

**People v Bratten**

2013 NY Slip Op 30075(U)

January 3, 2013

Sup Ct, Kings County

Docket Number: 6493/2011

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 :  
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 :  
 -against- :  
 :  
 VIRGINIA BRATTEN, :  
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 :  
 Defendant. :  
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DECISION AND ORDER  
Indictment No. 6493/2011

HON. PATRICIA M. Di MANGO:

The defendant, pro se, has moved for an order, pursuant to CPL § 420.40, permitting her to defer payment of the mandatory surcharge and other fees imposed upon her at sentencing. The People have opposed this application.

In deciding this motion, the court has considered the defendant’s moving papers, the People’s opposition, and has reviewed the official court file. Additionally, this court has referred to the official "Directives" of the Department of Corrections and Community Supervision ("DOCCS") and also relies on prior discussions with DOCCS personnel regarding the interpretation and implementation of these Directives.

The defendant was convicted of Burglary in the Third Degree under the captioned indictment, upon a plea of guilty, and was sentenced thereon, on October 17, 2011, to an indeterminate sentence of three and one-half to seven years' incarceration. At sentencing, a Mandatory Surcharge of \$300, a DNA fee of \$50, and a \$25 Crime Victim Assistance Fee were all imposed upon the defendant, for a total of \$375 in charges and fees. Payments towards all of these fees are presently being collected from the defendant's inmate funds.

The defendant, an inmate at Bayview Correctional Facility<sup>1</sup> at the time she brought this motion, is seeking to defer payment of her mandatory surcharge and the other imposed fees on the ground that she has insufficient income and no other property with which to presently pay these charges and that the current collection of same from her inmate funds is working an unreasonable hardship on her and prevents her from purchasing “basic needs” personal hygiene items.

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<sup>1</sup> According to the New York State DOCCS website, it appears that the defendant has since been transferred to the Taconic Correctional Facility.

In support of her application, Ms. Bratten has submitted an affidavit in which she asserts indigence, indicating that she has no property or bank accounts, and states that her minimal prison earnings are insufficient to both pay off the surcharge and fees and also purchase items she requires for basic personal hygiene.

The defendant avers that, as an incarcerated inmate, her prison wages are her only source of income. According to the defendant, she earns "\$10.00 every two (2) weeks." She further alleges that 100% of her prison wages are applied to the surcharge and fees, leaving her unable to purchase "basic needs" items "such as shampoo, deodorant, lotion, etc.," which are not provided to her as a State inmate and must therefore be purchased from the facility's commissary. Thus, Ms. Bratten maintains that the collection of the surcharge and fees are working an unreasonable hardship upon her as she must herself provide for her basic hygiene.

Accordingly, the defendant requests that she be granted an order permitting her to defer payment of her surcharge and fees until she is released from incarceration, when she will then be able to pay these charges without hardship.

The People oppose the defendant's motion on the ground that she has provided no compelling reason to defer payment of the mandatory surcharge (and other fees), and that her assertions of indigence and inability to purchase certain personal items are insufficient to support a claim of undue hardship upon herself or her immediate family as would warrant such a deferment. Additionally, in opposition to Bratten's claim that she is unable to maintain her hygienic needs, the People note that the defendant has provided no support for this claim and they further contend that, as with all inmates, the defendant is regularly supplied with items deemed necessary to maintain proper standards of hygiene, as well as being provided with stationery supplies.

Therefore, the People urge denial of the motion due to the mandatory nature of these fees and the defendant's failure to substantiate any allegations of unreasonable hardship upon herself or her family, that is, that the defendant has not demonstrated any hardship on her which is "over and above the ordinary hardship suffered by other indigent inmates."

#### Discussion

While some courts have held to the contrary with regard to a defendant sentenced to a period of incarceration greater than 60 days (see, e.g., People v Hopkins, 185 Misc2d 312 [Sup.Ct. Kings Co. 2000]), this court is of the view that it is permissible, pursuant to CPL § 420.40, to defer payment, in whole or in part, of the mandatory surcharge and other fees (see, People v Kistner, 291 AD2d 856 [4th Dept. 2002]; accord, People v Camacho, 4 AD3d 862 [4th Dept. 2004], lv. denied, 2 NY3d 761; People v Smith, 309 AD2d 1282, 1283 [4th

Dept. 2003]; see also, People v Domin, 13 AD3d 391, 392 [2nd Dept. 2004 -- citing with approval, People v Huggins, 179 Misc2d 636, 638 (Greene County Ct. 1999)], lv. denied, 4 NY3d 830 [2005]; People v Coffman, 36 Misc3d 1207(A) [Sup.Ct. Bronx Co. 2012]; People v Pierce, 16 Misc3d 1126(A) [Sup.Ct. NY Co. 2007]).

Nevertheless, this does not mean that a defendant is entitled to deferral merely for the asking. Rather, in order to obtain deferral of the surcharge and other mandatory fees, the defendant must establish, by credible and verifiable information, that present (installment) payment of such fees would work an “unreasonable hardship on defendant over and above the ordinary hardship suffered by other indigent inmates” (Kistner, supra, 291 AD2d at 856; People v Rodriguez, 292 AD2d 646, 647 [3rd Dept. 2002], lv. denied, 98 NY2d 654; People v Abdus-Samad, 274 AD2d 666, 667 [3rd Dept. 2000], lv. denied, 95 NY2d 862; People v Parker, 183 Misc2d 737, 738 [Sup. Court, Kings Co. 2000]).

Notwithstanding the defendant’s limited income and financial constraints, this court finds that the defendant here has failed to establish any particular hardship which is out of the ordinary and would warrant court intervention and, hence, deferment of the payment of the statutorily mandated charges, even assuming all<sup>2</sup> of her prison wages are being applied to payment of the surcharge and fees.

Indeed, it seems that Ms. Bratten is situated no differently from any other incarcerated, indigent defendant receiving minimal institutional wages. And, while she mentions certain personal care items she deems to be hygienic necessities, the defendant does not claim to have any unusual, necessary expenses or any special requirements which are not being provided to her while incarcerated, nor do her claims set her apart from other inmates who also are unable to purchase items which they would like to have. An alleged inability to purchase certain desired items is not the requisite hardship and is not a proper basis for granting a deferral of the mandatory charges.

For, while the defendant asserts that she is required to purchase shampoo, deodorant, lotion and other such necessities, it is the court’s understanding that all inmates are regularly provided with the essentials necessary for hygiene (see, People v Hazel, 13 Misc3d 728, 730-731 [Sup.Ct. Bronx Co. 2006 – absent a contrary showing, it may be presumed that “correction officials are providing for defendant's basic needs, including any essentials for appropriate hygiene in a prison setting”]; People v Parker, supra, 183 Misc2d at 738).

Unfortunately, while there are many items which one might deem essential to one's personal hygiene and grooming, in the realm of personal care, DOCCS' standard for what is

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<sup>2</sup> The defendant's claim that all of her money and wages are being applied to these charges will be discussed below.

"necessary"<sup>3</sup> may be quite different. Thus, while an inmate might believe that shampoo, deodorant or lotion should be among the hygiene products provided to all inmates, rather than being commissary items which must be purchased with inmate funds, these particular items are apparently not considered "necessary" by the New York State Commission of Correction, which sets the minimum standards for confinement in correctional facilities (see, 9 NYCRR 7612.5; DOCCS Directive No. 4009 [V]; see also, Correction Law § 45 [6]; People v Hazel, supra, at 730-731). That being the case, this court cannot conclude that one's inability to obtain non-"necessary" items should be ruled a "hardship," even though one might reasonably expect such supplies to be "standard issue." Since all inmates are in the same situation in that such items are not supplied as a matter of course, this deprivation, even if deemed a hardship, is no different or greater for this defendant, as compared to any other indigent defendant.

Regarding this defendant's institutional finances, the court notes that Ms. Bratten asserts that it is the "policy of the state facilities to encumber all money/wages immediately so that surcharges and DNA fees are paid in full within 180 days" and that therefore, her "prison wages are encumbered and 100% is deducted for payment of the surcharge and DNA fee," which leaves her with no money for commissary purchases. Ms. Bratten has not, however, provided any documentation for this claim, such as a copy of her inmate account statement reflecting such deductions or any paperwork showing the disbursements of her prison wages, whatever they may be. She has submitted no proof of her claimed earnings nor of commissary prices.

In making the above assertion, the defendant has cited to DOCCS Directive No 2788, subparagraphs (3)(a) and (b). However, reference to the current version of this Directive<sup>4</sup> does not appear to reflect a 100% wage collection practice for payment of the mandatory surcharge and fees. Moreover, it is the court's understanding that the surcharge and fees are typically collected at the rate of 20% from inmate earnings and 50% from any outside funds given to the inmate where there is one payment obligation on the inmate (or one collective set of payment obligations) (see, People v Hazel, supra, at 730). Such payment or repayment owed by the inmate is termed an "encumbrance." While the deduction process is different for certain other payment obligations (such as for "advances" and "gate money," as well as for court fees), where a defendant is paying off two (or more) active "encumbrances," 40% of an inmate's weekly earnings and 100% of his/her outside receipts will be collected and applied to such fees and charges (DOCCS Directive No. 2788 [IV] [B] [3] [b], [c]; see also, Matter of Begun v Goord, 249 AD2d 861 [3rd Dept. 1998]). In contrast, there is no demonstration here

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<sup>3</sup> See Directive No. 4009 (dated 7/15/2011), which enumerates "those items necessary for an inmate's cleanliness, health, and morale."

<sup>4</sup> The current version of Directive No. 2788 is dated March 30, 2012 and was last revised on July 10, 2012. It supersedes the prior Directive dated August 6, 2009.

of a 100% wage collection and the defendant has not even shown what moneys are being taken from her account nor what payment obligations she actually has, if any, other than the \$375 obligation known to this court.

In conclusion, this court finds that the defendant has not demonstrated the requisite "unreasonable hardship" that payment of the surcharge and other fees is imposing upon her or her immediate family as would provide a basis for deferment.

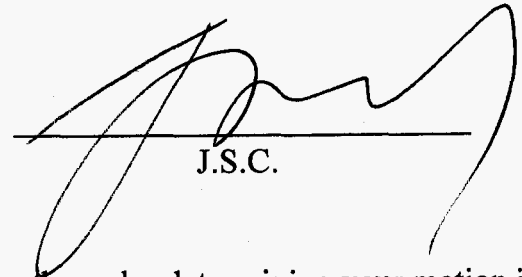
Therefore, in light of the defendant's failure to establish such "unreasonable hardship," and further, bearing in mind the mandatory nature of the surcharge and fees and the important goals served by collection of these charges (see, CPL § 420.40 [3]), the motion to defer the mandatory surcharge and other fees is, respectfully, denied, without a hearing.

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York  
January 3, 2013

**ENTERED**  
JAN - 7 2013  
NANCY T. SUNSHINE  
COUNTY CLERK

E N T E R ,

  
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J.S.C.

You are advised that your right to an appeal from the order determining your motion is not automatic except in the single instance where the motion was made under CPL §440.30(1-a) for forensic DNA testing of evidence. For all other motions under Article 440, you must apply to a Justice of the Appellate Division for a certificate granting leave to appeal. This application must be filed within 30 days after your being served by the District Attorney or the court with the court order denying your motion.

The application must contain your name and address, indictment number, the questions of law or fact which you believe ought to be reviewed and a statement that no prior application for such certificate has been made. You must include a copy of the court order and a copy of any opinion of the court. In addition, you must serve a copy of your application on the District Attorney.

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