

**People v Cooper**

2014 NY Slip Op 32845(U)

October 17, 2014

Sup Ct, Kings County

Docket Number: 4405/89

Judge: Evelyn J. Laporte

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 38

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THE PEOPLE OF THE STATE OF NEW YORK,	:	
	:	Ind. No.: 4405/89
	:	By: Hon. Evelyn Laporte
-against-	:	
	:	Date: October 17, 2014
LARRY COOPER,	:	
Defendant.	:	
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The defendant has filed a motion *pro se* pursuant to C.P.L. §440.20 to set aside his sentence on the grounds that his sentence as a mandatory persistent violent felony offender was invalid because one of his prior convictions was actually a youthful offender adjudication and therefore could not be used as a predicate felony to enhance his sentence. Additionally, the defendant moves pursuant to C.P.L. §440.10 to vacate his judgment of conviction on the ground that defense counsel provided ineffective assistance at the sentencing proceeding.

In support of his argument that he lacked the status of a mandatory persistent violent felony offender, defendant claims that his predicate conviction for Manslaughter in the 1<sup>st</sup> Degree under Kings County Indictment Number 3508/79 was in fact a youthful offender adjudication. He argues that the sentence he received on that case, which was an indeterminate term of imprisonment from one to three years for a class B violent felony, proves that his argument must be correct. He further argues that he was less than nineteen years old when the crime was committed and it was his first felony prosecution in Supreme Court, even though he had an extensive prior delinquency history in Family Court on other felony matters. The

defendant insists that under these circumstances, the sentencing judge was required to grant youthful offender status.

Based upon these claims, he argues that his adjudication as a second felony offender under Indictment number 3636/85 when he was convicted of Assault in the 2<sup>nd</sup> Degree was unlawful, and that it was improper to additionally adjudicate him as a mandatory persistent violent felony offender in the instant case.

The defendant also claims that his attorney provided ineffective assistance of counsel for failing to ensure that the court acknowledge his sentence as a youthful offender on the conviction for manslaughter in the 1<sup>st</sup> degree, that his attorney misadvised him on the instant case that he was facing a possible sentence of twenty-five years to life and that he could not controvert his prior convictions, and that his attorney should have prevented defendant's adjudication as a mandatory persistent violent felony offender.

The People argue that since defendant was convicted of three violent felony offenses within the mandated time frame as required by P.L. §70.08, he was correctly adjudicated a mandatory persistent violent felony offender. They further argue that all required procedures under CPL §400.16 were adhered to, and that defendant was never granted youthful offender status nor was he eligible to receive youthful offender treatment. Since defendant's status was correctly adjudicated, he was properly advised about a possible sentence as well as the inability to controvert his prior convictions, and since his attorney negotiated a better plea offer than the one initially offered, the People argue that defense counsel was effective. The People conclude that defendant's claims are all without merit and are procedurally barred.

Under Indictment number 3508/1979, the defendant was convicted of Manslaughter in the 1<sup>st</sup> Degree and sentenced on June 20, 1980 to an indeterminate term of imprisonment of one to three years. The People have provided the minutes of the sentencing proceeding, which definitively reflect that the defense attorney requested the Judge grant youthful offender treatment. The judge denied the request, stating his decision was based on the facts of the case and the recommendation of the Department of Probation. He sentenced the defendant, who was fifteen at the time of the crime, as a juvenile offender under P.L. §70.05 and C.P.L. §1.20(42), correctly following the guidelines and strictures of those statutes.

Additionally, C.P.L. §720.10(2)(c) precluded the defendant from being sentenced as a youthful offender, as the People correctly point out, because defendant had two prior juvenile delinquency adjudications for Robbery in the 1<sup>st</sup> Degree.

C.P.L. §720.10(2)(c) states:

Every youth is eligible to be found a youthful offender unless: "Such youth has previously been adjudicated on or after September 1, 1978, a juvenile delinquent who committed a designated felony act as defined in the Family Court Act."

Family Court Act §301.2(8) identifies Robbery in the 1<sup>st</sup> Degree as a designated felony act, and defendant's prior convictions as a juvenile delinquent occurred on February 27, 1979 and May 16, 1979, well after the effective date of the statute. Therefore, even if the judge had wished to exercise his discretion to adjudicate the defendant as a youthful offender, he would have been unable to do so legally.

On January 16, 1986, Defendant entered a plea of guilty to Assault in the Second Degree, a Class D violent felony offense, in satisfaction of Indictment number 3646/1985 which charged him with stabbing two women. On February 7, 1986, defendant appeared for sentencing and was

served with a predicate statement pursuant to C.P.L. §400.21, which listed his manslaughter conviction as the predicate felony. The People have attached a copy of that statement to their Affirmation in Opposition as Exhibit B. According to the minutes on that date, the defendant, through his counsel, controverted the prior conviction, claiming that it had been a youthful offender adjudication and could not be used to enhance the defendant's sentence on the assault case. The court held a hearing and determined that the defendant had not been adjudicated as a youthful offender, and therefore, he was sentenced to an indeterminate period of incarceration of two to four years as a predicate violent felony offender. His sentence was affirmed in *People v. Sweeney*, 133 AD2d 554 (2nd Dept 1987).

On November 17, 1989, defendant entered a plea of guilty under Indictment number 4405/1989, to Robbery in the First Degree, a class B violent felony, in satisfaction of the charges which alleged that he and two others had committed a gunpoint robbery. Defense counsel negotiated a plea from the original offer of twelve years to life to the minimum sentence of ten years to life to cover the nine count indictment. When served with the predicate statement at his sentencing proceeding on December 7, 1989, the defendant did not challenge the conviction for the two prior violent felonies. The Court has examined the predicate statement contained in the court file, and finds it to be an accurate statement of the relevant prior convictions.

The defendant did not controvert, nor raise any objection whatsoever to the predicate statement filed in this matter. The court determined that he was a mandatory persistent violent felony offender prior to imposing the promised sentence. Pursuant to C.P.L. §400.21(8), that finding is binding on the defendant in this and any other future proceeding.

C.P.L. §440.20 provides that, “at any time after the entry of a judgment, the court in which the judgment was entered may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law.” In this case, the defendant has failed to provide the Court with legal grounds to set aside the sentence, since the sentence imposed was valid and authorized.

As to defendant’s claims regarding ineffective assistance of counsel, The two-part test in *Strickland v Washington*, 466 US 668 (1984) requires a showing that counsel's performance was deficient and that the deficiency in performance prejudiced defendant. (*See also Aparicio v. Artuz*, 269 F.3d 78, 95 [2d Cir. 2001]). The performance of counsel is deficient if it “[falls] below an objective standard of reasonableness” under “prevailing professional norms.” (*Strickland supra* at 688). The second prong, also known as the prejudice prong, “focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process.” (*Hill v. Lockhart*, 474 US 52, 59 [1985]). In asserting these claims, the defendant has the burden of overcoming the presumption that his counsel’s representation was reasonable. (*Strickland supra* at 690). (“Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.”) Due to the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. There are countless ways to provide effective assistance in any given case.” (*Strickland, supra* at 689; *See also, People v. Baldi, supra* at 146-147; *People v. Jackson*, 52 N.Y.2d 1027 [1981]).

Based on defendant’s allegations, the Court must determine whether the evidence, the law and the circumstances of this particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided “meaningful representation.” (*People v. Baldi*,

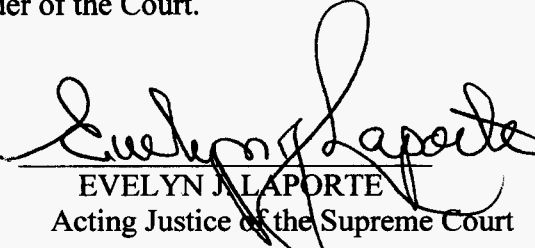
54 N.Y.2d 137 [1981]; *People v. Benevento*, 91 N.Y.2d 708 [1998]). “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. The defendant must show that defense counsel’s alleged deficiency constituted egregious and prejudicial error such that it deprived him of meaningful representation. (*People v. Caban*, 5 NY3d 143 [2005]).

Here, defense counsel provided accurate information and advice to the defendant regarding the maximum sentence he was facing along with the fact that defendant was bound by the prior determination regarding his predicate felony convictions, which he could no longer controvert. (*See People v. Loughlin*, 66 NY2d 633 [1985]).

While defendant argues that counsel should have prevented him from being sentenced as a mandatory persistent violent felony offender, as discussed above, that designation was properly adjudicated, so his attorney cannot be deemed ineffective for failing to make an argument that had little or no chance of success. (*People v. Caban*, supra at 152).

Defense counsel negotiated a favorable disposition on defendant's behalf and gave defendant accurate advice. Therefore, the defendant received the meaningful, effective representation to which he was entitled. Defendant’s motion is therefore denied in its entirety.

This constitutes the decision and order of the Court.

  
EVELYN J. LAPORTE  
Acting Justice of the Supreme Court  
**HON. EVELYN J. LAPORTE**

**ENTERED**  
OCT 23 2014  
NANCY T. SUNSHINE  
COUNTY CLERK

**Right to appeal:**

You are advised that your right to an appeal from the order determining your motion is not automatic except in the single instance where the motion was made under C.P.L. §440.30(1-a) for forensic DNA testing of evidence. For all other motions under Article 440, you must apply to a Justice of the Appellate Division for a certificate granting leave to appeal. **THE APPLICATION MUST BE SENT TO THE APPELLATE DIVISION, SECOND DEPARTMENT, 45 MONROE PLACE, BROOKLYN, NY 11201.** In addition, you must serve a copy of your application on the Kings County District Attorney, Renaissance Plaza, 350 Jay Street, Brooklyn, NY 11201. Do **NOT** send notice of appeal to the Supreme Court Justice who decided this motion.

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 question 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.