

People v Hardy

2017 NY Slip Op 33101(U)

November 30, 2017

Supreme Court, Erie County

Docket Number: 2015-01315D

Judge: Deborah A. Haendiges

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At a Criminal Special Term of Supreme Court, Part 9, held in and for the County of Erie and the State of New York at the Erie County Courthouse in the City of Buffalo on the 30th day of November 2017.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK

vs.

Indictment No. **2015-01315D**

BRANDEN L. HARDY,

Defendant.

HON. JOHN J. FLYNN, JR.,
District Attorney of Erie County,
By: **Daniel J. Punch, Esq.,**
Assistant District Attorney,
for the People,

Branden Hardy,
Defendant, *pro se.*

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ERIE COUNTY CLERK

FILED

MEMORANDUM AND ORDER

HAENDIGES, J.

The defendant moves pursuant to section 440.10 of the Criminal Procedure Law for an order vacating the judgment of conviction obtained in the above-

entitled matter.

On September 8, 2014, the defendant pleaded guilty to one count of Burglary in the Second Degree, a class C violent felony, in violation of section 140.25[2] of the Penal Law. He had been indicted on a charge of first degree burglary and a third degree weapon possession charge. Said charges arose out of the defendant's unlawful entry into the home of his former girlfriend at approximately 5:15 AM on August 2, 2015 and his intention to use a knife to harm her then current boyfriend. The defendant was sentenced on February 23, 2017 to a determinate term of five (5) years' imprisonment, to be followed by a five-year period of post-release supervision.

A notice of appeal was timely filed. Said appeal is pending.

On the instant motion, the defendant is seeking *vacatur* of his conviction on the ground that his guilty plea was not made knowingly and voluntarily:

1) because the court and the prosecution engaged in coercive tactics with the prosecution advocating the denial, and the court improperly denying, his valid speedy trial motion and forcing him to consider pleading guilty to the reduced charge offered by the prosecution or risk going to trial on the indictment charges; and

2) due to defense counsel's ineffectiveness as a result of advising the defendant that he could raise the speedy trial issue on his direct appeal and that the appellate court would reverse the conviction and dismiss the indictment on speedy trial grounds.

Having examined the affidavits in support of the defendant's post-conviction motion and the opposing affidavits of the People, this court finds that the motion is without merit and

accordingly is denied.

Considering at the outset ground 1 of the defendant's motion, the issues forming the basis for said ground are matters of record. As such, subdivision two of CPL §440.10, which severely limits the availability of the post-conviction remedy by precluding a court from vacating a judgment of conviction if sufficient facts appear on the record, provides that:

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

...

- (b) The judgment is, at the time of the motion, . . . pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal

The rationale for CPL §440.10[2][b] is that errors apparent on the face of the record are easily reviewable upon appeal, and as long as defendant has appealed or has ever had the opportunity to appeal, the law has afforded him adequate recourse (see *People v. Bye*, 95 Misc2d 1031).

The plea arrangement offered by the prosecution and this court's sentencing commitment appear on the face of the record. The proper method, then, to challenge the validity of the guilty plea is by way of an appeal (see *People v. Howard*, 12 NY2d 65; *People v. Glover*, 71 Misc2d 4). Consequently, the defendant's motion, based on

ground 1, must be denied (see *People v. Cuadrado*, 9 NY3d 362; *People v. Cooks*, 67 NY2d 100; *People v. Griffin*, 115 AD2d 902).

Turning now to ground 2 of the defendant's motion, this court notes that there is a presumption of regularity attaching to judgments of conviction (see *People v. Sessions*, 34 NY2d 254; *People v. Ramsey*, 104 AD2d 388). Such presumptions impose upon a defendant the burden of coming forward with substantial evidence to rebut the presumptions (see *People v. Pichardo*, 168 AD2d 577).

While the production of contrary evidence will satisfy the burden of going forward and eliminate the presumption of regularity from the case, bare allegations are insufficient to carry this evidentiary burden (see *People v. Session*, supra; *People v. Spencer*, 32 NY2d 446). In the instant case, the allegation that defense counsel was ineffective as a result of misadvising him on the likely success of his speedy trial issues on direct appeal as a way to induce his acceptance of the prosecution's plea offer has not been substantiated. Beyond his own self-serving assertions, the defendant does not provide any documentary evidence showing that counsel had improperly advised him on the outcome of his speedy trial issues on appeal by assuring him that the Appellate Division will find in his favor and dismiss the indictment. In fact, defense counsel, as well as the prosecutor and this court, placed on the record of the plea proceeding that the defendant, by pleading guilty, would thereby waive his statutory speedy trial rights, but not his speedy trial rights under the U.S. Constitution (Plea Transcript, pp. 40-42; see

People v. Taylor, 65 NY2d 1; *People v. Suarez*, 55 NY2d 940). The defendant acknowledged that he understood the distinction and stated that he was willing “to take the gamble” as he proceeded to plead guilty (*see* Plea Transcript, p. 43).

Under the New York standard, defense counsel is deemed effective so long as the evidence, law and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation (*see People v. Baldi*, 54 NY2d 137). The meaningful representation standard requires reasonable competence, not perfect representation, and focuses on the fairness of the process as a whole rather than any particular impact on the outcome of the case (*see People v. Modica*, 64 NY2d 828; *People v. Benevento*, 91 NY2d 708). The Federal standard applies a two-prong approach, which requires a showing both that counsel’s performance was deficient and that the deficient advice actually had an adverse effect on the defense (*see Strickland v. Washington*, 466 US 668; *People v. McDonald*, 1 NY3d 109). The instant defendant has failed to meet his burden of showing ineffective assistance of counsel under either standard.

As a matter of fact, this court notes that defense counsel made proper pre-trial motions, including the omnibus pre-trial discovery motion and a *Huntley* motion. Moreover, counsel engaged in extensive plea negotiation with the prosecution and spent significant time discussing the proposed plea agreement with the defendant. Defense counsel appeared ready to proceed to trial if the defendant had chosen not to plead guilty.

In any event, a thorough examination of the court record reveals that under the totality of the circumstances, defense counsel exercised the skill and diligence that one could expect from an experienced trial attorney. Since the defendant pleaded guilty to the charges, he thereby waived all non-jurisdictional defects in the proceeding before this court (see *People v. Nesbett*, 255 AD2d 950; *People v. Beaton*, 303 AD2d 593), including the right to challenge any factual basis for the plea as well as any defenses (see *People v. Harris*, 15 AD3d 882 [4th Dept.]; see also *People v. Parilla*, 8 NY3d 654 - defendant failed to show that alleged ineffectiveness of counsel goes to the voluntariness of his guilty plea). Moreover, a guilty plea and the resulting conviction are presumptively voluntary, valid and not otherwise subject to collateral attack (see *People v. Latham*, 90 NY2d 795; *United States v. Broce*, 488 US 563; *People v. Taylor*, *supra*).

Since the defendant has called into question the validity of his guilty plea, it is now incumbent upon the court to determine whether or not the defendant made a knowing, intelligent and voluntary plea of guilty. A review of the entire court file indicates that at no stage in the proceedings did the defendant exhibit any aberrant behavior that would suggest he did not understand the proceedings. An examination of the plea transcript reveals that the defendant was lucid, was coherent, responded appropriately to questions posed by this court and stated that he was not under the care of a doctor or mental health professional for any illness that would negatively impact his ability to understand the nature of the proceedings (see Plea Transcript, pp. 33, 43-44).

He also stated that he had not consumed any alcohol or drugs of any kind in the preceding twenty-four hour period (*see* Plea Transcript, pp. 33, 44). The defendant confirmed that he had enough time to discuss the plea offer with his attorney and that he was satisfied with the services his attorney had provided (*see* Plea Transcript, p. 44). He acknowledged that no promises, other than the sentencing commitment, were made by anyone to him in exchange for his guilty plea (*see* Plea Transcript, p. 54). The transcript further reveals that this court engaged in thorough, careful and thoughtful discussion of the effects of pleading guilty and not going to trial. This court fully discussed the legal principles involved in a guilty plea with the instant defendant (*see* Plea Transcript, pp. 44-49). The defendant affirmed that no one had forced him in any way into pleading guilty (*see* Plea Transcript, p. 54) and that he understood the rights he was giving up as a consequence of pleading guilty, including his right to a trial (*see* Plea Transcript, pp. 44-46) and his right to appeal (*see* Plea Transcript, pp. 50-53). It is therefore patent that the defendant's guilty plea was made knowingly, intelligently and voluntarily.

In addition and within the context of a guilty plea, a defendant has been afforded meaningful representation when he receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel (*see People v. Ford*, 86 NY2d 397; *People v. Fenty*, 96 AD3d 1075; *People v. Brown*, 305 AD2d 1068[4th Dept.]; *People v. Davis*, 302 AD2d 973[4th Dept.]). Here, defense counsel was successful in limiting the defendant's prison time on this indictment to five (5) years from an exposure

to a term of twenty-five (25) years if he had been convicted after trial on the charges set forth in the indictment. There is no showing that the plea bargaining process was infected by any allegedly ineffective assistance or that the defendant entered the plea because of his attorney's allegedly poor performance (see *People v. Petgen*, 55 NY2d 529; *People v. Wood*, 207 AD2d 1001[4th Dept.]). Given the nature of the claimed ineffectiveness and the demonstrable facts gleaned from the record, none of which casts doubt on the apparent effectiveness of counsel, the motion of the defendant, based on ground 2, is denied (see *People v. Relyez*, 1 AD3d 1016[4th Dept.]; *People v. Laraby*, 4 AD3d 749[4th Dept.]; *People v. Settembre*, 152 AD2d 681; *People v. Saunders*, 301 AD2d 869).

NOW, THEREFORE, upon reading and filing the notices of motion, and the unsworn supporting statement of defendant dated January 29, 2017, and the supporting affidavit of the defendant sworn to on the 26th day of June 2017, and the opposing affidavits of the District Attorney of Erie County by Daniel J. Punch, Assistant District Attorney, sworn to on the 19th day of April 2017 and the 26th day of July 2017, respectively, and due deliberation having been had thereon, it is

ORDERED, ADJUDGED AND DECREED that the said motion be and is hereby denied in all respects without a hearing.

This decision shall constitute the order in this matter for appeal purposes and no other or further order shall be required. Pursuant to CPL §§ 450.15 and 460.15,

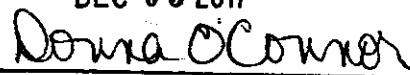
the defendant may appeal from this order denying his post-conviction motion to vacate his judgment of conviction only if a certificate is obtained granting him leave to appeal (see *People v. Serio*, 87 AD2d 978[4th Dept.]). If he wishes to appeal, the defendant must make an application to the Appellate Division of Supreme Court, Fourth Department, for such a certificate within thirty (30) days of service upon him of this Memorandum and Order (CPL §460.10[4][a]). If he is unable to pay the cost of such an appeal, the defendant may apply to the Appellate Division for leave to appeal as a poor person.

DATED: Buffalo, New York
November 30th, 2017



HON. DEBORAH A. HAENDIGES
Justice of the Supreme Court

GRANTED

DEC 05 2017
BY 

DONNA O'CONNOR
COURT CLERK