

**People v Plato**

2014 NY Slip Op 32108(U)

August 6, 2014

Sup Ct, Kings County

Docket Number: 8115/00

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM: PART 26

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

Decision and order

- against -

Indictment No.  
8115/00

KENNETH PLATO,

Defendant,

August 6, 2014

-----X  
PRESENT: HON. LEON RUCHELSMAN

The defendant has filed a motion seeking to vacate the conviction pursuant to CPL §440. The underlying facts which support this motion are as follows. On September 22, 2000, at approximately 5:45 a.m., a group of police officers executed a valid search warrant at 233 Sand Street, Apartment 11-G in the Farragut Housing Development in Brooklyn. While officers were attempting to enter the apartment, defendant and co-defendant Noah Small threw a quantity of cocaine and marijuana, three loaded handguns, boxes of live ammunition, two loaded magazines for guns, a bullet proof vest, and a police radio out of a bedroom window of the apartment. Two police officers, assigned to watch the window from the ground, observed the defendants discard the contraband through the window and recovered the discarded items. The police officers who entered the apartment found the defendants, the only occupants therein wearing just their underwear.

Defendant was charged for his crimes under Kings County Indictment Number 8115/2000, as having acted in concert with co-defendant Small, with three counts of Criminal Possession of a

Weapon in the Second Degree (PL §265.03[2]) and Criminal Possession of a weapon in the Fourth Degree (PL §265.01[1]), two counts of Criminal Possession of a Controlled Substance in the Third Degree (PL §220.16[1], [12]), one count of Criminal Possession of a Controlled Substance in the Fifth Degree (PLS 220.06[1]), Criminal Possession of a Controlled Substance in the Seventh Degree (PL §220.03), Criminal Possession of Stolen Property in the Fifth Degree (PL §165.40), Criminally Using Drug Paraphernalia in the Second Degree (PL §220.50[2]), Criminal Possession of Marijuana in the Fourth Degree (PL §221.15), and two counts of Possession of Ammunition (Administrative Code §10-131 [I] [3]).

Charged on the legal theory of constructive possession, the jury convicted defendant of with two counts of Criminal Possession of a Weapon in the Second Degree (PL §265.03[2]), Criminal Possession of a weapon in the Fourth Degree (PL §265.01[1]), two counts of Criminal Possession of a Controlled Substance in the Third Degree (PL §220.16[1]), Criminal Possession of Stolen Property in the Fifth Degree (PL §165.40), Criminally Using Drug Paraphernalia in the Second Degree (PL §220.50[2]), Criminal Possession of Marijuana in the Fourth Degree (PL §221.15), and two counts of Possession of Ammunition (Administrative Code §10-131 [I] [3]).

On January 8, 2001 this court denied the defendant's motion

seeking to vacate the convictions on various grounds including the fact the People failed to prove all the elements of each crime. Further, on October 3, 2005, the Appellate Division affirmed the defendant's judgement of conviction holding, in substance, that the trial courts's denial of defendant's motion for substitution of council was a provident exercise of discretion because defendant failed to show good cause for the substitution and the circumstances demonstrated that the application was merely a dilatory tactic. The Appellate Division also held that the imposition of a greater sentence upon resentencing after trial than the sentence offered during plea negotiations was not an indication that defendant was punished for proceeding to trial. Moreover, the court properly considered all relevant circumstances before imposing sentence. Lastly, the court held that defendant's remaining contention was without merit (People v. Plato, 22 AD3d 507, 801 NYS2d 536 [2d Dept., 2005]). On December 5, 2005, The Court of Appeals denied defendant's application of leave to appeal from the Appellate Division's decision affirming his judgment of conviction (People v. Plato, 6 NY3d 757, 810 NYS2d 425 [2005]). Moreover, the defendant's Habeas Corpus application has been denied as well (Plato v. Poole, 2008 WL 222667 [EDNY 2008]). Lastly, on August 7, 2008 this court denied defendant's motion pursuant to CPL §440 on the grounds there was a lack of DNA testing of the guns,

shells, casings, cocain packaged in 200 small ziplock bags, drug paraphernalia, and other evidence admitted at trial.

The defendant has now filed the instant motion seeking to vacate the conviction on the grounds the People failed to establish, beyond a reasonable doubt, the requisite knowledge necessary concerning the criminal possession of concaine and weapons.

#### Conclusions of Law

First, CPL §440.10(3)(c) permits a court to deny a motion to vacate a judgement if upon previous motion made under CPL article 440, defendant could have raised the issue but did not do so (People v. Brayley, 265 AD2d 826, 695 AD2d 832 [4<sup>th</sup> Dept., 1999] People v. Moolenaar, 207 AD2d 711, 616 NYS2d 590 [1<sup>st</sup> Dept., 1994]). Thus, the failure to raise these issues in the prior motion preclude their consideration at this time.


Moreover, and more importantly, as recorded in the prior order, it is well settled that a motion pursuant to CPL §440 may not be considered where all of the claims are errors of law which are clearly found in the trial record (People v. Roden, 21 NY2d 810, 288 NYS2d 638 [1968], People v. Cooks, 113 AD2d 975, 493 NYS2d 645 [3<sup>rd</sup> Dept., 1985]). The defendant has raised no issue requiring an additional record necessitating a post conviction proceeding rather than a direct appeal (People v. Drumond, 99

AD2d 760, 471 NYS2d 679 [2d Dept., 1984]). The issue concerning knowledge of possession is a matter specifically addressed on the record. Thus, the defendant had a full opportunity to address those concerns on direct appeal and is barred from doing so at this time.

Therefore, based on the foregoing the defendant has failed to raise any issue requiring a vacatur of the convictions or a hearing on the matter and consequently the defendant's motion is hereby denied.

This shall constitute the decision and order of the court.

DATED: August 6, 2014  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC

**ENTERED**  
  
AUG 11 2014  
  
NANCY T. SUNSHINE  
COUNTY CLERK