

People v Gumbs

2013 NY Slip Op 30878(U)

April 9, 2013

Supreme Court, Kings County

Docket Number: 2826/2011

Judge: Miriam Cyrulnik

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 33

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

Ind. No. 2826/2011

RICHARD GUMBS,
Defendant
-----X

Miriam Cyrulnik, J.S.C.:

Defendant moves, *pro se*, to vacate the judgment of conviction against him, pursuant to CPL §440.10, alleging that he was transported between a federal detention center in New Jersey and Kings County Supreme Court in violation of Article IV of the Interstate Agreement on Detainers Act (IADA). The People have submitted an affirmation in opposition to defendant’s motion. In deciding this motion, the court has considered defendant’s Motion to Vacate and the People’s Affirmation in Opposition.

On January 3, 2012, defendant pled guilty under Kings County Indictment Number 2826/2011 to Criminal Possession of a Controlled Substance in the Fifth Degree (Penal Law §220.06[1]), a Class “D” felony. Defendant agreed to a sentence of eighteen months on the indictment, to be served concurrently with a federal sentence imposed on July 6, 2011, pursuant to which he was imprisoned in New Jersey. Defendant’s plea came after he was transported between a federal detention center in New Jersey and Kings County Supreme Court on three occasions: October 12, 2011, November 21, 2011 and January 3, 2012. For each of these dates, the People secured defendant’s appearance in Kings County Supreme Court by means of a *writ of habeas corpus ad prosequendum*.

Defendant now argues that, since he was transported between New Jersey and New York without being tried on the New York indictment, his New York judgment of conviction must be

vacated pursuant to IADA, Article IV(e), which states, in pertinent part:

If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Defendant further argues that his judgment of conviction must be vacated on the ground that he did not receive effective assistance of counsel, due to the fact that his assigned counsel failed to advise him of the effects of IADA and to argue for dismissal of the Kings County indictment, based upon a violation thereof.

The People argue that defendant's motion must be denied because each of his appearances in Kings County Supreme Court was secured by means of a *writ of habeas corpus*, making the dictates of IADA inapplicable. The People further argue that defendant is procedurally barred from raising the IADA issue, pointing out that any such claim was waived by his failure to raise it at the time of the sentencing and, in any case, does not survive a guilty plea. Finally, the People argue that defendant's claim of ineffective assistance of counsel is procedurally barred and meritless.

Securing the attendance of defendants who are confined as prisoners in other jurisdictions of the United States is governed, in New York, by CPL Article 580. IADA is adopted and codified under CPL §580.20 and provides for procedures by which the attendance of defendants incarcerated in state¹ penal or correctional institutions may be secured.

Article I of IADA explains its purpose:

¹ "State," as defined by CPL §580.20, means "a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico."

The party states find that charges outstanding against a prisoner, detainers based upon untried indictments, informations or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints.

CPL §580.30 provides the procedure for securing the attendance of a defendant who is incarcerated in a federal prison. According to CPL §580.30(2), such defendant may be produced in the county in which a criminal action is pending against him by means of a *writ of habeas corpus ad prosequendum*.

The two methods of securing the attendance of defendants who are incarcerated outside the jurisdiction of New York are distinct, as are the purposes for which they are utilized (*see People v. Squitieri*, 91 Misc2d 290, 293 [Sup Ct, New York County 1977]). IADA was enacted to afford defendants and prosecutors the ability to speedily dispose of outstanding detainers (*id.*), while the *writ of habeas corpus* is a “procedural device used by a prosecutor who is actively seeking a disposition of pending criminal charges, not merely attempting to hold the defendant for some future date” (*id.*).

In the case at bar, defendant, who faced pending criminal charges, was produced in Kings County Supreme Court pursuant to a *writ of habeas corpus* on each of the three dates that lead to his plea. The People secured defendant’s appearance in Kings Supreme Court for the purpose of reaching a disposition in his case, not merely to obtain speedy disposition of outstanding detainers. Therefore, IADA is inapplicable and defendant’s motion to vacate the judgement of conviction must be denied.

However, even if IADA was applicable here, defendant’s failure to raise the issue upon

entering his plea, or upon sentencing, constitutes a waiver of his right to assert such a violation (*see People v. Pizetsky*, 46 AD3d 709 [2d Dept 2007], *lv denied* 10 NY3d 815 [2008]; *People v. Madden*, 234 AD2d 394 [2d Dept 1996], *lv denied* 89 NY2d 944 [1997]; *People v. Bundy*, 186 AD2d 1042 [4th Dept 1992], *lv denied* 81 NY2d 837 [1993]; *People v. Cusick*, 111 AD2d 251 [2d Dept 1985]; *People v. Vidal*, 85 AD2d 701 [2d Dept 1981]; *People v. Squitieri*, 91 Misc2d 290 [1977], *supra*).

With respect to defendant's claim of ineffective assistance of counsel, the People correctly point out that it is procedurally barred, as it is an issue apparent from the record that should have been raised on direct appeal (*see People v. Cooks*, 67 NY2d 100 [1986]; *People v. Pachay*, 185 AD2d 287 [2d Dept 1992], *lv denied* 82 NY2d 757 [1993]; CPL §440.10[2][b]). The case law is clear that a motion under CPL article 440 cannot be used as a substitute for that direct appeal (*People v. Brinkhuis*, 44 AD3d 677 [2d Dept 2007]; *People v. Degondea*, 3 AD3d 148 [1st Dept 2003]).

However, even if defendant's claim of ineffective assistance of counsel were not procedurally barred, it is based upon his premise that defense counsel failed to advise him of an IADA violation and to raise it on his behalf. As determined by this court, IADA is inapplicable to the case at bar and, therefore, defense counsel cannot have been ineffective in not raising it as an issue before the court.

Finally, by his plea bargain, defendant was convicted of a "D" felony instead of the top count of the indictment (a "B" felony) and received a sentence of incarceration to run concurrently with his federal sentence. Defendant cannot claim ineffective assistance of counsel, based upon violation of IADA, when he received an extremely favorable plea bargain (*see People v. Woodson*, 176 AD2d 186 [1st Dept 1991], *lv denied* 79 NY2d 834 [1991]; *People v. Pizetzky*, 4 Misc3d 681 [Sup Ct Suffolk County 2004]).

Accordingly, the defendant's motion to vacate his judgment of conviction is denied.


The defendant's right to an appeal from the order determining this 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 CPL article 440, the defendant must apply to a Justice of the Appellate Division for a certificate granting leave to appeal. This application must be filed within thirty (30) days after the defendant has been served by the District Attorney or the court with the court order denying this motion.

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

This constitutes the decision and order of the Court.

Dated: April 9, 2013



J.S.C.

ENTERED
APR -9 2013
NANCY T. SUNSHINE
COUNTY CLERK