CRIMINAL 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

WILLIAM MCMICHAEL,
Defendant.

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Decision

BY: GREEN, J.

SEPTEMBER 30, 2013

INDICT#: 4517/2004

Defendant moves pro se for an order to vacate his judgment of conviction pursuant to CPL article CPL article § 440.

Based on a review of defendant's motion papers dated May 30, 2013, with multiple exhibits and such other papers, including the People's opposition dated August 6, 2013, on file with the Court; the decision and order of the Court on defendant's motion is DENIED in its entirety.

Defendant pled guilty to Murder in the Second degree on August 11, 2005 and was sentenced to twenty-five years to life in prison on December 1, 2005 . (Feldman, J., at plea and sentence)

The charges stemmed from defendant's arrest, along with co-defendant, David Bowman, on July 14, 2004 for Attempted Robbery and Murder in the Second Degree, among other charges. The record of facts is that defendant and his co-defendant attempted to rob Tyrone Spann in a beauty supply store

because they wanted Mr. Spann's gold chain. The defendant, Mr. McMichael was found to be the shooter.

The claims defendant makes in his CPL 440 motion are claims appearing on the record, that he could have made in his direct appeal [1]. Because defendant did not raise these claims at the first instance when he filed a direct appeal in this matter, he is procedurally barred.

Pursuant to Criminal Procedure Law section 440.10 (2) ©, the court must deny a motion to vacate when *"although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him."*

On the record claims, defendant makes here, could have also been raised in his prior appeal as the facts were known to defendant at the time of judgment. *People v Cochrane*, 27 AD 3d 659 (App Div 2nd Dept 2006)

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[1] The Appellate Division, Second Department unanimously affirmed defendant's sentence without opinion. *People v McMichael*, 43 AD 3d 963 (September 11, 2007); Leave to appeal to the Court of Appeals was denied. *People v McMichael* 9 NY 3d 992 (November 15, 2007)

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 (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).

In his application, defendant challenged his sentence as being excessive. He avers that his appellate counsel advised that at the time of direct appeal there were no other grounds upon which she saw fit to challenge the matter.[2] This gives rise to the inference that the claims, appearing in the record, defendant now raises could have been considered by the appellate counsel.

Defendant has previously filed pro se coram nobis motion dated March 25, 2009 [3], which was denied. *People v McMichael*, 65 AD 3d 1167 (2nd Dept 2009);

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[2] See defendant's handwritten motion, paragraph 15, page 5 and Exhibit C.

[3] In that motion, defendant charged that his appellate counsel, Lynn Fahey, was ineffective for not raising a due process violation claim. The court found that defendant

leave to appeal to Court of Appeals was denied. *People v McMichael*, 13 NY 3d 940 (2010)

At the time of the filing of this instant motion, defendant indicated that his submission for a writ of federal habeas corpus, dated February 16, 2011, before the United States District Court, Eastern District of New York is pending.

As to the voluntariness of defendant's plea, this is a matter ordinarily apparent from the face of the record and must be brought on direct appeal. *People v Ramgeet*, 277 AD 2d 52 (1st Dept 2000)

This court finds nothing in the record to support defendant's contention that his plea was not voluntary and in full knowledge of the rights he was giving up.

Furthermore, such claims defendant makes were matters known to defendant prior to sentencing and defendant could have raised such issues with his underlying counsel and before the court at plea and prior to sentence. When the court questioned defendant during the plea on August 11, 2005 as follows, "Has anyone made you any other promises about what the sentence might be in this case.?", defendant answered, "no" [4].

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had not established that he was denied the effective assistance of appellate counsel.

[4] Transcript of plea minutes, August 11, 2005, P 5 L 23-25.

Defendant uses this question and answer in an attempt to support his position that his counsel at plea did not inform him of what other sentence he could receive for the crime he pled guilty to. However, this question and answer is distinctly different in that it conveys no other promises given for the plea and does not connote any inference about what defendant's attorney may have counseled him regarding sentencing.

The plea minutes also reflect that the defendant "went down several times and was able to speak to the prosecutor about the case in such a manner that the prosecutor agreed to enter into an agreement [with the defendant]" [5]

In addition, defendant's attorney stated, "I've been over this case extensively with Mr. McMichael before we entered into any agreement and made him aware of the evidence against him as well as any defenses that I thought would possibly be used at trial if we were to go to trial. In light of all of that, Mr. McMichael has asked me to withdraw his previously entered pleas of not guilty and enter a plea of guilty in its place to murder in the second degree." The court instructed the defendant not to answerer any questions that he did not understand and to ask the court or his counsel to explain anything he did not understand.[6]

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[5] Transcript of Plea P 3 L 9-22, defendant's attorney, Mr. Steven J. Chaiken, speaking.

[6] Transcript of Plea P 4, L 3-11, Mr. Chaiken speaking, and L 22-25, the court's instruction.

At the time of the plea the defendant was eighteen years old and he answered in the affirmative when the court asked defendant whether he talked to his attorney about the case and the plea. [7]

During the plea proceeding, the defendant told the court he had read and signed the cooperation agreement, told the court that he would be testifying against his co-defendant, that he understood everything the court instructed him in connection with the plea; and also understood that even though a person he referred to as Twizzle, a man known to be Enrique Gonzalez, was not named in the cooperation agreement, defendant understood that his plea agreement included his willingness to testify against Mr. Gonzalez. [8]

The record reflects that defendant refused to abide by the cooperation agreement [9] he made with the People which would have set defendant's imprisonment at fifteen years to life. Defendant's arguments regarding ineffective assistance of counsel, related to knowledge of his possible sentencing terms, is not plausible in light of the facts appearing on the record that defendant chose not to cooperate with the plea agreement and thus because of his lack of cooperation he did not receive the lesser sentence.

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[7] Transcript of Plea P 5, L 1-13.

[8] Plea minutes P 8.

[9] The cooperation agreement dated August 3, 2005, addended to defendant's motion papers as exhibit A, includes that defendant would receive such time in exchange for his cooperation and testimony against a co-defendant.

According to the record at plea and sentence, defendant told one story regarding his admission of the crime, during the court's allocution, at plea on August 11, 2005, in sum and substance, that he pulled out a gun towards the guy [a bystander] with the chain at a store on Belmont Avenue, told the guy to give up his chain. "He wouldn't give it up, so I shot him." [10]

By the time defendant appeared for sentencing on December 1, 2005, defendant had refused to cooperate with the plea agreement, refused to testify against his co-defendant and others and told a different story of what happened during the crime, ostensibly, according to the People, to mitigate his responsibility.

Defendant stated in his probation report in sum and substance that "the guy [a drug dealer] pulled out a gun at which time [defendant] pulled his gun out and shot him." The probation report also indicated that defendant did not exhibit any remorse. Defendant related with a "smirk" that he didn't know where he obtained the gun and stated "I just went and did it." [11]

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[10] Transcript of plea minutes, August 11, 2005, P 7.

[11] Transcript of sentencing minutes, December 1, 2005 P 8, as the court read the defendant's statement from the probation report into the record.

"Defendant concluded his statement with a chuckle and stated that 25 years to life is too long a bid for his offense." [12]

By defendant's own admission in his motion papers, and as recorded by the plea minutes dated, August 11, 2005, the court stated, "And, I also indicated to [the defendant], as you will see from the plea minutes, that I am not bound by the District Attorney's recommendation, although I would consider it."

The sentencing minutes also reflects that defendant's attorney argued in favor of the defendant in the hopes of salvaging the plea, for a sentence that was less than the maximum, by telling the court that defendant had been cooperative previously as well as forthright and remorseful and that defendant had never denied the shooting, and admitted his guilt. [13]

Defendant declined to say anything to the sentencing court about the sentence and he would not tell the court what made him back out of the cooperation agreement. The court stated to the defendant, "You leave me no alternative. . . I don't have any reason to give you anything less than the maximum. There's nothing here that mitigates the crime you committed nor are you giving me any reason to do so. I am going to sentence you, as

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[12] Transcript of sentencing minutes P 9, Line 1-3, as the court continued reading from defendant's probation report.

[13] Sentencing transcript P 9 L 12-25; P 10.

recommended by the district attorney, to 25 years to life for the crime of Murder in the Second Degree." [14]

Regarding off the record matters, defendant argues that his counsel at plea was ineffective and provided deficient representation. Defendant charges that he was coerced into taking a plea, that he did not know what was going on with his case from July 14, 2005 to July 2005, he did not receive copies of his indictment, felony complaint, DD 5s and other documents related to his case until 35 days prior to his pleading guilty, he was not consulted on important decisions and was not kept informed of important developments in the case, he did not know about pre-trial hearings and thus could not waive such, the handwritten and videotaped confession was obtained in violation of defendant's right to counsel, and defendant maintains he was unlawfully arrested and that it was not challenged by his counsel. [15]

Further, defendant maintains that he had no knowledge of the alternative courses of action in being criminally prosecuted. Defendant was 16 years old at the time of his arrest and mentally unstable. Defendant also believes that "trial

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[14] Sentencing transcript P 10, L 18-25; P 11, 1-25; P 12, L 1-2

[15] See, defendant's handwritten motion, paragraph 27 - 28, pg 8-9 and copy of a letter from the Department of Correction, signed by staff confidential, Blake Wingate, on behalf of the defendant, dated June 7, 2005 to Administrative Judges Firetog and Carey, along with a response letter dated June 17, 2005 and exhibit G.

counsel clearly took advantage of defendant's ignorance of the law, age and inexperience." [16]

These issues, regarding the advice or lack thereof that was given to defendant by his counsel are matters that do not appear in the record and known only by the defendant and his counsel at plea. These issues are properly brought forward in a CPL 440 motion and are issues that have not been brought before the court previously. *People v Brown*, 45 NY 2d 852 (1978) Even if some of those facts and circumstances may be discernible from the record, it can fall into the parameters of CPL 440 motion. *People v Hoyte*, 273 AD 2d 48 (1st Dept 2000)

Here, defendant's ineffective assistance of counsel claims are akin to failure to investigate a defendant's case. *People v Robertson*, 286 AD 2d 863 (4th Dept 2001)

However, defendant has waited almost ten years to bring such a motion.

Although, there is no time bar for bringing forth a CPL 440 motion, the length of delay in bringing such claims tend to reflect on the movant's credibility. *People v Nixon*, 21 NY 2d 388 (1967); *Robinson v New York*, 393 US 1067 (1969) Defendant has not provided any justifiable reason for such delay.

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[16] See, defendant's handwritten motion, paragraph 29-30, pg 9-10 and copies of defendant's Bellvue Hospital psychiatric treatment records, exhibit I.

Defendant is permissively barred from bring the claim now because he brings it over eight years after the fact with no justification for why such claims should be heard now either in a CPL 440 motion or in the interest of justice.

In order for defendant to sustain his burden here, defendant must exclude any possible legitimate basis for counsel's conduct. *People v Gil*, 285 AD 2d 7 (1st Dept 2001) Defendant maintains that he has requested an affidavit from his prior counsel to no avail.

Where the record reveals strategic reasons that may have been used by a reasonably competent attorney, the court has no reason to order a hearing to explore subjective intentions of defense counsel as the Court of Appeals has said, such would be irrelevant. *People v Satterfield*, 66 NY 2d 796 (1985)

Defendant provides conclusory allegations of ineffectiveness of counsel without establishing that such conduct rose to the level of deficient representation. People v Hickey, 277 AD 2d 511 (3rd Dept 2000)

Furthermore, defendant has not met the federal and state standards set out pursuant to *Strickland v Washington* and *People v Baldi*, 54 NY 2d 137 (1981).

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)

Furthermore, defendant's claims are found to be implausible at best, in light of the record at plea which establishes counsel's effective representation and defendant's affirmative answers, thereto, that he was counseled regarding his case and plea.

As such, defendant's CPL 440 motion is denied.

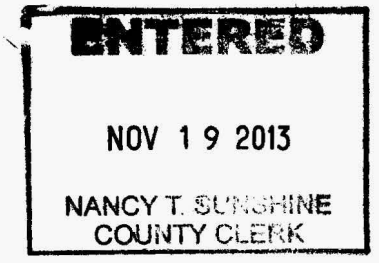
Further, defendant provides no good cause or justifiable reason in the interest of justice why this court should consider defendant's claims.

Consequently, defendant's motion herein must be denied in its entirety for both procedural reasons and on the merits.

Accordingly, based on the foregoing, and for other reasons enunciated in the People's opposition papers, the defendant's CPL 440 motion to set aside his conviction and overturn his sentence is DENIED.

This shall constitute the Decision, Opinion and Order of the Court.

The clerk of the court is directed to mail a copy of this decision and order to the defendant, William McMichael #05-A-6243, Wende Correctional Facility, Wende Road P. O. Box 1187, Alden, New York 14004-1187



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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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