SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 38

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THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

Against

SHANNON KELLY,

Defendant.

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Memorandum Decision

GREEN, J.

Indictments:
2928/1983
5090/1983

JULY 30, 2013

Upon the notice of motion defendant moves pro se' for an order pursuant to Criminal Procedure Law (CPL) sections 440.10 and 440.20 (1) to have his sentence therewith set aside.

Defendant's claims are procedurally barred and without merit, thus defendant's motion is summarily DENIED in its entirety.

Based on a review of the motion papers submitted October 2012, including the People's opposition papers, dated stamped March 21, 2013, the decision and order of the Court on defendant's motion is summarily DENIED in its entirety for the following reasons.

Defendant makes this motion claiming ineffective assistance of counsel and that his sentence is illegal three decades after he was convicted.

Defendant plead guilty to both indictments here on February 14, 1983. He pled guilty to one count of Robbery in the First Degree on indictment number 2928/83. On indictment number 5090/1983, defendant pled guilty to one count of Criminal Possession of A Weapon in the Second Degree.

On March 6, 1984, defendant was sentenced to concurrent prison terms of two to six years on each indictment. (Coffinas, J.)

Defendant argues that his plea counsel was ineffective because he urged defendant to plead guilty to avoid possible indictment for a narcotics conspiracy implicating the defendant for sale of narcotics and that defendant did so out of fear. [1]

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[1] Defendant attaches as exhibit A to his motion a copy of documents related to indictment number 2958/83 involving a unsealing order for search warrant testimony of a confidential informant regarding conspiracy. Although, indictment number 2928/83

Defendant says he later found out that the allegation was false and also says his counsel was ineffective for lying to him, however, defendant provides no documentation substantiating such claims.

Defendant also requests this court to set aside his sentence, because he believes the two to six years he received on the Robbery indictment was illegal and that he should have received a sentence of between one to three years for a first time juvenile felony offender.

Defendant makes his claim only on the robbery charge and does not apply the same reasoning to the weapons charge. Defendant also claims that he was innocent and did not rob anyone at gun point, that he had been involved in a fight with the victim. He says he beat the victim up and then broke the victim's glasses in half. Defendant maintains that he was coerced into pleading guilty by his attorney and stated he told his attorney that he wanted to go to trial on the robbery charge. (Defendant's motion at page 2)

Defendant relies on the case of *People v Welch*, 485 NYS 2d 590 (3rd Dept 1985), however that case is distinguishable from defendant's matter.

Contending that the conversations were off the record matters between him and his attorney, defendant properly places such issues within the context of a CPL 440 motion.

Regarding matters appearing on the record, now being challenged by defendant, defendant is mandatorily barred as he could have brought such matter up by direct appeal but failed to do so and offers no justification for not filing such appeal.

However, based on the information or lack thereof that defendant has provided, regarding his ineffective assistance of counsel claims not appearing on the record, he is not entitled to a hearing.

Notwithstanding defendant's selective application of his argument regarding the sentencing, he is mis-informed because in 1983, the maximum sentence was between four and one half to fifteen years with the minimum being one-third of that amount. Accordingly, two to six years was a legal sentence for a C-felony in 1983 accorded a first time offender.

However, defendant attaches to his motion papers, a document titled "Felony Sentencing Chart - Crimes Post 9/1/98. On that chart, the minimum for a non-violent C felony is one to three years and the minimum for a Juvenile Offender or

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appears at the top of one of the pages with 2958/83 written in ink slightly below it, defendant's name does not appear on any of the pages.

a Youth Offender (YO) is one to three years. Defendant believes he should have been sentenced one to three years, but he provides no substantiation, to support his claim, from the record or any other evidence.

Regarding his plea to the weapons charge, defendant brings up that he was a youthful offender and he should have been sentenced as a first time felony offender for criminal possession of a weapon in the second degree.

Whether defendant was to be accorded youthful offender status was a determination to be made at the time of defendant's conviction and not at time of sentencing. *People v Mosley*, 88 AD 2d 520 (App Div 1st Dept 1982)

A determination of youthful offender status is for the trial court after consideration of pre-sentence report in consideration of extended period of incarceration taking into account the seriousness of the nature of the crime at issue. *People v Johnson*, 92 AD 2d 672 (App Div 3rd Dept 1983)

But, if a determination of eligibility is reached and such youthful offender status is warranted, then it must be made at the time of pronouncing sentence. CPL 720.20 (1); *People v Robinson*, 110 AD 2d 939 (App Div 3rd Dept)

Here, there was no pronouncement during sentencing of defendant being accorded youthful offender status.

Also, a refusal to accord a defendant youthful offender status is within the trial court's discretion and is not a violation of defendant's constitutional rights since it is a privilege accorded to a youth. *People v Drayton*, 47 AD 2d 952 (App Div 2nd Dept 1975)

If defendant here was eligible, whether the trial court actually considered youthful offender status is another issue. *People v Cobb*, 64 AD 2d 656 (App Div 2nd Dept 1978)

Further, the court gave the defendant an opportunity to speak at sentencing but defendant stated that he had nothing to say. Noting, in mitigation, that no one was injured in indictment 5080/83 and no one was seriously injured in indictment number 2928/83, Judge Coffinas waived the mandatory assessment under each plea and imposed the two sentences to run concurrently to each other, as agreed under the plea arrangement. In addition the court directed for the sentences to run concurrently with any violation of probation. [2]

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[2] Minutes of sentencing before Hon. Nicholas C. Coffinas, dated March 6, 1984, attached to defendant's motion papers as Exhibit E at P. 2 - 3.

Defendant appears not to assert the ineffective assistance of counsel claim on the weapons charge, however it is not entirely clear from defendant's papers and the attorney, Martin Goldberg represented defendant at both plea and sentencing.

Despite the selective application of defendant's arguments challenging his plea and sentence, this court is unpersuaded by defendant's claims of ineffective assistance of counsel and defendant's sentence was legally imposed.

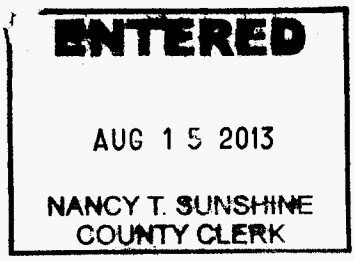
A hearing is not required where defendant does not substantiate any of his claims and conclusory allegations does not establish that any misconduct arose to the level of ineffectiveness. *People v Hickey*, 277 AD 2d 511 (3d Dept 2000)

Furthermore, the legitimacy of defendant's claims is severely undermined by his 30 year delay in bringing up these issues for the first time in a CPL 440 motion. Defendant provides no justification for such a lengthy delay. *People v Nixon*, 21 NY 2d 338 (Ct of App 1967)

Consequently, defendant's motion is denied in its entirety.

Accordingly, based on the foregoing, the defendant's CPL 440 motion to vacate his judgment of conviction and set aside his sentence is DENIED in its entirety.

This constitutes the decision and order of the Court.




ENTER:

Hon. Desmond A. Green,
ACTING J. S. C.

**Notice of Right to Appeal for a Certificate Granting Leave to Appeal**

Defendant is informed that his right to appeal from this order determining the within 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, defendant 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.

Appellate Division, Second Department
45 Monroe Place
Brooklyn, NY 11201

Kings County Supreme Court
Criminal Appeals
320 Jay Street
Brooklyn, NY 11201

Kings County District Attorney
Appeals Bureau
350 Jay Street
Brooklyn, NY 11201