SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 24

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

SPENCER BOWENS,

Defendant.

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By: Hon. Thomas J. Carroll

Date: April 8, 2013

DECISION & ORDER

Indictment No.: 185/82 & 4429/82

Defendant moves, pro se, to vacate his judgment of conviction pursuant to CPL § 440.10 on the grounds that he was denied the effective assistance of counsel. For the following reasons, the motion is denied.

In January 1982, co-defendants Ronald Bowens and Carl Finch were charged under Indictment No. 185/82 with multiple counts for their participation in a robbery and shooting that took place on January 3, 1982. Subsequently, defendant was charged alone under Indictment No. 553/82 with the same counts and with respect to the same acts. Defendant was charged separately because he was arrested at a later date than his accomplices. On June 9, 1982, Indictment No. 553/82 was consolidated into Indictment No. 185/82.

In August 1982, defendant was charged with another person under Indictment No. 4429/82 with robbery in the second degree for their participation in a separate robbery that took place on August 6, 1982.

On January 28, 1983, represented by Lloyd Bleecker, Esq., defendant pleaded guilty under the consolidated Indictment No. 185/82 to robbery in the first degree. He also pleaded guilty under Indictment No. 4429/82 to robbery in the second degree based upon his commission

of the referenced separate robbery. Defendant was sentenced on both cases on April 5, 1983, to concurrent terms of imprisonment of two to six years (Krausman, J.).

Defense counsel filed Notices of Appeal for both robbery convictions. By Decision and Order dated January 29, 1990, the Appellate Division, Second Department, granted the People's motion to dismiss the appeal.

In September 1998, a jury in the United States District Court for the Eastern District of Virginia found defendant guilty of conspiracy to possess and distribute crack cocaine, powder cocaine, and heroin; two counts of harboring a fugitive from arrest; and obstruction of justice. *See U.S. v. Bowens*, 224 F. 3d 302 (4th Cir. 2000). According to the District Court for the Middle District of Pennsylvania's summary, at the sentencing hearing defendant had objected to the Pre-Sentence Report (PSR) claiming that it indicated that he had two prior New York State robbery convictions. Defendant had argued that because the "two state robbery charges were: consolidated by a superceding indictment, the subject of a single sentencing proceeding, and resulted in the imposition of concurrent sentences, the PSR should have reflected that he only had one prior robbery conviction" *(Bowens v U.S.*, 2011 U.S. Dist. LEXIS 131212, 2011 WL 5520531 [M.D. Pa. 2011]). Also according to the summary, the sentencing court rejected defendant's argument "concluding that the PSR correctly listed the defendant as having two robbery convictions because the robberies were two separate offenses punctuated 'by an intervening arrest' and therefore not related for purposes of the Federal Sentencing Guidelines." *Id.* Defendant was sentenced to life imprisonment.

In 2000, the Fourth Circuit affirmed the drug conspiracy conviction and the "life sentence for conspiracy to distribute crack cocaine" while vacating the harboring convictions.

Bowens, 224 F. 3d 302.

In 2009, the Eastern District of Virginia denied defendant's motion to correct a clerical error. In that motion defendant had again claimed that his two New York State robbery charges were consolidated into a single conviction. When it denied relief , "the sentencing court noted that it had already addressed and dismissed Bowens' argument." *Bowens*, 2011 U.S. Dist. LEXIS 131212, 2011 WL 5520531 (M.D. Pa 2011) (summarizing).

Defendant petitioned for a writ of habeas corpus in the District Court for the Middle District of Pennsylvania "challenging the calculation of his criminal history score under the Federal Sentencing Guidelines... ." *Id.* In 2011, in denying his writ, the habeas court wrote that "[t]he undisputed record clearly establishes that since the time of sentencing Petitioner has made repeated efforts to challenge his PSR in order to have it modified to reflect that he had fewer prior criminal offenses. Bowens' pending action again asserts the same PSR argument with the only difference being that it is now couched in terms of being an attack on his BOP custody classification." *Id.* The habeas court also wrote: "The undisputed record clearly establishes that his PSR related claim has been presented to and twice denied by the sentencing court." *Id.*

In 2012, the Fourth Circuit affirmed the Eastern District of Virginia's denial of defendant's motion for a reduction of sentence. *U.S. v Bowens*, 478 Fed. Appx. 39 (4th Cir. 2012).

In 2013, the Third Circuit affirmed the Middle District of Pennsylvania's denial of defendant's habeas petition. *Bowens v U.S.*, 2013 U.S. App. LEXIS 233, 2013 WL 49762 (3rd Cir. 2013).

Defendant now argues ineffective assistance in that his attorney gave him "bad advice"

with regard to his decision to plead guilty. He alleges that he told his attorney that he wanted to proceed to trial because he was innocent, and that counsel informed him that if he agreed to plead guilty under Indictment No. 4429/82, the court would dismiss the charges under Indictment No. 185/82. According to defendant, "[c]ounsel never properly investigated the offer that the District Attorney's Office was offering, because if he had so, he would have known that Bowens was indeed still plead guilty to an offense that he was ready to stand trial for." Second, defendant claims that he was denied the effective assistance of counsel when his attorney failed to perfect an appeal.

Defendant's current attempt to challenge the New York convictions underlying the classification of his federal sentence is unavailing.

Preliminarily, the allegations of ineffectiveness are procedurally barred from collateral review. In his sworn affidavit, defendant makes the conclusory claim that he was denied effective assistance of counsel during plea negotiations but his specific allegations about defense counsel's "bad advice" are contained in his unsworn, self-serving Memorandum of Law. Furthermore, while in his sworn affidavit defendant makes a conclusory claim that he was denied his Due Process rights, the specific allegations are, again, contained in his unsworn self-serving Memorandum of Law. As defendant has failed to make "sworn allegations substantiating or tending to substantiate all the essential facts," his motion may thus be denied (CPL § 440.30[4][b]).

Defendant's claims are also without merit. Defendant has failed to show that counsel's performance fell below an "objective standard of reasonableness" based on "prevailing professional norms" (*Strickland v Washington*, 466 U.S. 668, 687-688 [1984]) or that he was

deprived of meaningful representation (*People v Baldi,* 54 NY2d 137, 147 [1981]; *People v Benevento*, 91 NY2d 708 [1998]). In the context of a guilty plea, a defendant has been afforded meaningful representation when he receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel (*People v Ford*, 86 NY2d 397, 404 [1995]; *People v Hawkins*, 94 AD3d 1439, 1440 [4th Dept 2012]; *People v Caruso*, 88 AD3d 809, 810 [2d Dept 2011]). In this instance counsel negotiated a very favorable plea bargain of two to six years concurrent imprisonment despite facing two indictments, one of which contained multiple class B felony charges. Where nothing in the record casts doubt on the apparent effectiveness of counsel, defendant has received effective representation (*Ford* at 404). Defendant's conclusory allegations are insufficient to establish ineffective assistance of counsel.

Defendant's remaining claim that counsel failed to perfect an appeal is also without merit. In New York "[t]he right to appeal is a statutory right that must be affirmatively exercised and timely asserted" (*People v West*, 100 NY2d 23, 26 [2003]). Pursuant to 22 NYCRR § 606.5(b) retained or assigned trial counsel must, immediately after the pronouncement of sentence, advise a defendant in writing of the right to appeal and the time limitations involved. A defendant must also be informed of the manner for instituting an appeal and obtaining a transcript of the trial, and be advised of the right to seek leave for appointment of counsel and to proceed with the appeal as a poor person. Even the failure to file a Notice of Appeal does not constitute ineffective assistance per se as counsel may be deemed professionally unreasonable only by failing to follow defendant's express instructions with respect to appeal (*Roe v Flores-Ortega*, 528 U.S. 470 [2000]).

Here, counsel satisfied his obligation to defendant when he filed Notices of Appeal for

both robbery convictions, thereby preserving defendant's right to appeal. At that point, it was up to defendant to pursue an appeal, either by hiring an attorney or seeking an appointment by the court. Defendant failed to seek leave to appeal and ask for poor person relief and the assignment of counsel within the nine-month period commencing from the Notice of Appeal (22 NYCRR § 670.8[f]). Even when given notice that his appeal was dismissed for failure to prosecute, nine years after the Notice of Appeal was filed, defendant failed to raise any challenge to his convictions.

Finally, defendant's twenty-nine-year delay in filing the instant motion in a New York State court severely weakens the credibility of his claims. Throughout all of his post-conviction litigation, defendant has repeatedly challenged the calculation of his federal sentence but has until now never attributed any fault to defense counsel with respect to his New York robbery convictions. At both plea and sentence, defendant failed to raise any question about the alleged promises made by counsel. The New York State Court of Appeals has held that "revelatory of the seriousness of defendant's present claims, is that defendant waited over a decade before asserting them. In stale cases, defendants have all to gain by reopening old convictions, retrial being so often an impossibility. These are factors to consider in determining how valid the assertions are... ." (*People v Nixon*, 21 NY2d 338, 352 [1967]). Thus, a lengthy delay can be considered in evaluating the validity and legitimacy of a post-judgement claim (*People v Melio*, 304 AD2d 247, 252 [2d Dept 2003]; *People v Hanley*, 255 AD2d 837, 838 [3d Dept 1998]). The weakness of defendant's position is compounded by his failure to offer a reason for the extremely long delay. In light of the absence of any explanation and given that the relevant facts should have been long known to defendant, the delay is unjustifiable (*see People v Degondea*, 3 AD3d

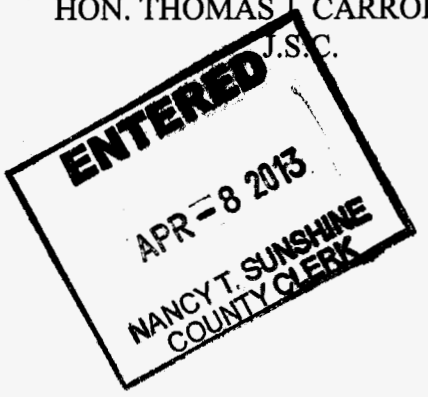
148, 160 [1st Dept 2003]).

Accordingly, the motion is denied in its entirety.

This decision constitutes the order of the court.

ENTER:

HON. THOMAS J. CARROLL
HON. THOMAS J. CARROLL
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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