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STATE OF NEW YORK
COUNTY COURT :: COUNTY OF BROOME

THE PEOPLE OF THE STATE OF NEW YORK

-v-

DIMAS VARGAS, JR.,
Defendant.

DECISION AND ORDER
Indictment Nos. 05-557; 05-601

KEVIN P. DOOLEY, J.

On August 12, 2016, the above-named defendant filed a Motion for an Order, pursuant to CPL 440.10 and 440.20, vacating his judgment of conviction and/or setting aside the sentence imposed on June 30, 2006, in connection with his conviction for Criminal Possession of a Weapon in the Second Degree, Criminal Possession of a Weapon in the Third Degree, Reckless Endangerment in the First Degree, Assault in the Third Degree, and Perjury in the First Degree under Indictment No. 05-601, and his conviction for Conspiracy in the Fourth Degree, eleven counts of Criminal Sale of a Controlled Substance in the Third Degree, thirteen counts of Criminal Possession of a Controlled Substance in the Third Degree, and three counts of Criminal Possession of a Controlled Substance in the Fourth Degree, under Indictment No. 05-557.

The defendant submits that his conviction under Indictment No. 05-557 should be vacated on the ground he was denied the effective assistance of counsel, and/or the sentences imposed on each indictment should be set aside, because the sentences were unauthorized, illegally imposed or otherwise invalid as a matter of law.

On October 14, 2016, the Broome County District Attorney's Office filed a response in connection with the defendant's motion under Indictment No. 05-601. The defendant filed a "reply" letter to the District Attorney's response on November 3, 2016. On November 14, 2016, the New York State Attorney General's Office filed its response in connection with the defendant's motion under Indictment No. 05-557. The defendant's "legal advisor" filed a "reply" letter to the Attorney General's response on November 15, 2016.

Procedural History

On September 15, 2005, a Broome County Grand Jury handed up Indictment No. 05-557, charging the defendant with one count of Conspiracy in the Fourth Degree, fourteen counts of Criminal Sale of a Controlled Substance in the Third Degree, twelve counts of Criminal Possession of a Controlled Substance in the Third Degree, three counts of Criminal Possession of a Controlled Substance in the Fourth Degree and one count of Endangering the Welfare of a Child. The indictment, which was prosecuted by the Office of the New York State Attorney General Statewide Organized Crime Task Force, alleged that the defendant, acting alone or in concert with others, was engaged in narcotics trafficking from June 2005, through July 2005, in Broome County.

On October 5, 2005, a Broome County Grand Jury handed up Indictment No. 05-601, charging the defendant with Criminal Possession of a Weapon in the Second Degree, Criminal Possession of a Weapon in the Third Degree, Reckless Endangerment in the First Degree, Assault in the Third Degree, and Perjury in the First Degree. The indictment, which was prosecuted by the Broome County District Attorney's Office, alleged that on September 23, 2005, the defendant fired a handgun during an argument outside of a tavern in Binghamton, and then gave false testimony before the grand jury investigating the incident.

On March 24, 2006, the defendant was convicted after a jury trial, under Indictment No. 05-601, of all the counts in the indictment.

On April 17, 2006, the defendant executed a written waiver of his right to a jury trial in connection with Indictment No. 05-557. The bench trial of the indictment commenced on May 8, 2006, and on May 12, 2006, the defendant was convicted of Conspiracy in the Fourth Degree, eleven counts of Criminal Sale of a Controlled Substance in the Third Degree, thirteen counts of Criminal Possession of a Controlled Substance in the Third Degree and three counts of Criminal Possession of a Controlled Substance in the Fourth Degree.

On June 30, 2006, the defendant was sentenced as a second felony offender to an aggregate of sixteen years under Indictment No. 05-601 and a consecutive aggregate sentence of fourteen years under Indictment No. 05-557.

A Notice of Appeal was filed on the defendant's behalf in connection with each conviction.

On March 18, 2007, the defendant filed a Motion for an Order, pursuant to CPL 440.10, vacating his judgment of conviction under Indictment No. 05-557, on the ground he was denied the effective assistance of counsel. On November 21, 2007, at the defendant's request, the Court ordered the motion withdrawn without prejudice.

By Memorandum and Order dated March 26, 2009, the Appellate Division, Third Department affirmed the defendant's conviction under Indictment No. 05-601, holding that the defendant was not denied the effective assistance of counsel, there was legally sufficient evidence to establish the crimes charged, and the verdict was not against the weight of the evidence. *People v. Vargas*, 60 AD3d 1236 (3d Dept., 2009).

By Memorandum and Order dated April 1, 2010, the Appellate Division, Third Department affirmed the defendant's conviction under Indictment No. 05-557, holding that the search warrant executed in the case was supported by probable cause, the verdict was supported by the weight of the evidence and the defendant was not denied the effective assistance of counsel at trial. *People v. Vargas*, 72 AD3d 1114 (3d Dept., 2010).

On June 30, 2010, the defendant filed a Motion for an Order, pursuant to CPL 440.10, vacating his judgment of conviction under Indictment No. 05-601, on the ground the conviction was "based upon the prosecutor's knowing use of perjured testimony before the grand jury;" and the Court lacked subject matter jurisdiction because the felony complaint was "vitiate (sic) by a falsely sworn statement." By Decision and Order dated August 17, 2010, the defendant's motion was summarily denied.

Defendant's Current Motion

The defendant now moves for an Order vacating his judgment of conviction under Indictment No. 05-577, on the ground he was denied the effective assistance of counsel. The defendant submits that he rejected a favorable plea and sentencing offer extended to him on March 31, 2006, because of erroneous advice given to him by his trial attorney. The defendant was advised that if he was willing to enter a plea as a second felony offender to two counts of Criminal Sale of a Controlled Substance in the Third Degree and one count of Endangering the Welfare of a Child in satisfaction of Indictment No. 05-557, the Court would impose an aggregate sentence of eighteen years, and impose a concurrent aggregate sentence of eighteen years for his conviction under Indictment No. 05-601. The defendant alleges that he rejected the

plea offer after his trial attorney advised him that the prosecutor would have to produce the cocaine at trial in order to convict the defendant of any of the narcotics possession or sale charges contained in the indictment. The defendant claims he would have accepted the plea offer "(h)ad my lawyer told me that the people did not have to produce the drugs at trial in order to procure a conviction on the drug offenses." Therefore, he asks for "specific performance of the original plea offer" or reversal his conviction under Indictment No. 15-557. See *Lafler v. Cooper*, 132 S.St. 1376 (2012); *People v. Bank*, 28 NY3d 131 (2016); *People v. Maldonado*, 116 AD3d 980 (2d Dept., 2014).

In response, the prosecutors from both the Broome County District Attorney's Office and State Attorney General's Office submit that the defendant's motion, which is supported solely by his own affidavit, should be summarily denied because his allegations are not supported by any other affidavits or evidence, and under the circumstances of the case, there is no reasonable possibility the defendant's allegations are true. The Assistant Attorney General also submits that the defendant's allegations do not constitute a legal basis for relief, because the defendant has failed to demonstrate that the advice given by his attorney was "professionally unreasonable."

Findings of Fact

Based on its review of the record of the proceedings below and the submissions of the parties, the Court finds that the defendant has failed to allege sufficient facts to support his motion, or to warrant the relief he seeks. Although the defendant claims that on March 31, 2006, he rejected the plea offer him because his attorney advised him that the prosecution was required to produce at trial the cocaine he was charged with possessing or selling, as alleged in each count of the indictment, his claim is not supported by any other affidavit or evidence, and there is no basis for the Court to conclude his allegations are true.

The question of whether the prosecution could offer circumstantial evidence to prove that the substance the defendant sold to others was a controlled substance, was raised by defense counsel on several occasions throughout the pre-trial and trial proceedings. Although defense counsel consistently argued that testimony from a drug addict identifying the substance he or she purchased and consumed as being cocaine was inherently unreliable, defense counsel never argued that, as a matter of law, the prosecution was required to produce the controlled substance that was possessed or sold, in order to obtain a conviction. As the Assistant Attorney General

argues, it is "implausible" that defense counsel would advise the defendant that the prosecution could not legally obtain a conviction without producing the cocaine at trial, while at the same time acknowledging on the record and in his written submissions that it was permissible, although difficult, to establish the identity of the controlled substance by circumstantial evidence.

It is clear defense counsel properly advised the defendant on this issue, and the viability of a trial strategy that focused on the unreliability of drug addicts as "expert witnesses." In his trial memorandum of May 8, 2006, defense counsel had argued that in reported cases in which drug addicts testified as "experts" concerning the identity of the substance they ingested, there was additional circumstantial evidence offered, "in the form of surveillance, video tapes, wiretaps and chemical tests." On March 31, 2006, when the plea offer was extended to the defendant and rejected by him prior to the trial of Indictment No. 05-577, the defendant requested an adjournment of the pre-trial hearings to allow him more time to review recordings of the intercepted calls before deciding whether to accept the plea offer. There would have been no reason to review the recordings at that point unless the defendant was attempting to determine if those calls would support the testimony of drug users concerning the identity of the substances they purchased.

There was only one occasion when any comment was made on the record concerning the issue of whether the cocaine had to be produced at trial, and that comment was made by the trial court, not the defendant's attorney. At the conclusion of the suppression hearing on April 17, 2006, the defendant asked the Court: "All of these drugs that's in this case, with this case right here, with my indictment, do I get presented in court, do I have he the right to see these drugs the confidential informant bought or that it's reliable that I'm selling to a person, I'm charged with selling drugs?" The Court advised the defendant to discuss the issue with his attorney, and explained that the prosecution was required to prove beyond a reasonable doubt that cocaine was sold on each occasion. The defendant asked "So they have to present cocaine to the Court to show that I sold cocaine?" to which the Court responded "yeah."

It is unclear, from this brief exchange, whether the Court understood exactly what the defendant was asking or why. It appears that the defendant was attempting to confirm the advice he had been given by his attorney concerning the admissibility and reliability of circumstantial evidence to establish the identity of the substances possessed and sold. Regardless of whether the Court responded correctly to the defendant's inquiry, the Court advised the defendant to raise

any issues concerning the trial with defense counsel. The exchange itself, however, does not support the defendant's allegation that his trial counsel provided erroneous advice.

Conclusions of Law

CPL 440.30 (4) (d) provides that a court may summarily deny a post-conviction motion when an allegation of fact essential to support the motion is either contradicted by a court record or other official document or is made solely by the defendant, unsupported by any other affidavit or evidence, and under all the circumstances attending the case, there is no reasonable possibility that such allegation is true. Here, other than the defendant's self-serving affidavit, there is no evidence to suggest or establish that defense counsel provided erroneous advice, or that the defendant relied on such erroneous advice when he rejected the favorable plea and sentencing offer extended to him on March 31, 2006. *People v. Leonard*, 63 AD3d 1278 (3d Dept., 2009); *People v. Kennedy*, 46 AD3d 1099 (3d Dept., 2007) Given the circumstance of this case, there is no reasonable possibility that defense counsel believed that the prosecution was required to produce the cocaine allegedly sold or possessed in every count of the indictment, or that he provided such erroneous advice to the defendant. *People v. Chu-Joi*, 26 NY3d 612 (2015); *People v. McCullough*, 144 AD3d 1526 (4th Dept., 2016). Therefore, the defendant's motion for an Order vacating his judgment of conviction and/or setting aside the sentences imposed is summarily denied.

It is so Ordered.

Dated: February 2, 2017
Binghamton, New York

HON. KEVIN P. DOOLEY
Broome County Court Judge