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

THE PEOPLE OF THE STATE OF NEW YORK -against- MELVIN ALEXANDER, Defendant.	DECISION AND ORDER Ind. #12403/95 Date: February 24, 2014 By: Hon. William E. Garnett

The defendant moves to vacate his judgment of conviction, pursuant to Criminal Procedure Law §440.10(1)(h), on the grounds that (1) his guilty plea was jurisdictionally defective and (2) that counsel was ineffective.

The defendant also moves to set aside his sentence, pursuant to Criminal Procedure Law §440.20(1), arguing that the persistent violent felony offender sentence was illegally imposed. Finally, the defendant claims that counsel did not provide effective assistance at his sentencing.

Background

The defendant was charged by Indictment #12403/95 with Robbery in the First Degree, (Penal Law §160.15[3]), a class "B" violent felony, et al.

On March 15, 1996, the defendant pled guilty to Attempted Robbery in the First Degree, a class "C" violent felony, in full satisfaction of the indictment. He was promised a sentence of eight

years to life as a persistent violent felony offender. The defendant waived his right to appeal.

On April 17, 1996, the defendant appeared with his attorney, Robert C. Newman, Esq., for sentencing. The Court advised the parties that the defendant had not yet been adjudicated a persistent violent felony offender.

The People served a copy of the persistent statement. The statement alleged that on June 6, 1973 the defendant had been convicted of Rape in the First Degree, a class "B" violent felony. The statement further alleged that on July 27, 1979, on Ind. #1589/78, the defendant had been convicted of Robbery in the First Degree, a class "B" violent felony, and that on October 5, 1979, on Ind. #2011/78, the defendant had been convicted of Robbery in the First Degree.[1]

The defense attorney alerted the court to the fact that the 1973 conviction was not a conviction for Rape in the First Degree but rather a conviction for Robbery in the First Degree.

The People amended the persistent statement to reflect that the defendant's 1973 conviction was for Robbery in the First Degree, a class "B" violent felony offense.

The defendant admitted the prior "violent" felony convictions, did not raise any constitutional claims and acknowledged that he had

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[1]The persistent statement also listed the periods during which the defendant was incarcerated on these convictions and the prisons in which the defendant was incarcerated.

discussed the matters with his attorney. Specifically, in regard to the 1973 conviction, he stated that: "I have no problem with the lawfulness and so forth." Sentencing Min., p. 3.

After the Court adjudicated the defendant a persistent felony offender and before sentence, the defendant asked the court about the sequentiality of the two 1979 convictions. Defense counsel informed the court that he had advised the defendant that the 1979 convictions would count as only one conviction for persistent sentencing purposes. Counsel had further informed the defendant that the earlier conviction, i.e., the 1973 conviction, was the second "violent" conviction which made him a persistent violent felony offender. The court made the same explanation to the defendant.

The court then sentenced the defendant on the Attempted Robbery in the First Degree plea to eight years to life as he was promised.

The defendant did not appeal from the judgment of conviction.

CPL §440.10 - Motion to Vacate the Judgment of Conviction

Criminal Procedure Law §440.10(1)(h) provides that a judgment may be vacated upon the ground that "[t]he judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States."

The defendant contends that his plea to Attempted Robbery in the First Degree was a jurisdictionally defective plea because Attempted Robbery in the First Degree is not a lesser-included

offense of Robbery in the First Degree. The defendant suggests that: "Attempted Robbery in the First Degree should have been reduced to second degree Robbery ..." rendering the instant offense a non-violent felony conviction. Defense Motion, p. 10. The defendant also claims that his attorney was ineffective for failing to raise this issue.

The defendant's claim that the plea was jurisdictionally defective is a matter of record and should have been be made by direct appeal. As the defendant waived his right to appeal, the instant application is denied. CPL §440.10(2)(c); People v. Caudrado, 9 N.Y.3d 362, 364-365 (2007).

In any event, the defendant's contention is without merit. The defendant was charged by Ind. #12403/95 with Robbery in the First Degree, Penal Law §160.15(3), et al. Pursuant to a plea agreement, the defendant pleaded guilty to Attempted Robbery in the First Degree (Penal Law §§110/160.15[3]), a class "C" violent felony offense.

As it is "legally possible to attempt to commit [the crime of Robbery in the First Degree] an attempt to commit such crime constitutes a lesser included offense with respect thereto." CPL §1.20(37). Consequently, Attempted Robbery in the First Degree is a lesser-included offense of Robbery in the First Degree. CPL §1.20(37); CPL §220.10(4)(b). Thus, the plea to Attempted Robbery in the First Degree was not jurisdictionally defective. Moreover, any

plea, even to a fictitious crime, is not defective if it is a product of a plea bargain. People v. Johnson, 89 N.Y.2d 905, 907-908 (1996); People v. Martinez, 81 N.Y.2d 810, 812 (1993); People v. Foster, 19 N.Y.2d 150, 153 (1967); People v. Mayo, 77 A.D.3d 683, 684 (2d Dept. 2010). In addition, even if the defendant had pleaded guilty to Robbery in the Second Degree, as he suggested, he would still have stood convicted of a class "C" violent felony offense.

The defendant next claims that the plea to Attempted Robbery in the First Degree was defective because that "single count in the Supreme [sic] Court Information was not an 'offense for which the defendant [had been] held for the action of the Kings Grand Jury', in that it was not an offense charged in the felony complaint or a lesser-included offense of an offense charged in the felony complaint". Def. Supplemental Affirmation., p. 2.

The defendant's claim is without merit. The defendant pled guilty to a lesser-included offense of a crime charged in a indictment and not a Superior Court Information.

As the defendant's claims are without merit, counsel could not have not been ineffective for not asserting them.

CPL §440.20

A sentence may only be vacated where the sentence was "unauthorized, illegally imposed or otherwise invalid as a matter of law." CPL §440.20(1).

Pursuant to Penal Law §70.08(1)(a), "a persistent violent felony offender is a person who stands convicted of a violent felony offense ... after having been subjected to two or more predicate violent felony convictions as defined in paragraph (b) of subdivision one of section 70.04".

To qualify as a predicate violent felony conviction, Penal Law §70.04(1)(b)(i) provides, in pertinent part, that: "[t]he conviction must have been in this state of a Class "A" felony ... or of a violent felony offense as defined in subdivision one of section 70.02 ..." and that (ii) the "[s]entence upon such prior conviction must have been imposed before commission of the present felony".

The defendant contends that the crime for which he stood before the court for sentencing, i.e., Attempted Robbery in the First Degree, is not one of the listed violent felony offenses in Penal Law §70.02(1)(b).

Attempted Robbery in the First Degree is a "C" violent felony offense as Penal Law §70.02(1)(b) defines attempts to commit class "B" violent felony offenses as class "C" violent felony offenses.

Next, the defendant contends that the filing of the persistent statement was untimely and that the information contained therein "was insufficient as required by C.P.L. 400.20(3) to sustain their burden of proving that the defendant was the person convicted of those felonies ... [and that the statement] failed to establish factors of defendant's history, background and character ...." Def.

Mtn., p. 10.

Contrary to the defendant's contention, a persistent statement is timely filed when it is submitted prior to the imposition of sentence. CPL §§400.16(2), 400.15(2). Since the People filed the persistent statement prior to the imposition of sentence, the statement was timely.

The defendant's other claim is bottomed on the mistaken belief that he was sentenced as a "persistent felon" pursuant to Criminal Procedure Law §400.20, et seq. and Penal Law §70.10(2).

However, the defendant was sentenced, pursuant to Criminal Procedure Law §400.16 and Penal Law §70.08 which do not permit the court to consider factors other than the convictions themselves. The sentencing court had no discretion to consider the defendant's history and character in deciding whether to adjudicate him a persistent violent felony offender.

The defendant argues that the People failed to establish that his predicate convictions were constitutionally obtained. The People have no such burden. Once the defendant is advised that he has the right to challenge the constitutionality of his prior convictions, the defendant must first raise a constitutional infirmity. The defendant did not do so.

The defendant next contends, citing People v. Hymes, 21 A.D.3d 823 (1st Dept. 2005), that the persistent statement must have set forth the subdivision of Penal Law §160.15 to qualify that

conviction as a violent felony offense. The defendant's contention is without merit.

In Hymes, supra, the court could not determine whether the defendant's predicate conviction for Attempted Criminal Possession of a Weapon in the Third Degree qualified as a violent felony conviction because Penal Law §70.02(1)(d) expressly limited class "E" violent felony offenses to only certain subdivisions of Penal Law §265.03.

In contrast, Penal Law §70.02(1)(a), which defines class "B" violent felonies, applies to all subdivisions of Penal Law §160.15.

Next the defendant argues that his prior felonies could not be used for the purpose of adjudicating him a persistent violent felony offender as these offenses were committed prior to the enactment of the violent felony offender sentencing scheme and were not defined in Penal Law §70.02 as "violent felonies".

The Court of Appeals in People v. Morse, 62 N.Y.2d 205 (1984), directly addressed the defendant's argument. In Morse, supra at 213, the Court held that:

> "[T]he persistent violent felony law require[s] imposition of enhanced punishment upon conviction as a second or persistent violent felony offender, even though at the time of the prior conviction on which enhanced punishment is based the prior crime was not classified as a violent felony offense."

As the defendant's prior Robbery in the First Degree convictions were classified as violent felony offenses prior to the

commission of his last conviction, the defendant was properly sentenced as a persistent violent felony offender.

The enhanced punishment statutes do not violate the ex post facto clause. People v. Morse, supra at 217-218. The constitutionality of the enhanced punishment statutes have been upheld by the United States Supreme Court. Weaver v. Graham, 450 U.S. 24 (1981).

The defendant also avers that his sentence should be set aside because the two 1979 predicate convictions violated the rule of sequentiality and therefore neither could be used to enhance his sentence.

The two 1979 violent felony convictions only counted as one conviction as the sentence on the first offense, i.e., Ind. #1589/78, had not been imposed prior to the commission of the second offense, i.e., Ind. #2011/78. People v. Morse, supra. The 1973 conviction coupled with the 1979 convictions constituted the requisite prior two predicate violent felony convictions.

Thus, contrary to the defendant's contentions, he was lawfully adjudicated a persistent violent felony offender.

The defendant was not denied the effective assistance of counsel during the sentencing for counsel's failure to raise any of the aforementioned meritless claims. Strickland v. Washington, 466 U.S. 668 (1984).

Accordingly, based on the foregoing analysis and discussion,

the defendant's motions to vacate the judgment of conviction made pursuant to Criminal Procedure Law §440.10(1)(h) and to set aside his sentence made pursuant to Criminal Procedure Law §440.20(1) are denied in their entirety.

This opinion shall constitute the decision and order of the court.

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, N.Y., 11201, for a certificate granting leave to appeal from this determination. This application must be filed 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, the 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).

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.

Kings County Supreme Court
Criminal Appeals
320 Jay Street
Brooklyn, N.Y. 11201

Kings County District Attorney
Appeals Bureau
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Dated: February 24, 2014
Brooklyn, New York

William E. Garnett
A.J.S.C.