

People v McCants

2011 NY Slip Op 34162(U)

July 7, 2011

Supreme Court, Nassau County

Docket Number: 614N-2006

Judge: Joseph C. Calabrese

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT, NASSAU COUNTY

CRIM. TERM PART 35
Motion Cal. No. C-015
INDICTMENT NO. 614N-2006

PRESENT:

HON. JOSEPH C. CALABRESE, AJSC

PEOPLE OF THE STATE OF NEW YORK:	:	Hon. Kathleen M. Rice District Attorney Nassau County Mineola, New York By: Barbara Kornblau, Esq.
-against-	:	
GERMAINE MC CANTS,	:	Virginia Conroy, Esq. Attorney for Defendant 55 Front Street # 9 Rockville Centre, N.Y. 11570
Defendant.	:	

Counsel for Defendant seeks an order of this Court assigning her, nunc pro tunc, as 18B counsel to make a CPL 440.10 motion.¹ The Court has considered the papers of both the People and the Defense and determines the following.

No Right to Assigned Counsel for Post Conviction Motions

There is no right to assigned counsel for post-conviction, collateral attacks. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). The right to assigned counsel exists only during the original criminal proceeding and direct appeal. McKethan v. Mantello, 292 F.3d 119, 123 (2d Cir. 2002). See also People v. Lopez, 14 Misc. 3d 1223A, 2006 WL 3962056 at 10 (N.Y. Supreme Court, Bronx County 2006)(no constitutional right to counsel in motion made under CPL 440); People v. Richardson, 159 Misc. 2d. 167, 170 (N.Y. Supreme Court, Kings County, 1993)(the New York Constitution does not require counsel be assigned on a

¹ (See People v. McCants, Ind. No. 614N-10, Motion C005). Defendant's CPL 440.10 motion was prepared and served on the Court with Notice of Motion dated March 1, 2011 by Counsel for Defendant. The instant motion, for Assignment of Counsel, was made *after* that, with Notice of Motion dated June 6, 2011.

post conviction motion). N.Y. Judiciary Law section 35(1) specifies that counsel for indigent persons may be assigned upon appeal or habeas corpus; it is silent as to CPL 440. County Law section 722(4) indicates that counsel may be assigned in the event that a CPL 440 hearing is ordered, not for the preparation of a CPL 440 motion. See also, People v. Richardson, 159 Misc. 2d at 171. Thus, Defendant is not legally entitled to assigned counsel for the preparation of his CPL 440.10 motion, but the Court would consider assignment in the event a hearing is ordered on the CPL 440.10 motion.

No Ethical Obligation to Assign Counsel

Defendant’s next argument is that he is entitled to have Counsel for Defendant assigned as a result of Counsel’s original assignment and the ethical obligations that assignment requires.

A review of the Affirmation accompanying the CPL 440.10 motion reveals the following history of Counsel’s representation of this Defendant. Counsel was “assigned” to represent Defendant on March 13, 2006, and represented Defendant at the pre-trial, pre-trial hearing and jury trial stages of the proceedings. (CPL 440.10 motion, C-005; Affirmation and Supporting Exhibits, March 1, 2011; paragraph 1, page 1). Counsel adds that she represented Defendant **pro bono** in a CPL 330.30(1) motion, sentencing, filing of Notice of Appeal, Motion for Poor Person assignment of Appellate Counsel, and a CPL 460.50 motion. Counsel claims to have served as Defendant’s **pro bono** legal advisor in the preparation of his Pro-Se Supplemental Appeal. Counsel for Defendant also claims to have represented Defendant **pro bono** on a CPL 460.20 Application to the Court of Appeals. (Affirmation of March 1, 2011; paragraphs 2 and 3, page 1). Counsel goes on to state that she:

“[F]iles this C.P.L. 440.10 motion pursuant to her original assignment to represent Mr. McCants, and all the ethical obligations that that [sic] assignment of representation requires of her. She represents to the court that there has been no change in Mr. McCant’s financial status as an indigent person since the original assignment.”

(Affirmation of March 1, 2011; paragraph 4, page 1).

The Court is aware of no ethical consideration, disciplinary requirement or Canon of Judicial Conduct that obligates an assigned attorney - - or the County paying the attorney - - to continue 18B assigned representation after direct appeal. Likewise, Counsel for Defendant's acknowledgment that she represented Defendant **pro bono** after direct appeal significantly undercuts her claim of a genuine belief that her paid assignment in this matter is somehow continued, compelled or justified by the original assignment. The Court finds therefore that Counsel for Defendant's March 2006 original "assignment" to represent Defendant terminated upon the direct appeal. See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); McKethan v. Mantello, 292 F3d 119, 123 (2d Cir. 2002); People v. Lopez, 14 Misc. 3d 1223A, 2006 WL 3962056 at 10 (N.Y. Supreme Court, Bronx County 2006); People v. Richardson, 159 Misc 2d. 167, 170 (N.Y. Supreme Court, Kings County, 1993). The Court will not assign Counsel for Defendant on this basis either.

Discretionary Assignment

The Court declines, moreover, to exercise whatever discretion it arguably has to assign Counsel for Defendant under these circumstances, nunc pro tunc.

Counsel for Defendant has already prepared and filed a CPL 440.10 motion **pro bono**² addressing at great length the defects that Defendant claims exist in his conviction. Thus, the proposed assignment of counsel is not a matter of providing Defendant assistance in making his argument. Rather, Counsel for Defendant is seeking an avenue by which to be compensated by the County for her time and effort in making the motion. The Court is loathe to set a precedent where, as here, an attorney would force the County to pay for post-conviction motions by doing the work first and later seeking assignment. Agreeing with Defendant in this matter would completely circumvent the presumptively valid regulatory scheme embodied by

²

The Court concludes that the CPL 440.10 motion in this matter was prepared **pro bono** since Counsel for Defendant knew Defendant was indigent when she undertook to make the motion and that she has worked since the termination of his direct appeal on other matters **pro bono**.

the Nassau County Bar Association Assigned Counsel Defender Plan, Inc.,³ which administers the County's responsibilities to those accused who, unlike Defendant, are statutorily or Constitutionally entitled to counsel.

For all the reasons stated above, Defendant's requested relief is denied in its entirety.

SO ORDERED.

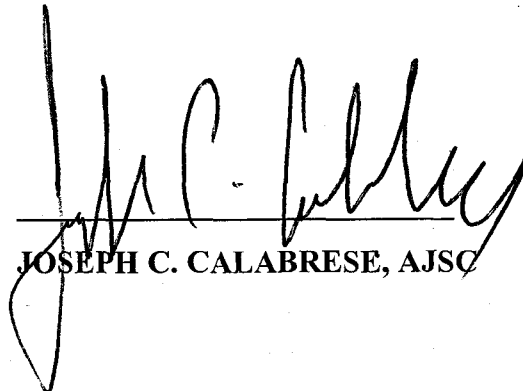
ENTERED
AND
FILED

JUL 12 2011

CLERKS OFFICE
COUNTY COURT
NASSAU COUNTY

ENTER

Dated: July 7, 2011


JOSEPH C. CALABRESE, AJSC

³According to the Nassau County Bar Association Assigned Counsel Defender Plan, Inc.:

Section 722 of Article 18B of the County Law provided counties with several alternative methods of fulfilling the requirement of providing counsel, investigative and expert services to indigent defendants. Two of those methods were (1), for the county to provide counsel and other services pursuant to a contract with a "private legal aid bureau or society" and (2), pursuant to "a plan of a (local) bar association." These are the two methods chosen by Nassau County.

Pursuant to this choice, on January 24, 1966, by Resolution No. 60-1966, the Nassau County Board of Supervisors authorized the County Executive to enter into a contract with the Nassau County Bar Association for "the maintenance of an office of Administrator to provide legal representation in certain criminal matters." The program was previously administered through the Nassau County Commissioner of Accounts. It is presently administered through the Nassau County Attorney's Office.