarged parole time remaining on his previous conviction. Because the court was required only to advise defendant about the instant sentence, the court's reference to defendant's having completed time served was both accurate and sufficient. The granting of defendant's

application to withdraw the plea is therefore unwarranted in this instance (*People v Davis*, 56 AD3d 794 [2d Dept 2008] [defendant not entitled to withdraw his plea where the court neither expressly nor impliedly promised that his sentence would run concurrently with his undischarged term]).

Defendant also alleges that DOCS improperly calculated his prison time and seeks an order directing the agency to carry out the sentence and commitment order in accordance with defendant's claimed concurrent sentencing arrangement. Such relief is not available through a CPL § 440.10 motion to vacate judgment. To the extent defendant believes DOCS has exceeded its authority or has acted arbitrarily in arriving at its computation, he must raise such allegations in a proceeding pursuant to Article 78 of the Civil Procedure Law and Rules, naming DOCS as the respondent party (*see Gill v Greene*, 12 NY3d at 4]). In any event, "the sentencing court here committed no error and there was none for DOCS to correct" (*id.* at 7).

Finally, defendant presents his claims without any supporting facts or sworn affidavits. Such unsubstantiated allegations are procedurally barred because there is no reasonable possibility that they are true (CPL § 440.30[4][b]).

In his previous motion to withdraw his plea, defendant also argued that he did not understand that his sentence was to run consecutively with his previous undischarged sentence. On that basis the court allowed defendant to withdraw his guilty plea. Having received the benefit of that decision, defendant's credibility is now severely undermined by both his insistence on repeating the same argument and by his failure to present evidence that counsel misinformed him that his sentences would run concurrently. That defendant received a more favorable sentence after withdrawing his plea further renders his claims less believable now. This

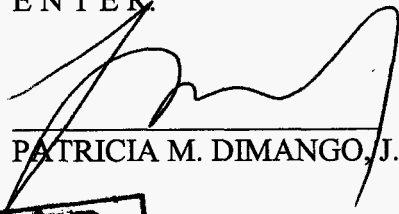
beneficial plea in the face of much harsher maximum sentencing exposure reflects an effective performance by counsel (*see Ford*, 86 NY2d at 404).

Accordingly, defendant's motion is denied in its entirety.

This decision constitutes the order of the court.

The defendant is hereby advised pursuant to 22 NYCRR § 671.5 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 his 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 certification granting leave to appeal is granted.

ENTER:


PATRICIA M. DIMANGO, J.S.C.

