

People v Kirkland

2014 NY Slip Op 33773(U)

July 25, 2014

County Court, Westchester County

Docket Number: 13-766

Judge: Barry E. Warhit

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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

FILED
AND ENTERED
ON July 25, 2014
WESTCHESTER
COUNTY CLERK

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

-against-

ADAM KIRKLAND,

Defendant.

-----X
WARHIT, J.

DECISION AND ORDER

Indictment No.: 13-766

JUN 25 2014
T.
COUNTY CLERK
COUNTY OF WESTCHESTER

By Notice of Inability to Pay Fine Imposed and Affidavit in Support thereof, Defendant has moved, *pro se*, for an order, pursuant to New York State Criminal Procedure Law ("Criminal Procedure Law" or "CPL") § 440.20, resentencing him to excuse court imposed fines in the amount of \$375. By Affirmation in Opposition and Memorandum of Law, the People have opposed Defendant's application in its entirety.

On February 24, 2014, Defendant appeared with counsel before this court for the commencement of pre-trial hearings. Rather, than proceed with the hearings and a subsequent trial, Defendant elected to enter pleas of guilty to one count each of Robbery in the first degree and Burglary in the first degree in exchange for a negotiated sentence. Upon finding Defendant's pleas to have been knowingly, intelligently and voluntarily made, this court accepted Defendant's pleas of guilty and adjourned the matter for sentence.

On April 22, 2014, in accordance with the negotiated plea deal, court sentenced the defendant to concurrent terms of twelve (12) years imprisonment followed by five years of

post-release supervision. The court imposed the mandatory \$300 surcharge, \$50 DNA Databank fee and \$25 crime victim assistance fee.

Defendant is presently serving the imposed sentence. The website maintained by the New York State Department of Corrections and Community Supervision informs that May 12, 2026 is the maximum expiration date of Defendant's sentence and that June 30, 2024 is his earliest release date.

Through the within application, Defendant claims he is unable to pay the \$375 mandatory surcharge and imposed fees and seeks to be resentenced in order to avoid payment thereof. The court is without authority to waive the imposition of the surcharge and fees (CPL § 420.35[2])("[u]nder no circumstances shall the mandatory surcharge, sex offender registration fee, DNA databank fee or the crime victim assistance fee be waived [other than the crime victim assistance fee may be waived in the case of a Youthful Offender upon a finding of financial hardship]"). Accordingly, Defendant's motion for re-sentencing is denied.

To the extent the within application can be read as an application to defer payment of the imposed surcharge and fees, Defendant's application must also be denied. The New York State Penal Law ("Penal Law" or "PL") directs trial courts to impose mandatory surcharges and fees including, among others, a DNA databank fee and a crime victim assistance fee (PL § 60.35[1][a][1]; CPL § 420.35[2]). Penal Law § 60.35[5], which addresses the collection of said mandatory surcharges from incarcerated prisoners, specifically directs that, without exception, the facility "shall cause any amount owing to be collected from such

person during the term of imprisonment from moneys to the credit of an inmates' fund¹ or such moneys earned by a person in the work release program" (PL § 60.35[5]).

The Criminal Procedure Law contemplates a defendant's right to seek to defer the obligation to pay all, or part, of the court imposed mandatory surcharges and fees including, but not limited to, the DNA database fee at a financial hardship hearing (CPL § 420.40[1]). However, this enabling statute explicitly requires that the financial hardship hearing occur "[o]n an appearance date set forth in a summons issues pursuant to subdivision 3 of section 60.35 of the penal law, . . ." (CPL § 420.40[2]). Penal Law § 60.35[8] expressly limits matters in which a summons may be issued to those in which a defendant is not sentenced to more than sixty (60) days incarceration (PL § 60.35(8)).

Lower courts have reached contradictory conclusions regarding whether an incarcerated defendant, who is serving a sentence of more than sixty (60) days, is entitled to seek deferral of mandatory surcharges and fees. Upon consideration of the clear language of the applicable statutes and mindful of the mandate that laws be executed in accord with the spirit and meaning the legislature intended, this court joins those lower courts which have determined that a defendant incarcerated in excess of sixty (60) days is not entitled to deferral of mandatory surcharges and fees (see People v. Morrison, 36 Misc.3d 868 [Sup Ct., NY Co. 2012]; People v. Allen, 13 Misc. 3d 1208[A] [Sup. Ct. NY Co. 2006]; People v.

¹The inmates' fund includes money which the inmate had in his possession upon entering the facility as well as any money he earns through work performed at the facility or which is deposited on his behalf with the superintendent of the facility (CPL § 60.35[5]).

Hopkins, 185 Misc 2d 312 [Sup Ct. Kings Co. 2000]².

Further support for the fact that the legislature did not intend for Defendant to be entitled to the relief sought is found at CPL § 420.40[3] which directs courts to “be mindful of the mandatory nature of the surcharge . . . or DNA databank fee and the important criminal justice and victim services sustained by such fees” (CPL § 420.40[3]). Additionally, the legislature expressly provided that, where an incarcerated defendant owes mandatory surcharges and fees, the facility in which the inmate is detained “shall cause any amount owing to be collected from such person during the term of imprisonment from moneys to the credit of an inmates’ fund³ or such moneys earned by a person in the work release program” (PL § 60.35[5])(emphasis added). Of import, Penal Law § 60.35[5] does not identify any exceptions to this rule or set forth a procedure by which an inmate may object to the facility’s collection of the imposed surcharges and fees (see, Id.).

Even assuming, arguendo, that the within Defendant is entitled to seek deferral of the imposed mandatory surcharge and fees, he is ineligible for the relief sought. Deferral is not awarded simply for the asking (see, People v. Sabino, 2010 N.Y. Misc. LEXIS 2337, 2010 NY Slip Op 31291[U] [Sup Ct, Kings Co. 2010]). Only a defendant, who sets forth credible and verifiable evidence demonstrating that he is indigent and that payment of the surcharge would

² Other courts have reached a contrary conclusion (see, People v. Bennett, 2013 N.Y. Misc. LEXIS 1406, 2013 NY Slip Op 30676[U] [Sup Ct, Kings Co.]; People v. Pierce, 16 Misc 3d 1126[A], 847 N.Y.S.2d 904, 2007 NY Slip Op 51587[U] [Sup Ct, NY Co. 2007]; People v. Hazel, 13 Misc 3d 728, 827 N.Y.S.2d 561 [Sup Ct, Bronx County 2006]).

³The inmates’ fund includes money which the inmate had in his possession upon entering the facility as well as any money he earns through work performed at the facility or which is deposited on his behalf with the superintendent of the facility (CPL § 60.35[5]).

work an unreasonable hardship upon him or his immediate family, is entitled to a deferral (CPL § 420.40[2]).

The herein Defendant filed a pre-printed form which is wholly devoid of any assertions or documentation concerning his prison employment or other credits to or charges against his inmate account. The mere fact that Defendant is incarcerated does not prove indigence (see, People v. Hopkins, 185 Misc.2d at 316; People v. Santiago, 160 Misc.2d. 349 [1994]; People v. Johnson, 147 Misc.2d 1015 [1990]).

Moreover, Defendant utterly failed to distinguish his alleged financial hardship from that of any other inmate (see, Notice of Inability to Pay Fine Imposed and Affidavit in Support). Accordingly, he has not demonstrated, as is required, that the imposed surcharges and fees cause him an unreasonable hardship over and above the ordinary hardship other indigent inmates suffer (see, CPL § 420.40[2]); see, People v. Abdus-Samad, 274 AD2d 666 [3d Dept. 2000], lv. denied, 95 NY2d 862 [2000]; see also, People v. Law, 41 Misc.3d 1220(A); 2013 N.Y. Misc. LEXIS 4931 [Sup.Ct. Bx.Co. 2013]).


The within Defendant merely puts forth, in wholly conclusory and self-serving form, that he is currently incarcerated and without ability to pay the imposed surcharges and fees. (see, Notice of Inability to Pay Fine Imposed and Affidavit in Support). This court is "entitled to presume, absent a showing otherwise, that correction officials are providing for the defendant's basic needs, including any essentials for appropriate hygiene in a prison setting (People v. Hazel, 13 Misc.3d 728 [Sup.Ct. Bx. Co. 2006] citing NYS Correction Laws § 137). Defendant herein does not allege that prison officials are not providing for his basic needs.

For all of the foregoing reasons, this court finds Defendant lacks a legal right to request deferral of mandatory surcharges and fees and, even assuming he has such a right, that

Defendant has wholly failed to demonstrate a financial hardship upon which the relief requested should be granted. Consequently, Defendant's motion is denied in its entirety.

The foregoing constitutes the decision and order of this court.

Date: White Plains, New York
July 25, 2014



HONORABLE BARRY E. WARHIT
Westchester County Court Judge

HON. JANET DiFIORE
District Attorney, Westchester County
111 Dr. Martin Luther King Jr. Boulevard
White Plains, New York 10601
By: John J. Sergi
Assistant District Attorney

MR. ADAM KIRKLAND (14A1767)
Defendant, Pro se
Downstate Correctional Facility
Box F
Red Schoolhouse Road
Fishkill, New York 12524-0445

CLERK OF THE COURT