

People v Ortiz

2013 NY Slip Op 30076(U)

January 3, 2013

Sup Ct, Kings County

Docket Number: 9378/2010

Judge: Patricia DiMango

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This opinion is uncorrected and not selected for official publication.

In his motion papers, the defendant cites to only these four indictment numbers (4089/2010, 8019/2010, 2193/2011, and 9378/2010), but asserts that he must pay \$1,400 (in Mandatory Surcharges and fees). The court notes that Mr. Ortiz was also sentenced in Kings County under two other indictments on July 10, 2012: No. 9411/2011 and No. 1801/2012 (and received additional, concurrent imprisonment terms of one year and two to four years, respectively) Consequently, the defendant stands convicted of Criminal Possession of Stolen Property in the Fifth Degree under Indictment No. 9411/2011, which sentence bears a Mandatory Surcharge of \$175 and a \$25 Crime Victim Assistance Fee. Under Indictment No. 1801/2012 Ortiz was convicted of one count of Burglary in the Third Degree, upon which a Mandatory Surcharge of \$300, a DNA fee of \$50, and a \$25 Crime Victim Assistance Fee were all imposed.

The sum total of all of these surcharges and fees imposed is \$1,325². Payments towards all of these charges are presumably presently being regularly collected from the defendant's inmate funds in the ordinary manner and at the usual rate.³

Thus, the defendant, who was being detained at a New York City Department of Correction facility⁴ at the time he brought this motion, is herein seeking to defer payment, in whole or in part, of his mandatory surcharges and the fees on the ground that he is incarcerated and has insufficient income to presently pay these charges and that this current financial obligation constitutes a hardship on him.

In his sworn, form affidavit submitted in support of his request for a "Financial Hardship Hearing" and deferral, the defendant states that he is incarcerated and without sufficient income to pay his surcharges and fees. Specifically, the defendant avers that his is "making \$0 at the rate of prison wages." Accordingly, given his situation and the fact that he

² It is unclear to the court how the defendant arrives at the figure of \$1,400, and the defendant provides nothing to substantiate that amount.

³ It is apparently the policy of DOCCS to deduct 20% from an inmate's earnings, and 50% from any funds given to the inmate from family and friends, and to apply same towards the surcharge and other fees (*see, People v Hazel*, 13 Misc3d 728, 730 [Sup.Ct. Bronx Co. 2006]). However, where a defendant, such as Mr. Ortiz here, has two or more sets of surcharges and fees (which payment obligations DOCCS terms "encumbrances"), then 40% of that inmate's weekly earnings and 100% of his/her outside receipts may be collected and applied to these fees and charges as well as towards any other encumbrance incurred by the incarcerated defendant (*see, DOCCS Directive No. 2788 [IV] [B] [3] [b], [c]; see also, Matter of Begun v Goord*, 249 AD2d 861 [3rd Dept. 1998]).

⁴ The defendant has since been transferred to New York State custody, and, according to the New York State DOCCS website, he is presently housed at the Clinton Correctional Facility.

has no income with which to pay the surcharges and fees, Mr. Ortiz requests a hearing in conjunction with his application for deferral⁵ of all or some of these charges.

(This was the entire extent of the defendant's submissions and averments.)

The People have opposed the defendant's motion, asserting that he provides no documented, compelling reason to defer payment of the mandatory surcharges and related fees. They maintain that Mr. Ortiz's allegations of indigence are insufficient to support a claim of undue hardship suffered by himself or his immediate family as might warrant a deferment of payment of these charges.

Accordingly, the People urge denial of the motion due to the mandatory nature of these charges and the defendant's failure to establish that the pendency and collection of this financial obligation imposes an unreasonable hardship upon himself or his family, namely, a hardship that is "over and above the ordinary hardship suffered by other indigent inmates."

Discussion

Although 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 [2004]; People v Smith, 309 AD2d 1282, 1283 [4th Dept 2003]; see also, People v Domin, 13 AD3d 391, 392 [2d 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 County 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 mandatory surcharges and other 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;

⁵In his prayer for relief, the defendant additionally requests, in the alternative, that the "imposition of the fine" be "dismiss[ed]." (It may be noted that no fine was here assessed against the defendant.) To the extent this constitutes an application for a waiver of his surcharge and fee obligations, the defendant does not further discuss the matter of "waiver," nor have the People addressed same.

People v Rodriguez, 292 AD2d 646, 647 [3d Dept 2002], lv denied, 98 NY2d 654 [2002]; People v Abdus-Samad, 274 AD2d 666, 667 [3d Dept 2000], lv denied, 95 NY2d 862 [2000]; People v Parker, 183 Misc2d 737, 738 [Sup Ct, Kings Co. 2000]; see also, CPL § 420.40 [2]).

Notwithstanding the defendant's alleged lack of income, 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. Indeed, Mr. Ortiz has provided no proof of his financial status or of his alleged lack of any prison income, and also fails to allege, much less demonstrate, that the payment of the surcharge and fee would work an "unreasonable hardship" on him or his immediate family, if any. Thus, this court concludes that the defendant has not met his burden to establish his personal hardship, by credible and verifiable information.

Absent such a showing, it would seem and may be concluded that the defendant here, Mr. Ortiz, is situated no differently from any other incarcerated, indigent defendant of limited means. Moreover, the defendant does not claim to have any unusual expenses or particular obligations, nor any special requirements which are not being provided to him while incarcerated.

The court would note that, insofar as the defendant claimed in his papers to be receiving no prison wages, the court believes this was only a temporary situation which was due to the defendant's then being in New York City custody, awaiting transferral to the State correctional system. However, now that the defendant is in State custody (as alleged by the People and confirmed through the DOCCS' website), this court may presume that the defendant is now earning typical inmates' prison wages (see, Correction Law § 187), which can and will be applied towards his mandatory surcharges and fees.

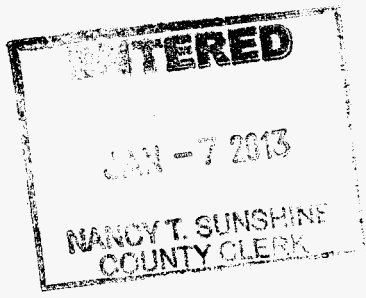
Lastly, turning to the defendant's alternative request for a "dismissal" of his "fine," the court observes that no fines were imposed under any of the cited convictions. Assuming this may be interpreted as an application for waiver of payment of the surcharges and fees, it must be noted that the Criminal Procedure Law does not authorize the outright waiver of any of the mandatory surcharges, DNA databank fees or the crime victim assistance fees for this defendant.⁶ Hence, to the extent deemed raised by the defendant, that branch of his motion seeking a waiver cannot be entertained and such relief must be denied to him.

⁶See, CPL § 420.35 (2); see also, People v Owens, 10 AD3d 619 (2d Dept 2004), lv denied, 4 NY3d 766 (2005); People v Morrison, 36 Misc3d 880, 882 [Sup. Ct. NY Co. 2012] ; but see, People v Brian L, 17 Misc3d 724 [Watertown City Ct. 2007 – finding lack of waiver provision for disabled persons unconstitutional]. Also, legislation was proposed in 2011 to repeal the waiver prohibition, but was not passed.

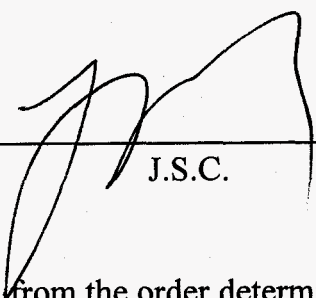
In conclusion, this court finds that the defendant has not alleged the requisite "unreasonable hardship" that payment of the surcharges and other fees is imposing upon him or his immediate family, if any, as would provide a basis for deferment, or even require a hearing thereon. Therefore, the motion to defer payment of the defendant's mandatory surcharges, DNA databank fees and crime victim fees is, respectfully, denied, without a hearing.

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York
January 3, 2013



E N T E R ,



J.S.C.

You are hereby 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 you are 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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