

People v Kilpatrick

2014 NY Slip Op 33272(U)

December 5, 2014

Supreme Court, Kings County

Docket Number: 6894/1985

Judge: Miriam Cyrulnik

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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 33

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

-against-

Indictment No: 6894/1985

VICTOR KILPATRICK,

Defendant

-----X

Miriam Cyrulnik, J:

Defendant moves, *pro se*, to vacate his judgment of conviction, pursuant to CPL §440.10, alleging that he was denied effective assistance of counsel with respect to plea offers made by the People.¹ The People oppose. In determining this motion, the court reviewed defendant's Motion to Vacate, the People's Affirmation in Opposition, defendant's Reply Affirmation and the court file.²

DEFENDANT'S CLAIMS THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ARE PROCEDURALLY BARRED

CPL §440.10 (3) (c) states:

Notwithstanding the provisions of subdivision one, the court may deny a motion to vacate a judgment when:

(c) Upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.

By his *pro se* motion, dated April 28, 1998, defendant sought to vacate his judgment of conviction pursuant to CPL §440.10, arguing, *inter alia*, that he was denied the right to effective

¹ Defendant's 2010 motion to set aside the verdict was decided by this court upon the retirement of the previous judge. Court practice dictates that any subsequent motions by this defendant are similarly assigned.

² For a comprehensive procedural history of defendant's case, *see* People's Affirmation in Opposition, pages 1 through 8.

assistance of counsel. On October 29, 1998, the Honorable Abraham Gerges rendered his decision denying defendant's motion to vacate in its entirety.

In his 1998 motion, defendant offered arguments regarding his right to effective assistance of counsel. However, although the information upon which he bases the instant motion was readily available to him in April 1998, defendant failed to include these issues and arguments among his requests for relief. Defendant now offers no reasonable explanation for his failure to do so.

Although defendant alludes to his opinion that the case law in 1998 did not support his present ineffective assistance of counsel claim, he concedes that he was aware of the arguments, but was unwilling or unable to present them at that time. Defendant further concedes that he became aware of relevant state case law "in the early 2000's," at which time he began work on the instant motion. However, defendant did not file the instant motion until 2014 (*see* Affidavit attached to defendant's Reply Affirmation at page 2).³

It is well settled that a court may summarily deny a motion to vacate, pursuant to CPL §440.10 (3) (c), where defendant presents arguments that could have been raised on a previous motion to vacate (*see People v Cochrane*, 27 AD3d 650 [2d Dept 2006], *lv denied* 7 NY3d 787 [2006]; *People v Brown*, 24 AD3d 271 [1st Dept 2005], *lv denied* 6 NY3d 846 [2006]; *People v Dover*, 294 AD2d 594 [2d Dept 2002], *lv denied* 98 NY2d 767 [2002]; *People v Thomas*, 147 AD2d 510 [2d Dept 1989], *lv denied* 74 NY2d 669 [1989]).

Defendant's failure to raise the grounds and issues presented in the instant motion when he made his previous motions to vacate in 1998 and 2010, despite being in a position to do so, is a

³ The court notes that, in 1998, the case law existed to enable defendant to make his present ineffective assistance arguments (*see U.S. v Gordon*, 156 F.3d 376 [2d Cir. 1998]; *Boria v Keane*, 99 F.3d 492 [2d Cir. 1996]).

procedural bar pursuant to CPL §440.10 (3) (c).

EVEN IF DEFENDANT'S INSTANT MOTION WAS NOT PROCEDURALLY BARRED PURSUANT TO CPL §440.10 (3) (c), HIS CLAIMS ARE WITHOUT MERIT AND ARE PROCEDURALLY BARRED PURSUANT TO CPL §440.30 (4) (d).

Criminal Procedure Law §440.30 (4) (d) states:

Upon considering the merits of the motion, the court may deny it without conducting a hearing if:

(d) An allegation of fact essential to support the motion is (i) contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true.

Defendant's latest claim of ineffective assistance of counsel is without merit. First, defendant relies chiefly upon his own self-serving affidavit, in which he claims that his counsel inadequately discussed with him the plea offers made by the People (*see* defendant's affidavit, attached to his Motion to Vacate). Defendant asserts that, had his counsel explained the terms of the plea offers made, the advantages and disadvantages of rejecting plea offers, the sentencing exposure, the allocution, his prospects for success at trial and the potential incarceration he faced after trial, he would have accepted a plea offer instead of going to trial.

Defendant also relies upon an affidavit from his mother, in which she essentially recounts defendant's version of his interactions with his counsel (*see* affidavit of Emilie Kilpatrick, attached to defendant's Motion to Vacate as Exhibit A).⁴

⁴ Although defendant's mother indicates in her affidavit that she once met with defense counsel on defendant's behalf, she offers no substantive information about the meeting. She also admits that much of the in-court interaction between defense counsel, defendant and the People that she claims to have witnessed was beyond her hearing and/or understanding.

The court finds that defendant's motion is based solely upon these self-serving affidavits, unsupported by any other credible evidence. Taking into consideration these factors and all other circumstances attending this case, the court finds that there is no reasonable possibility that defendant's allegations are true.

In order to prevail on a claim of ineffective assistance of counsel based on defense counsel's failure to adequately apprise him of a plea offer, a defendant would have to establish "that the People made the plea offer, that the defendant was not adequately informed of the offer, that there was a reasonable probability that the defendant would have accepted the offer, and that there was a reasonable likelihood that neither the People *nor the court* would have blocked the alleged agreement (*People v Nicelli*, 2014 NY Slip Op 07370 [2d Dept 2014] [emphasis added]; *see also People v Maldonado*, 16 AD3d 980 (2d Dept 2014); *Missouri v Frye*, 132 S Ct 1399 (2012); *Lafler v Cooper*, 132 S Ct 1376 (2012). There is no credible evidence to support any of the first three factors, and the fourth is directly contradicted by the record. The sentencing judge's comments suggest that it was virtually certain he would not approve concurrent sentences of 15-to-life.⁵ Therefore, defendant's Motion to Vacate is summarily denied as procedurally barred pursuant to CPL §440.30 (4) (d) (*compare People v. Maldonado*, 16 AD3d 980, *supra* [ordering a hearing in a case where allegations were raised before the court more than one month prior to the defendant's plea]).

In addition to the procedural bars discussed above, defendant offers no reasonable excuse or

⁵ The sentencing judge rejected the People's recommendation of consecutive 20-to-life sentences, calling the ADA who made it "kind and lenient" (Minutes of Sentencing Proceedings at page 15). He called the case "one of the worst...I think I presided over as a judge" (Minutes at page 12) and imposed the maximum sentences instead, stating "the record should reflect if I'm not around in 50 years, the defendant should serve every day of this sentence and never be allowed on the streets of any civilized society" (Minutes at page 19).

explanation for his delay in bringing the instant motion. Defendant was sentenced on February 18, 1987 - more than 27 years ago. The court notes it has been approximately 16 years since defendant's 1998 CPL §440 motion (in which he argued ineffective assistance of counsel), and 3½ years since his 2010 CPL §440 motion to vacate. These delays may be taken into consideration in determining the instant motion.

In *People v Torres*, – Misc.3d –, 2010 NY Slip Op 33167(U) (Sup Ct, Kings County 2010), the court held that “defendant’s credibility [was] undermined by the substantial period of time that passed before submitting” a CPL 440.10 and 440.20 motion 15 years after appealing the decision, noting that in *People v Nixon*, 21 NY 2d 338 [1967], the court “held that a delay of more than a decade was an important factor to be considered in evaluating the seriousness of the defendant’s claims” (see also *People v Degondea*, 3 AD3d 148 [1st Dept 2003], *lv denied* 2 NY3d 798 [2004]; *People v Melio*, 304 AD2d 247 [2d Dept 2003], *lv denied* 3 NY3d 644 [2004]; *People v Hanley*, 255 AD2d 837 [2d Dept 1998], *lv denied* 92 NY2d 1050 [1999]; *People v Sheppard*, – Misc.3d –, 2010 NY Slip Op 32887[U] [Sup Ct, Kings County 2010]; *People v Perez*, 11 Misc.3d 1093A [Sup Ct, Kings County 2006]; *People v Kirkland*, 1 Misc.3d 904A [Sup Ct, Kings County 2003]). Delays as lengthy as those in the present case “can be considered in evaluating the validity and legitimacy of a post-judgment motion” (see *People v Torres*, – Misc.3d –, 2010 NY Slip Op 33167[U] [Sup Ct, Kings County 2010], *supra*).

Accordingly, defendant’s motion to vacate his judgment of conviction is denied in its entirety.

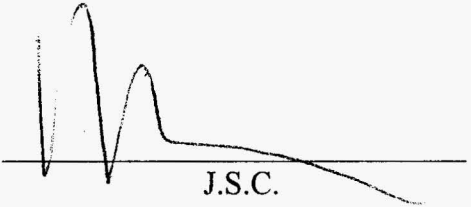
The defendant’s right to an appeal from the order determining this motion is not automatic except in the single instance where the motion was made under CPL §440.30 (1) (a) for forensic

DNA testing of evidence. For all other motions under CPL Article 440, the defendant must apply to a Justice of the Appellate Division for a certificate granting leave to appeal. This application must be filed within 30 days after the defendant has been served by the District Attorney or the court with the court order denying this motion.

The application must contain the defendant's name and address, indictment number, the questions of law or fact which the defendant believes ought to be reviewed and a statement that no prior application for such certificate has been made. The defendant must include a copy of the court order and a copy of any opinion of the court. In addition, the defendant must serve a copy of his application on the District Attorney.

This constitutes the decision and order of the Court.

Dated: December 5, 2014



J.S.C.

ENTERED
DEC 11 2014
NANCY T. SUNSHINE
COUNTY CLERK