

<b>People v Mills</b>
2014 NY Slip Op 33381(U)
December 15, 2014
Supreme Court, Kings County
Docket Number: 12026/93
Judge: Evelyn J. Laporte
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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.: 12026/93
	:	By: Hon. Evelyn Laporte
-against-	:	Date: December 15, 2014
	:	
LEOPOLD MILLS,	:	
Defendant	:	
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The defendant has filed a motion pursuant to C.P.L. §440.20 to set aside his sentence for a violation of probation on the grounds that the sentence of incarceration for five to fifteen years to run consecutively to the sentence imposed on two other indictments was unlawful. He alleges that a Declaration of Delinquency (“DOD”) was never filed in the case, and therefore, his term of probation had expired prior to this sentence being imposed. He argues that pursuant to Penal Law §65.15 (2) and C.P.L. §410.30, a DOD must be filed to interrupt the period of a probationary sentence. Upon the filing of the declaration, the probationary time period is tolled until a final determination as to the delinquency has been made by the court. If no such declaration is filed, then the probationary period continues to run. He argues that his probation expired because no such declaration was filed here. In support of this allegation, he argues that there are no notations on the jacket of the court file to show that the DOD was filed, nor was he ever personally served with a DOD. In response, the Department of Probation argues that the defendant has failed to come forward with evidence to overcome or rebut the presumption of regularity, and therefore, his motion must be denied.

On December 30, 1993, the defendant was indicted for Criminal Sale of a Controlled Substance in the Third Degree (P.L. §220.39), two counts of Criminal Possession of a Controlled Substance in the Third Degree (P.L. §220.16[1]), and two counts of Criminal Possession of a Controlled Substance in the Seventh Degree (P.L. §220.03). On February 17, 1994, defendant entered a plea of guilty to Attempted Criminal Sale of a Controlled Substance in the Third Degree, and on April 19, 1994, he was sentenced to 1 day plus five years probation. Two years later, while still on probation, defendant was rearrested on a charge of Criminal Possession of a Controlled Substance in the Third Degree and indicted for this offense under Indictment #6641/96. He subsequently entered a plea of guilty to Attempted Criminal Possession of a Controlled Substance in the Fifth Degree to cover this indictment.

On October 2, 1996, almost five months after his re-arrest, a violation of probation ("VOP") was filed on the original case, and the VOP was adjourned to track the above-mentioned Indictment #6641/96. The defendant made several appearances, however, on a subsequent adjourn date, September 23, 1997, the defendant failed to appear on both cases and a warrant was ordered for his arrest. The defendant remained at large until he was rearrested on November 6, 1998 on a charge of Murder in the Second Degree. He was indicted for that charge, along with one count of Manslaughter in the First Degree, and one count of Criminal Possession of a Weapon in the Fourth Degree under Indictment #11224/98. No action was taken on the drug case or the VOP while the murder case was pending.

After a jury trial on the murder indictment, defendant was found guilty of Manslaughter in the First Degree and Criminal Possession of a Weapon in the Fourth Degree and was sentenced on June 22, 1999 to concurrent terms of imprisonment of twenty-two years for the

Manslaughter conviction and one year for the Criminal Possession of a Weapon conviction. On the next day, defendant was produced on both the violation of probation which is the subject of this motion, and on Indictment #6441/96, the drug case which the VOP had been tracking. The defendant was then sentenced to a term of five to fifteen years imprisonment on the VOP to run consecutively to the sentence imposed on the Manslaughter conviction, and a sentence was imposed of a period of incarceration for two to four years, also to run consecutively, on the drug case in which the defendant had previously entered a plea of guilty. Defendant now challenges the sentence imposed on the VOP, claiming that it is an illegal sentence since a Declaration of Delinquency was never filed in the case, and therefore, the probation term expired prior to sentence being imposed.

The defendant has waited fifteen years to file this motion, and not only does this extensive passage of time detract from the credibility of his claim, but additionally and not surprisingly, the Court finds that some relevant information is unavailable or missing. There have been myriad problems in reconstructing what occurred in this case. The court files for Indictments 6441/96 and 11224/98 are missing. The minutes for October 2, 1996, the date the violation of probation was lodged, are unavailable. (*See*, Exhibit A, Affidavit of Keith Olarnick.) The Department of Probation's file on this case is also unavailable.

While there is no time limit on filing a C.P.L. §440 motion, courts have denied without a hearing motions brought after a prolonged or excessive delay. (*People v. Friedgood*, 58 N.Y.2d 467 [1983][motion to vacate judgment of conviction denied without a hearing where defendant waited more than three years to file it and failed to show that he used due diligence in adducing the facts underlying the motion;] *See also People v. Macon*, 33 Misc 3d 1216(A) [Sup Ct, NY County 2011]; *People v. Nixon*, 21 NY2d 338 [1967]).

While a great deal of information is missing, the Court has been able to reconstruct information relevant to this motion through prior decisions issued in this matter. On October 22, 2001, the Appellate Division, Second Department issued a decision which covered all three of defendant's indictments in *People v. Mills*, 287 AD2d 657 (2nd Dept 2001). In his direct appeal, defendant raised two issues: (1) that the evidence was legally insufficient to establish his guilt of manslaughter beyond a reasonable doubt; and (2) that the sentences imposed upon him were excessive. The court found that the evidence was, in fact, legally sufficient to support a finding that the defendant acted with the intent to cause serious physical injury, thereby establishing his guilt of manslaughter in the first degree beyond a reasonable doubt, and that the sentences imposed were not excessive. While defendant had an opportunity to raise his on the record claim that a Declaration of Delinquency was never filed and he was therefore illegally sentenced on the violation of probation, he failed to do so.

On January 5, 2004, defendant filed a motion pursuant to C.P.L. § 440.10 and 440.20 in this court. In his motion to set aside the sentence, defendant argued that he had been improperly adjudicated a second felony offender. The court found that the defendant was properly adjudicated a second felony offender under New York Penal Law §70.06 and the motion was denied. The Appellate Division further denied defendant's application for leave to appeal this decision. (June 23, 2004, Prudenti, J.). Once again, the defendant did not raise his claim that the Department of Probation failed to file a Declaration of Delinquency.

C.P.L. §440.30 directs that in a motion to set aside the sentence, a defendant should raise every ground upon which he intends to challenge the sentence, however, this defendant failed to do so in his direct appeal or in his prior motion filed pursuant to C.P.L. §440.20.

Additionally, on July 26, 2004, defendant filed a petition for *habeas corpus* in the Eastern District of New York. In that petition, he raised the following claims: (1) that the evidence was insufficient to support his conviction of manslaughter; (2) that his trial counsel was ineffective; and (3) that he was improperly adjudicated as a second felony offender. As is the case in defendant's prior motions, he did not argue that he was improperly sentenced due to the failure of the Department of Probation to file a Declaration of Delinquency.

In a decision dated May 26, 2005, the Federal court (Gleeson, J.) denied all of defendant's claims, finding that he received the effective assistance of counsel, and that the evidence at trial amply supported the jury's verdict. The court found the defendant's sentencing claim to be without merit. (*Mills v. Phillips*, 2005 WL 1262105 [EDNY 2005]).

This Court has closely examined the court file in this case, and while the defendant's assertion that there is no DOD in the court file is accurate, there are other official documents that provide essential information. On June 23, 1999, when defendant was sentenced on the violation of probation, the court clerk filed an Order of Commitment containing information about the defendant, including his date of birth and NYSID number, information about the crime and the indeterminate term of incarceration imposed, as well as the fact that the sentence was to run consecutively to Indictment 6641/96 and #11224/98. In the remarks section, the clerk noted that the defendant plead guilty to two specifications, number one and number five, on his VOP case. These specifications are derived from a Violation of Probation report which is regularly filed by the Department of Probation simultaneously with the DOD. (*Aff. In Opposition*, ¶ 15.)

It is well settled that a presumption of regularity attaches to all judicial proceedings, and it is the defendant who bears the burden of rebutting that presumption. (*People v. Firrira*, 258 AD2d 666 [2nd Dept 1999]; *People v. Washington*, 246 AD2d 676 [2nd Dept 1998]). "Upon the

presumption of regularity rests much of the sanctity and effectiveness of our judicial system and it has been held to be of paramount importance in the administration of justice. It has been variously called an 'invincible presumption', and an 'indisputable presumption' or 'a maxim of jurisprudence,' not with the idea of giving it conclusiveness against proof to the contrary, but of measuring the evidence required to overcome it. The presumption of regularity may be overcome only by affirmative proof sufficient to rebut its effectiveness; neither conjecture, inference, nor coincidence can be substituted for such affirmative proof or refute the force of the presumption." (*People v. Lopez*, 97 AD2d 5 [1st Dept 1983]).

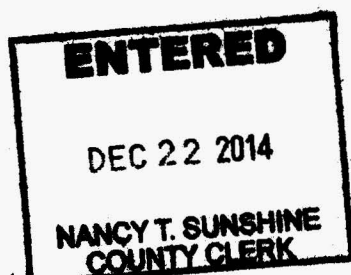
In the absence of any specific proof, the law presumes that the statutory requirements were satisfied. Under the presumption of regularity, the law further presumes that no official or person acting under an oath of office will do anything contrary to his official duty, or omit anything which his official duty requires to be done. Substantial evidence is necessary to overcome the presumption. (*People v. Dominique*, 90 NY2d 880 [1997]).

Applying the rule to this case, the law presumes that the representative of the Department of Probation filed the proper paperwork in this case, including both the Violation of Probation Report containing the appropriate specifications, as well as the DOD, which tolled the probationary time period. The absence of a reference to the DOD on the jacket of the court file, or the fact that the document cannot be located in the court file eighteen years after it was filed, is inconclusive and therefore insufficient to rebut the presumption of regularity accorded to judicial proceedings. (*People v. Nazario*, 253 AD2d 726 [1st Dept 1998]). Since under the presumption of regularity it is presumed that the DOD was filed, the probationary period was

appropriately tolled during the pendency of the defendant's other cases, and when sentence on the VOP was imposed, it was a valid and authorized sentence.

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, and he has failed to submit substantial evidence to overcome the presumption of regularity related to the filing of the DOD in this case.

This constitutes the decision and order of the Court.



*Evelyn J. Caporte*  
EVELYN J. CAPORTE  
Acting Justice of the Supreme Court

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.