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

EDGAR QUINONES,
Defendant.

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DECISION and ORDER

BY: GREEN, J.

DATED: August 15, 2013

INDICT NO: 7676/2000

In motion papers dated January 23, 2013, the defendant moves pro se for an order to set aside his sentence pursuant to CPL article § 440.10.

Based on a review of the motion papers, including the People's opposition dated March 18, 2013 and defendant's sur reply dated March 25, 2013; such other papers on file with the Court, and the proceedings had prior thereto, the decision and order of the Court on defendant's motion is DENIED in its entirety for the following reasons.

Pursuant to a jury trial defendant was convicted on November 30, 2001 of Penal Law section 160.10 (3), Robbery in the Second Degree.

Defendant had been charged for the crime of robbery in two separate incidents taking place in two different locations in Kings County involving parking lot attendants. He sustained a conviction for an incident on August 28, 2000

against parking lot attendant, Hubert Saladin. He was acquitted for an incident on September 6, 2000 against parking lot attendant Luis Nunez.

Defendant was sentenced by Justice Kreindler on January 8, 2001 as a persistent violent felony offender, to imprisonment of twenty years to life.

Defendant has filed numerous motions [1] for relief, including an appeal, a writ of habeas corpus and a prior CPL § 440 motions; each was denied. Leave to appeal therefrom the denials were also denied.

In the instant motion, defendant's second CPL § 440.10, defendant raises claims of ineffective assistance of counsel in that his judgment should be set aside because his trial counsel did not render advice on the plea offer of 16 years to life imprisonment.

The United States Supreme Court decision in *Strickland v Washington*, 466 US 668 (1984) sets out the standard for assessing "reasonably effective assistance" and infers a "strong presumption" that the attorney rendered effective assistance.

The court has the discretion to summarily dismiss defendant's motion if it is not substantiated by sworn allegations of fact pursuant to CPL section 440.30

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[1] Defendant's most recent prior motion, pursuant to CPL § 440.20 to set aside his sentence, was denied by this court in a decision and order dated June 1, 2012.

(4) (b). The court also has the authority to grant a hearing requiring defendant to prove by a preponderance of the evidence the truth of his allegations material to the court's determination pursuant to CPL section 440.30 (3), (5).

If allegations of fact essential to support defendant's motion to vacate is in dispute, then the court must conduct a hearing. CPL 440.30 (6)

Here, the facts alleged by defendant in support of his motion are not in dispute, such facts are not "solely within the knowledge or possession of the defendant" as here the facts purported by defendant are contradicted by the court record.

Consequently, defendant is not entitled to a hearing.

Defendant's claim here is procedurally barred because he failed to raise the claim in his first CPL § 440.10 motion and his argument that he should not be foreclosed from raising the argument now on the basis that the United States Supreme Court decisions in the companion cases of *Lafler v Cooper,* 132 S Ct 1376 (2012) *and Missouri v Frye,* 132 S Ct 1399 (2012) were not decided at the time of his first CPL § 440.10 motion is misguided.

Further, defendant's claims are belied by the record he relies on as a basis to support his argument. According to the minutes of the November 1, 2001

proceedings before Hon. Robert S. Kreindler, just prior to the start of the *Wade Dunaway* pre-trial hearing in this matter, the parties attempted to work out a plea agreement.

Defendant's attorney, Richard Occhetti informed the court that the defendant wanted to personally address the court. The defendant did so, stating, "I'm just asking the court for mercy for my soul, if I could plead guilty to eight years." [2]

The judge explained to the defendant that the components of the plea agreement was not up him and that such plea agreement had to be worked out by the parties, however he would approve whatever agreement was negotiated. The defendant again told the court that he would take eight years if the People would offer it. [3]

The judge relayed that based on the bench conference with the assistant district attorney and defendant's attorneys [4] the People's "absolute minimum that they would begin to consider is more than ten years. So we're working in a

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[2] Court minutes, titled Wade-Dunaway hearing, portion regarding discussion of plea dated November 1, 2001, P 3, L 13-24

[3] Court minutes of November 1, 2001 at P 4.

[4] Two attorneys were present on behalf of the defendant, Richard A. Occhetti and Michael Higgins, court minutes of November 1, 2001 at P 2.

vacuum. It's [the eight years defendant wanted] not a feasible plea, from what I hear." [5]

The conversation continued as to whether the defendant would be cooperating on some basis with the district attorney's office as leverage in negotiating his plea further and ADA Miyashiro clarified that they were no longer in need of cooperation from the defendant so that any information he conveyed would not benefit him in plea negotiations. [6]

After the defense attorney explained that he understood the plea offer from the People to a flat ten years rather than ten to life as the court stated ADA Miyashiro stated, "I can begin with that..." and ADA Miyashiro represented to the court that he did convey defendant's willingness to plead to the flat ten years to his office. [7]

A recess was taken in anticipation of a return call from the District Attorney's office regarding the plea negotiations. ADA Miyashiro reported back to the court that the People would not consider an offer for less than 16 years. [8]

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[5] Court minutes of November 1, 2001 at P 5 L 3 - 8.

[6] Id, at P 5, L 9 - 25 to P 6 L 1-13.

[7] Id at P 6 L 14 - 25 and P 8.

[8] Id at P 8, L 25 to P 9 L1.

The defendant nor his attorneys gave the court any indication that defendant was accepting of the 16 year offer. The court continued with commencing the pre-trial hearings.

Defendant states in his sur reply, that "at no point during the course of plea bargaining process, did Judge Robert S. Kreindler, ever explore this concern with Mr. Quinones directly or otherwise question him as to whether he knowingly rejected the People's offer of 16 years..." Here, defendant confuses the duty of the court to advise on defendant's acceptance of a plea offer at the stage of allocution.

Defendant also relies on *People v Richard Shaw*, 18 Misc 3d 1136(A) (Sup Ct Bx Cty 2008) and cites it in his sur reply in support of his request for a hearing and to grant his motion in this matter. However, although Justice Richard Price in *Shaw*, granted a hearing, he did not ultimately grant defendant's motion. Like defendant in the *Shaw* case, defendant here also cites *Boria v Keane*, 99 F 3d 492 (2nd Cir 1996) which held that an attorney's failure to give any advice regarding the wisdom of accepting a plea offer constituted ineffective assistance of counsel.

Here, defendant has not sufficiently established his claim that his attorney failed to provide any advice about whether the plea offer of 16 years was desirable. *Shaw* is distinguishable from the instant matter, in that the defendant

in *Shaw* did not personally participate on the record in the plea negotiations. The defendant in this matter first tried to get eight years, then ten years which clearly shows that when the People rejected the ten years and came back with 16 years, clearly, it was not desirable to the defendant.

As enunciated by the United States Supreme Court and under New York State Law, there is no constitutional right of the defendant to a plea offer. *Weatherford v Bursey*, 429 US 545 (1977)

Hence, it follows that the court does not bear the burden of deciphering whether a defendant understands his rejection of a plea.

Furthermore, the defendant here is a sophisticated felon who was quite forthright in speaking up for himself when he requested a flat eight years, and later agreed to take ten years, so if there was something he did not understand about the 16 year plea offer, this particular defendant would have spoken up.

Defendant also believes that his trial attorney did not "advise [him] . . .to overcome his disinclination."

However, the record is quite clear in showing that defendant was vociferous in his plea negotiation, and adamant about first pleading to a flat eight years and then acquiescing to a flat ten years if the People would offer it. The

People did not offer the flat ten years. The People offered a flat 16 years, which the defendant did not accept.

Here, the risks of going to trial were the same whether defendant refused any type of offer. Defendant does not assert that his trial attorney did not advise him of the risks of going to trial, which is the main consequence of not accepting any plea offer.

Furthermore, the People's stance in the plea negotiations as well as the defendant's willingness to jump at a plea offer at the outset, and even offer up his own bid, presumes the strength of the People's case here.

It is quite improbable under the circumstances that defendant would have taken the 16 years. The first eight pages of minutes of the proceedings together with sidebar conferences, bench conferences and a recess shows that a good length of time was taken up by the court to provide the defendant an opportunity to work out a plea agreement. However, defendant choose to go to trial.

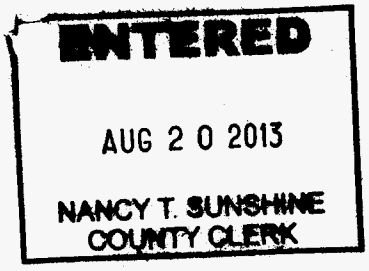
Even if defendant were not procedurally foreclosed from bringing up this claim now because he did not bring it up in his prior appeal or in his CPL § 440 motion, defendant's claim of ineffective assistance of counsel is conclusory, vague, unsubstantiated by any documentation in his motion papers and contradicted by the record. Thus, defendant's claim is denied on the merits.

In addition to the New York standard evaluating whether counsel provided "meaningful" representation, the court must look to whether counsel's overall conduct deprived the defendant of a fair trial. *People v Caban*, 5 NY 3d 143 (2005); *People v Benevento* 91, NY 2d 708 (1998)

Defendant's instant motion is mandatorily and permissively procedurally barred; and defendant's claims are denied on the merits.

Accordingly, based on the foregoing, the defendant's CPL § 440.10 motion to vacate his judgment is DENIED in its entirety.

This constitutes the decision and order of the Court.



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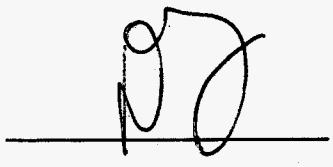

Hon. Desmond A. Green, J.S.C.

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.

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