

People v Victor
2013 NY Slip Op 33448(U)
December 11, 2013
Supreme Court, Kings County
Docket Number: 2770/2010
Judge: Suzanne M. Mondo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 28

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

- against -

DECISION AND ORDER
INDICTMENT NO. 2770/2010

WILIO VICTOR ,

DEFENDANT.

-----X
MONDO, SUZANNE, J.:

Defendant moves, *pro se*, to vacate the judgment of conviction pursuant to CPL §440.10 and to set aside the sentence pursuant to CPL §440.20. This is defendant's second *pro se* motion to vacate the judgment of conviction. Defendant also moves pursuant to CPL §440.30(1-a) for an order directing that DNA testing be performed, but fails to specify on what evidence such testing be performed.

On August 8, 2011, defendant pleaded guilty to one count of sexual misconduct (PL §130.20(1)), an A misdemeanor, in full satisfaction of Indictment 2770/2010, which charged defendant with eleven counts of rape in the second degree and lesser-related charges. In exchange, defendant was promised a sentence of one year jail. The court questioned defendant and defense counsel as follows:

THE COURT: Have you had enough time to discuss this matter with your lawyer who stands beside you?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied with his representation of you in this case?

THE DEFENDANT: Yes.

THE COURT: Counsel, have you discussed with your client any possible immigration consequences?

MR. WEINRICH: Yes, I have, your Honor. I have also consulted with immigration counsel before. I also advised my client.[sic]

THE COURT: Sir, do you understand that in order to plead guilty before me today, you are giving up certain constitutional rights, such as: Your right to a trial in this matter, and the right to have your lawyer cross-examine witnesses that would have been called at trial by the prosecutor, and your right to remain silent and other constitutional rights; do you understand?

THE DEFENDANT: Yes.

THE COURT: Is that what you wish to do?

THE DEFENDANT: Yes.

THE DEFENDANT: Yes.

(Plea minutes, pp. 3-4)

Defendant also stated that no one had forced him to plead guilty, and that he

was pleading guilty because he was guilty (Plea minutes, p. 5).

On September 9, 2011, the court conducted a SORA hearing. On September 29, 2011, the court imposed a one-year jail sentence, which defendant already had completed, and determined that defendant was a level 2 sex offender.

On May 8, 2010, the United States Department of Homeland Security filed a Notice to Appear against defendant, which alleged that defendant was subject to removal from the United States under Immigration and Nationality Act (INA) §237(a)(2)(A)(i), for having been convicted of a crime of moral turpitude (theft) in Florida on February 10, 2005, within five years after being admitted to the United States as a lawful permanent resident. On October 3, 2011, federal authorities served defendant with the Notice to Appear. On May 31, 2013, defendant was ordered deported. Defendant appealed that order and remains in immigration custody in Bergen County Jail.

Defendant's Prior Motion

In August 2012, defendant filed a motion pursuant to CPL §440.10 to vacate his conviction. In that motion, which this Court denied on March 1, 2013, defendant asserted that his attorney had been ineffective because he failed to advise him of the deportation consequences of his guilty plea.

Defendant's Present Motion

In August 2013, defendant again moved to vacate the judgment of conviction in this case pursuant to CPL §440.10 and to set aside the sentence imposed upon him pursuant to CPL §440.20 . Defendant asserted for both claims that: his lawyer did not visit him in jail; he feared receiving a longer prison sentence if he did not accept the prosecution's offer to plead guilty; he misunderstood his attorney's advice because his lawyer denied him a Creole interpreter; and he did not understand the immigration consequences of his guilty plea.

Defendant's Motion to Vacate the Judgment of Conviction

A defendant is afforded effective assistance of counsel "so long as the circumstances of the particular case, viewed in totality and as of the time of representation, reveal that the attorney provided meaningful representation." People v. Baldi, 54 N.Y.2d 137, 147 (1981). Counsel's performance must not only be shown to be deficient, but must also be shown to have prejudiced defendant. See People v. Benevento, 91 NY2d 708, 713-714 (1998). "In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel." People v. Ford, 86 NY2d at 404.

Here, defendant's claim that he received ineffective assistance of counsel is

without merit. His first allegation – that his attorney failed to visit him in jail – certainly does not in itself substantiate such a claim. Nor does defendant's claim that he pleaded guilty because of his own fear of receiving a longer prison sentence if he did not.

Further, defendant's claim that he misunderstood his attorney because his attorney denied him a Creole interpreter is belied by the record. During defendant's plea allocution, he never stated that he did not understand either the Court or his attorney due to a language barrier. Nor did he request more time to speak with his attorney.

Defendant's accusation that he did not realize the deportation consequences of guilty plea is nearly identical to the claim rejected by this Court's decision denying his previous CPL §440.10 motion. After a thorough review of the papers submitted throughout the case and of the case record, this Court finds no reason to change its decision that defendant received effective and meaningful representation. CPL §440.10(3)(b).

Defendant's claims also are undermined both by the protracted plea negotiations that ensued in this case and by the favorable disposition that was negotiated by defense counsel. Defendant was charged with eleven counts of rape in the second degree, all class D violent felony offenses, for which he could have

received consecutive sentences of seven years incarceration, followed by postrelease supervision ranging from three to ten years. See PL §§70.80(6); 70.02(1)(c); 70.45(2-a)(a). Instead, he was fortunate to receive a more lenient offer to plead guilty to a class A misdemeanor and receive one year jail, which he already had served.

Defendant's Motion to Set Aside the Sentence

Concerning defendant's motion pursuant to CPL §440.20 to set aside his sentence, defendant does not contend that his sentence was illegally imposed. His claim, therefore, may not be raised on a CPL §440.20 motion. See People v. Cunningham, 305 AD2d 516 (2nd Dept. 2003) (CPL §440.20 "generally does not encompass excessive sentence claims").

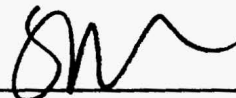
Accordingly, defendant's motion is denied in its entirety.

This constitutes the decision and order of the court.

Defendant is advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, NY 11201 for a certificate granting leave to appeal from this determination. This application must be made within 30 days of service of this decision. Upon proof of financial inability to retain counsel and to pay the costs and expenses of the appeal, defendant may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Application for poor person relief will be entertained

only if and when permission to appeal or a certificate granting leave to appeal is granted (22 NYCRR 671.5).

ENTER:



SUZANNE MONDO
Justice of the Supreme Court

December 11, 2013

