

People v Gibson
2014 NY Slip Op 32267(U)
August 26, 2014
Sup Ct, Kings County
Docket Number: 1263/2004
Judge: James P. Sullivan
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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: PART 3

-----X	
THE PEOPLE OF THE STATE OF NEW YORK	: DECISION AND ORDER
	:
-against-	:
	:
	: Dated: August 21, 2014
	:
DANA GIBSON,	:
	:
Defendant.	: Indictment No. 1263/2004
-----X	
JAMES P. SULLIVAN, J.	

The defendant has moved, *pro se*, for an order pursuant to CPL § 440.10, to vacate his judgment of conviction. Defendant was convicted, pursuant to his guilty plea, of two counts of criminal sexual act in the first degree (P.L. § 130.50 [1], [4]) under Indictment 1263/2004. In a motion dated April 1, 2014, the defendant moves to vacate his conviction on the grounds of ineffective assistance of counsel. People have filed an answer in opposition dated June 23, 2014.

Procedural History

Defendant previously filed a motion pursuant to CPL § 440.40 where he claimed that his attorney provided ineffective assistance of trial. The court rendered a decision on February 17, 2012 denying defendant's motion. In this case, defendant was convicted, pursuant to his guilty plea, of two counts of criminal sexual act in the first degree (P.L. § 130.50 [1], [4]), one count with respect to each of the two victims. In return for his guilty plea, this court promised to sentence defendant to two concurrent terms of imprisonment of twenty years each. On December 21, 2004 defendant was sworn in for the plea allocution. In response to the court's inquiries, defendant acknowledged that he discussed the matter fully with his attorney. The defendant indicated that he was satisfied with his attorney, and that no one was forcing him to plead guilty. After the court advised him of the rights he was waiving by pleading guilty instead of going to trial, defendant stated that he understood. The defendant further informed the court that he understood his plea conviction was the same as a conviction after trial. Defendant admitted his guilt on both crimes.

Defendant, represented by the same attorney, appeared for sentencing on May 19, 2005. After the court advised the parties that a legal issue had arisen regarding the promised sentence, the People offered the defendant a new sentence of two concurrent terms of 16 years to life in return for defendant's guilty plea to two counts of attempted criminal sexual act in the first degree. After conferring with his client, counsel indicated that the new offer was acceptable to the defendant. The court informed the defendant that in order to obtain the new disposition, he would have to withdraw his original plea and enter a new plea to the charges. Defendant acknowledged on the record that he

had discussed the matter fully with his attorney, that he had sufficient time to discuss the case with his attorney before deciding to plead guilty, and that he was satisfied with the manner in which counsel was representing him. Defendant again informed the court that he understood that entering the guilty pleas would have the same effect as a conviction after trial. After withdrawing his original plea, the defendant once again admitted his guilt to the two separate charges. Defendant admitted that both acts were by forcible compulsion. The record reveals that defendant told the court that he had no doubts about his answers or statements, and did not have any further questions. The defendant did not contest the predicate felony statement and was adjudicated a persistent violent felony offender. Defendant declined to make any statement before the imposition of the negotiated sentence. This court then imposed the promised sentence of two concurrent terms of imprisonment of 16 years to life.

Defendant was represented on direct appeal to the Appellate Division, Second Department, by a different attorney from Appellate Advocates. On or about December 18, 2006, appellate counsel filed a brief, pursuant to *Anders v. California*, 386 U.S. 738 [1967], in which counsel sought permission to withdraw because she could find no non-frivolous issues to raise on defendant's behalf. Appellate counsel stated that the record indicated that the guilty plea was knowing, voluntary, and intelligent. In a Decision and Order dated February 27, 2007, the Appellate Division affirmed the judgment of conviction. The Appellate Division stated that it had reviewed the record, and it agreed that there were no non-frivolous issues which could be raised on appeal. The Appellate Division also granted appellate counsel's application for leave to withdraw as counsel (*People v. Gibson*, 37 A.D.3d 851 [2d Dept 2007]).

The Current Motion

The defendant moves again to vacate his conviction, claiming ineffective assistance of counsel. Defendant claims that since police lacked probable cause, his arrest was "illegal." He alleges that his counsel was ineffective for failing to investigate the facts surrounding his arrest, and for failing to inform him that his arrest allegedly lacked of probable cause. Defendant bases this claim on a discrepancy between the Voluntary Disclosure Form and the People's response to defendant's initial C.P.L. § 440.10 motion as to where the initial identification of the defendant occurred. The Voluntary Disclosure Form, dated March 8, 2004, states that defendant was identified by the complainant, Kellie Ann Doctor, on February 26, 2004 at 5:45 p.m. at E. 96th Street and Saratoga Avenue, in Kings County. The defendant was subsequently identified by a second complainant, Zalika May, in a lineup on February 26, 2004 at approximately 11:15 p.m. Defendant complains that the People alleged in their initial response to his motion, that the initial point-out was made at a different location, namely, 45 Nevins Street, Brooklyn, New York. As a result of this discrepancy, defendant claims that his arrest was illegal and lacked probable cause. In their current answer in opposition, the People indicate that they had derived this information from the New York City Department of Probation Pre-Sentence Report which indicated that the complainant "saw the defendant on the street" in front of 45 Nevins Street. Defendant claims that but for this alleged failure, he would not

have pleaded guilty and would have proceeded to trial and prevailed.

A defendant who in open court admits guilt of an offense charged may not later seek review of claims relating to the deprivation of rights that took place before the plea was taken. (*People v. Alexander*, 97 N.Y.2d 482, 485 [2002]). Moreover, while certain constitutional claims such as voluntariness of the plea survive the entry of the plea, the only claims of ineffective assistance of counsel that survive the guilty plea are those that directly involve the plea-bargaining process. (*People v. Seaberg*, 74 N.Y.2d 1 [1989]; see, *People v. Sorino*, 82 A.D.3d 911 [2d Dept. 2011]; *People v. Turner*, 40 A.D.3d 1018 [2 Dept. 2007]).

This court has carefully reviewed the moving papers and all attached documents. Assuming *arguendo* that defendant is claiming that his plea was involuntary, his claim must be denied, as it is based solely on his own conclusory statements. As to defendant's allegation that trial counsel was ineffective for failure to investigate and inform him about his alleged illegal arrest, these claims are procedurally deficient, as defendant makes only bare, conclusory allegations. Further, defendant does not provide any affidavits, or certified documents which would support his claim. Moreover, defendant's allegations are contradicted by the court record and are wholly devoid of any factual support and under these and all the other circumstances attending the case, there is no possibility that such allegation is true (CPL § 440.30 [4] [b] [d]).

Defendant's claim appears to be based on a paperwork inconsistency involving the prosecutor's response to defendant's prior C.P.L. § 440.10 motion, made almost seven years after entering his plea of guilty. Specifically, the defendant refers to the People's opposition to defendant's initial motion, which states that the complainant, Kellie Ann Doctor, observed the defendant on February 26, 2004 in front of 45 Nevins Street in Kings County New York. The People claim that they received this information from the New York City Department of Probation Pre-Sentence Report which was reviewed by this court at defendant's May 19, 2005 sentencing. The defendant claims that this discrepancy demonstrates that there was no probable cause for his arrest.

In the present case, defendant fails to allege "any ground constituting legal basis for the motion" (C.P.L. § 440.30 [4] [a]). To the extent that defendant is claiming that his plea was not voluntary as he was deprived of the effective assistance of counsel, that allegation is belied by his statements under oath where on two separate occasions, defendant indicated that his plea had not been forced or coerced and that the plea was being entered of his own free will. Further, the record indicates that on December 21, 2004 and May 19, 2005 defendant admitted to the court that he had received enough time to consult with counsel, that he had discussed the matter fully with counsel, and that he was satisfied with counsel's representation. (See, *People v. Caruso*, 88 A.D.3d 809 [2d Dept. 2011]; *People v. Aguayo*, 73 A.D.3d 938 [2d Dept. 2010]; *People v. Cobb*, 19 A.D.3d 506 [2d Dept. 2005]).

In any event, the court has thoroughly reviewed the court file and grand jury minutes and finds no support for defendant's claim. A review of the file clearly indicates that there was probable cause for defendant's arrest. The record reveals that the complainant, Kelly Ann Doctor, observed

the defendant outside the kitchen window of her apartment. After observing him for some time, she informed her family that she recognized him as the individual who had previously attacked her. Her mother observed a male black outside her building. As the complainant exited the building she saw him crossing E. 95th Street in Brooklyn. The individual ran, and after a chase the family asked a New York city firefighter to hold the defendant until the police arrived. Pursuant to a point-out by the complainant, the defendant was placed under arrest. Additionally, on February 26, 2004, at 11:15 p.m., the defendant was identified by the second complainant, Zalika May, as the individual who had attacked her on February 3, 2004.

The right to effective assistance of counsel is guaranteed by the Federal And State Constitutions (US Const 6th Amend; NY Const, art 1 §6; *People v. McDonald*, 1 NY3d 109, 113). Here, defendant's claim fails to state any cognizable legal grounds for finding that he was denied the effective assistance of counsel. Notwithstanding any inconsistencies between the Voluntary Disclosure Form and the Probation Report regarding where the complainant observed the defendant and pointed him out to the police, the fact remains that defendant was identified as the perpetrator by two separate complainants on separate occasions.

In the context of a guilty plea, a defendant has been afforded meaningful representation when he receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel. (*People v. Ford*, 86 N.Y.2d 397 [1995]). Here, defense counsel negotiated an extremely favorable plea which substantially reduced defendant's potential exposure had he been convicted of these offenses following trial. The defendant's unsubstantiated and conclusory assertions are contradicted by the record, and therefore, are insufficient to support this motion. CPL § 440.30 (4) (d). (See, *People v. Perez*, 83 A.D.3d 738 [2d Dept. 2011]; *People v. Caruso*, *supra*). Defendant again admitted his guilt on May 19, 2005 before this court. (See, *Strickland v. Washington*, 466 U.S. 668 [1984]; *People v. Baldi*, 54 N.Y.2s 137 [1981]).

Under all the circumstances evident upon review of the record and having received the benefit of a favorable plea bargain, the court finds that the defendant received meaningful representation. (*Ford*, 86 N.Y.2d at 404).

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

This constitutes the decision and order of the court.

The defendant is hereby advised pursuant to 22 NYCRR § 671.5 of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York, 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 his 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 certification granting leave to appeal is granted.


James P. Sullivan, J.S.C.
HON. JAMES P. SULLIVAN
J.S.C.

