

People v Ellis

2016 NY Slip Op 32876(U)

January 14, 2016

County Court, Westchester County

Docket Number: 15-0207s

Judge: Anne E. Minihan

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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

FILED
AND ENTERED
ON January 14, 2016
WESTCHESTER
COUNTY CLERK

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:
THE PEOPLE OF THE STATE OF NEW YORK :
:
-against- :
:
:
DEVON ELLIS, :
:
Defendant. :
-----X

DECISION AND ORDER
Indictment No.: 15-0207s

MINIHAN, J.

The following papers were considered on Defendant Devon Ellis' motion pursuant to New York State Criminal Procedure Law ("CPL") § 420.40, seeking that the mandatory surcharges imposed upon him by this court be deferred pending his release from incarceration or alternatively for an order dismissing the surcharges:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affidavit	1
Affirmation in Opposition/Memorandum of Law	2

FILED
JAN 15 2016
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

Upon consideration of the papers filed, the defendant's motion is DENIED.

Facts and Procedural History

On December 5, 2014, the defendant personally appeared with counsel and was arraigned on Westchester County Indictment number 15-0207 stemming from an arrest by the Greenburgh Police Department on December 2, 2014. According to the People, on December 2, 2014, at approximately 4:24 p.m., at the corner of Tarrytown Road and Yellowstone Avenue, Town of Greenburgh, Westchester County, New York, the defendant was found in possession of seven individually packaged bundles containing sixty-nine glassine envelopes of heroin where the defendant resisted arrest.

On May 4, 2015, the defendant personally appeared with counsel before this court and subsequent to a complete *voir dire*, entered a knowing, intelligent and voluntary plea of guilty to one count of criminal possession of a controlled substance in the 5th degree (Penal Law § 220.06 (01) in full satisfaction of the indictment.

On July 13, 2015, in accordance with the negotiated plea, this court sentenced defendant to a determinate term of imprisonment of 2 ½ years of incarceration in state prison to be followed by 1 ½ years of post-release supervision. Additionally, this court imposed a \$300.00 mandatory surcharge, a \$25.00 crime victim assistance fee, and a \$50.00 DNA databank fee.

The defendant is presently serving the imposed sentence. The website maintained by the New York State Department of Corrections and Community Supervision informs that January 2, 2017 is defendant's earliest release date and that May 12, 2017 is the maximum expiration date of his sentence.

On November 5, 2015, the court received the defendant's instant motion to defer mandatory surcharges pursuant to CPL § 420.40. Through the within application, the defendant contends that he receives no prison wages and as such, making payments toward the mandatory fees imposed by this court presents a financial hardship (defendant's aff ¶ 5). Accordingly, the defendant seeks an order of this court deferring payment or in the alternative dismissing the fines (*Id* at ¶ 6). The defendant did not include any information regarding his income from sources other than prison earnings, his expenses, property, bank accounts, or any funds received by him or on his behalf at the time of admission or the balance currently in his inmate account.

The People have opposed the defendant's application.

Legal Analysis

Penal Law § 60.35 and Criminal Procedure Law § 420.35 provide for the imposition of mandatory surcharges and fees including, among others, a DNA databank fee and a crime victim assistance fee, as well as the collection of any unpaid portion of the fees during a defendant's imprisonment (PL § 60.35[1][a][I]; CPL § 420.35[2]). CPL § 420.40[3] 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]).

Penal Law § 60.35[5], provides for the collection of mandatory surcharges, and specifies 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]). Penal Law § 60.35[5] neither identifies exceptions to this rule nor sets forth a procedure by which an inmate may object to the facility's collection of the imposed surcharges and fees (*see Id*). Penal Law § 60.35(8) governs the collection of such fees and directs the issuance of a summons "if after sixty days from the date [the mandatory surcharge] was imposed it remains unpaid" (Penal Law § 60.35[8]). An appearance date is fixed in the summons and the defendant is required to appear on "the first day court is in session falling after the sixtieth day from

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]).

the imposition of the mandatory surcharge.” The statute additionally provides that:

“*[t]he court shall not issue a summons under this subdivision to a person who is being sentenced to a term of confinement in excess of sixty days in jail or in the department of corrections and community supervision. The mandatory surcharges, sex offender registration fee and DNA databank fees, crime victim assistance fees and supplemental sex offender victim fees for those persons shall be governed by the provisions of section 60.30 of this article” (Penal Law § 60.35[8])(emphasis supplied)².*

Penal Law § 60.30, entitled “civil penalties,” provides that “[t]his article does not deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty and any appropriate order exercising such authority may be included as part of the judgment of conviction” (Penal Law § 60.30).

In any event, to obtain a deferment of a mandatory surcharge under CPL § 420.40, a defendant is required to set forth credible and verifiable evidence demonstrating that he is indigent and that the payment of surcharges would work an unreasonable hardship upon him or his immediate family (CPL § 420.40[2]; *see eg, People v Parker*, 183 Misc2d 737, 738 [Sup Ct Kings Co, 2000]). Where a defendant’s basic needs (food, lodging, hygienic supplies, and clothing) are provided by the penal institution where he is housed, a defendant must assert sufficient facts establishing an unmet need to warrant deferral (*People v Parker*, 183 Misc 2d 737, 738 [Sup Ct Kings Co, 2000]). A deferral is not awarded simply for the asking (*see People v Sabino*, 42 Misc3d 141(A)[Sup Ct Kings Co, 2010]) and the mere fact that a defendant is incarcerated does not prove indigence (*see People v Hopkins*, 185 Misc2d 312, 316 [Sup Ct kings Co, 2000]; *see also People v Santiago*, 160 Misc2d 349 [1994]; *People v Johnson*, 147 Misc2d 1015 [1990]).

²Notably, the People point out that based on the language of Penal Law § 60.35[8] italicized above has led to a rift in lower court precedent. Some courts have ruled that deferral of the mandatory surcharge under CPL § 420.40[2] is unavailable to a defendant whose term of confinement exceeds sixty days, since the statute precludes the issuance of a summons and an appearance due to non-payment for such persons (*see eg, People v Morrison*, 36 Misc3d 880 [Sup Ct NY Cty, 2012]; *People v Hopkins*, 185 Misc2d 312 [Sup Ct Kings Cty, 2000]). Other courts have held, to the contrary, that such discretionary authority to defer a mandatory surcharge is available for any defendant under the broad authority granted by Penal Law § 60.30 over “civil penalties” (*see eg, People v Law*, 41 Misc3d 1220 [Sup Ct, Bronx Cty, 2013]; *People v Bennett*, 2013 NY Slip Op 30676U [Sup Ct Kings Cty, 2013][DiMango, J.]). The Appellate Division, Fourth Department has recognized blanket authority for deferral of mandatory surcharges and fees (*People v. Camacho*, 4 AD3d 862 [2004]). In the absence of authority from the Appellate Division, Second Department, this court is bound by the Fourth Department’s precedent (*see Mountainview Coach Lines v. Storms*, 102 AD2d 663, 664 [1984]).

The defendant herein has failed to set forth a basis upon which this court should reasonably conclude that he requires deferral of the mandatory surcharge and fees. The defendant's affidavit is devoid of any assertions or documentation concerning his credits to or charges against his inmate account. So too, the defendant fails to show, or even allege, whether he is responsible for supporting an immediate family member who could be adversely affected by deductions from his prison inmate account to the extent he has a balance (*see People v Taylor*, 2008 WL 912939 [NY Sup, 2008]). Further, the defendant has failed to distinguish his alleged financial hardship from that of any other inmate in that he has failed to show any circumstance affecting him which render the imposed fees an unreasonable hardship on him over and above the ordinary hardship suffered by other indigent inmates (CPL § 420.40[2]); *see People v. Abdus-Samad*, 274 AD2d 666 [3d Dept, 2000]; *see also, People v Julian Martinez*, Ind No 14-0114 [West Co Ct, 2015](Warhit, J.); *People v William Reyes*, Ind Nos S810-2013, 901S-2013 [West Co Ct, 2014](Zambelli, J.); *People v Law*, 41 Misc3d 1220(A)[Sup Ct Bx Co, 2013]; *People v Adam Kirkland*, Ind No 13-0766 [West Co Ct, 2014](Warhit, J.); *People v Morrison*, 36 Misc3d 868 [Sup Ct NY Co, 2012]; *People v Allen*, 13 Misc3d 1208[A] [Sup. Ct. NY Co. 2006]; *People v Hopkins*, 185 Misc 2d 312 [Sup Ct Kings Co, 2000]).

Accordingly, and for all of the foregoing reasons, this court finds that the defendant has not provided any "credible and verifiable information establishing that the surcharge would work an unreasonable hardship on defendant over and above the ordinary hardship suffered by other indigent inmates" (*see Abdus-Samad, supra*, at 667). Since the defendant has failed to make the requisite showing as to why his mandatory surcharge and fees should be deferred, his motion pursuant to CPL § 420.40 is denied.

The foregoing constitutes the decision and order of this court.

Date: White Plains, New York
January 14, 2016


HON ANNE E MINIHAN
Westchester County Court Judge

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