

People v Woodruff

2013 NY Slip Op 31578(U)

June 28, 2013

Supreme Court, Kings County

Docket Number: 07029/2012

Judge: Martin P. Murphy

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 40

-----X
THE PEOPLE OF THE STATE OF NEW YORK

-against

Decision and Order

CPL 440.10, 440.20

DENNIS WOODRUFF

Indictment 07029/2012

-----X

JUSTICE MARTIN P. MURPHY

Defendant moves, *pro se*, to vacate his conviction and sentence pursuant to *CPL 440.10* and *440.20* on the grounds that he was improperly sentenced to consecutive rather than concurrent terms of imprisonment. For the following reasons, the motion is denied.

Defendant was convicted in *Queens County* on *October 27, 1994* of criminal possession of a weapon in the second degree and was sentenced to *seven to twenty years* imprisonment. He was released to parole on *January 8, 2010* with an initial projected parole release date of *January 9, 2017*.

On *October, 2012*, defendant was arraigned on the instant indictment charging him with criminal possession of a controlled substance in the third degree, among other related charges, for acts committed on *August 11, 2012*. Subsequent to his arrest in this case, the parole board conducted a hearing and sentenced *defendant* to a period of incarceration for violating the terms of his parole. That sentence, which remains undischarged, began on *August 28, 2012*.

On *January 9, 2013*, defendant was produced in *Kings County Supreme Court* where he pled guilty to criminal possession of a controlled substance in the seventh degree in exchange for a promised sentence of *one year* in jail. [*Murphy,J.*]. Defendant was sentenced in the same proceeding. During the plea allocution and sentencing, the court did not specify whether the

sentence imposed for the drug charge was to run concurrent or consecutive to *defendant's* previously imposed sentence for the violation of parole; nor did the *Uniform Sentence and Commitment* form specify how the sentences should run. The *Department of Correctional Services* [*"DOCS"*] has accordingly calculated *defendant's* sentences to run consecutively.

In a brief form affidavit, *defendant* now argues that the sentencing court failed to "state concurrent as agreed upon." He claims that he would not have pled guilty had he known that his sentence on the drug charge would run consecutively to his undischarged sentence for violating probation. In support of his motion, he has submitted a memorandum from the *Legal Aid Society* which explains that pursuant *PL 70.25*, a criminal court sentence will automatically run consecutively to parole time owed if a judge does not specifically order the sentence to run concurrently. *Defendant's* claims are both procedurally barred and without merit.

Defendant's challenge to the voluntariness of his plea under *CPL 440.10* is procedurally barred because *defendant* could have raised that issue on appeal. Here, the court's explanation of *defendant's* sentence appears entirely on the record of the plea and sentencing proceedings.. Accordingly, where *defendant* failed to raise his claim on appeal, he is now barred from doing so on a collateral motion. *CPL 440.10[2][c]*; see *People v Cooks*, 67 NY2d 100 [1986] [*CPL 440.10* should not be employed as a substitute for direct appeal when defendant was in a position to raise an issue but failed to do so] ; see also *People v Cuadrado*, 9 NY3d 362 [2007]).

Defendant's motion is also procedurally barred on the ground that he has failed to substantiate his vague allegation that he was promised concurrent sentencing. [*CPL 440.30[4][b]*]. He has not provided any sworn allegations substantiating this claim, nor any other evidence or record.

In any event, *defendant's* sentence was properly imposed under the law and there is no

legal basis for *vacatur* on the ground that it was illegal, invalid or unauthorized. *CPL 440.20[1]*, *440.30[4][a]*. Here, *defendant* was convicted of a *Class A misdemeanor*, which requires a definite sentence. *PL 70.15[1]*. According to the applicable sentencing statute, "...if a court does not specify the manner in which a sentence imposed by it is to run, the sentence shall run as follows: ...a definite sentence shall run concurrently with any sentence imposed at the same time and shall be consecutive to any other term". *PL 70.25[1][b]*. Defendant had previously been sentenced on his parole violation, which remained undischarged at the time he was sentenced to a definite term on his drug charge. Thus, where the court did not specify how his two sentences should run in relation to each other, *PL 70.25* directs that they should run consecutively. Contrary to *defendant's* assertion of a previous promise by the court, there is nothing in the record to indicate that the court either intended to or did in fact order the sentences to run concurrently.

The court's failure to specify how the sentences should run did not render *defendant's* plea involuntary. A trial court must ensure that a *defendant*, before entering a guilty plea, has a full understanding of what the plea entails and its consequences. Though the court need not engage in any particular litany during the plea colloquy, due process requires that the plea represent a voluntary and intelligent choice among the alternative courses of action available to the defendant. *People v Gravino*, 14 NY3d 546 [2010]; *People v Ford*, 86 NY2d 397 [1995]. Thus, the court must inform a defendant of the direct consequences of the plea. *People v Hill*, 9 NY3d 189 [2007]; *People v Monk*, 83 AD3d 35 [2nd Dept., 2011]). In contrast, a court's silence regarding collateral consequences does not warrant *vacatur* of a plea because collateral consequences are peculiar to the individual and generally result from the actions taken by agencies that are outside the court's control. *People v Belliard*, 20 NY3d 381 [2013]; *Gravino*,

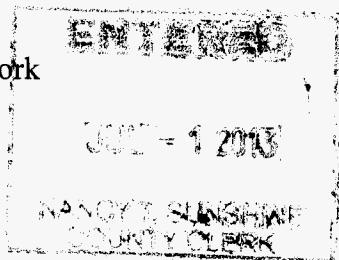
supra; *Ford, supra*.

Furthermore, the court's silence on consecutive or concurrent sentencing was proper in view of the relevant law. In a similar case, addressing the portion of *PL 70.25* applicable to the sentencing of second felony offenders, the *Court of Appeals* held that "[n]othing in the statute and nothing in the *Constitution* requires the sentencing court to say the word 'consecutive,' either orally or in writing. Nothing in the statute even requires that the sentencing court be made aware that the prior sentences are undischarged". *People ex rel. Gill v Greene*, 12 NY3d 1 [2009]. The propriety of the court's silence regarding the concurrent and consecutive imposition of sentences was recently upheld by the *Court of Appeals* when it found that "the consecutive nature of the new sentence is a collateral rather than direct consequence of a conviction in determining the adequacy of a plea allocution". *Belliard, supra*. Accordingly, the court's silence here did not render the voluntariness of the plea subject to challenge where the court had no duty to advise *defendant* about the collateral consequence of consecutive sentencing and did not give *defendant* any reason to think that the sentences would run concurrently. *Belliard, supra*.

Accordingly, *Defendant's* motion for *vacatur* is *DENIED* in its entirety.

This *decision* shall constitute the *order* of the court.

Dated: June 28, 2013
Brooklyn, New York



MARTIN P. MURPHY, A.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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