| **People v Giddens** |
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| 2018 NY Slip Op 34602(U) |
| December 12, 2018 |
| County Court, Westchester County |
| Docket Number: SCI No. 15-0595 |
| Judge: Larry J. Schwartz |
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COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

FILED
DEC 13 2018
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

**DECISION & ORDER**

RALPH GIDDENS,

SCI No. 15-0595

Defendant.

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SCHWARTZ, J.

The following papers numbered 1 and 2 were considered on the *pro se* motion, brought by defendant RALPH GIDDENS, pursuant to Criminal Procedure Law 440.10 seeking to vacate his judgment of conviction by guilty plea entered on March 29, 2017 to grand larceny in the second degree and criminal tax fraud in the third degree:

| PAPERS | NUMBER |
|---|---|
| Notice of Motion, Affidavit in Support and Exhibits | 1 |
| People's Affirmation in Opposition | 2 |

Upon the foregoing papers, the motion is disposed of as follows:

Facts

As gleaned from the submissions, by felony complaint on October 16, 2014 defendant was charged with grand larceny in the second degree and two counts of criminal tax fraud in the third degree. He was accused of stealing several hundred thousands of dollars from New Your Grocer, LLC ("NYG") as director of operations by diverting funds from NYG's accounts to accounts controlled by him for his own personal use without permission or authority. The defendant was arraigned on the felony complaint that same day without counsel present. The Legal Aid Society was assigned on October 17, 2014 and the matter was adjourned at defense request to October 24, 2014. On October 20, 2014, the defendant retained new counsel, Harold Rumsey, Esq., who made a bail application before this Court (Neary, J.). Mr. Rumsey advised the Court the defendant would waive his right to a speedy hearing and would consent to a tolling of speedy trial times to discuss a possible plea.

The defense requested adjournments on the next several appearances through May 13, 2015 when the defendant and counsel executed a SCI conference agreement expressly waiving his right to a speedy probable cause hearing pursuant to CPL 180.80 and to a speedy trial pursuant to CPL 30.30 "until such time as the defendant

declines such superior court conference or plea" (People's Ex. 4). The defendant also signed an immunity agreement, dated that same date, wherein he also agreed to waive his speedy trial rights and agreed that "any and all adjournments will be at his request" (Def. Ex. A). Over the course of a series of proffer sessions, the defendant was given an opportunity to explain his questionable transfers and expenditures to the People. Thereafter, on October 15, 201,5 a conference was held before this Court (Warhit, J.). In court the defendant was offered a plea to grand larceny in the second degree and to criminal tax fraud with concurrent terms of imprisonment of one to three years and order of restitution to NYG of $435,000 and to the Department of Taxation and Finance in the amount of $28,975. On January 5, 2016, the defense requested an adjournment to deal with medical issues and did so on the next several appearances until April 14, 2016. On that date, the defendant appeared and stated his desire to accept the offered plea. He signed a waiver of indictment and sworn.

During that same appearance, the defense consented to an amendment of the S.C.I. to indicate that criminal tax fraud charge would be amended from a fourth degree to a third degree as the amount of the fraud was in excess of $10,000. The Court then allocuted defendant on his plea. The defendant stated that he had sufficient time to discuss the plea with his attorney, that he was satisfied with his attorney's advice, that no one made any promises to him to induce him to take the plea, and that he was pleading guilty because he was in fact guilty of the crimes he was pleading guilty to (People's Ex. 7). The Court accepted his plea. The defendant also signed a written waiver of right to appeal which he stated he had gone over with counsel and fully understood it. The Court found that this waiver was knowingly, voluntary and intelligently made (*id.*).

The defendant requested, and was granted, an adjournment of sentencing to September 21, 2016 so that spinal surgery could first be had. On September 21, 2016 he asked for a further adjournment to October 12, 2016 for sentencing or documentation that surgery was scheduled for a date certain. After further adjournments at the defendant's request, on March 29, 2017, the defendant came before the court and reaffirmed his pleas. Defendant was sentenced in accord with the promised sentence of two concurrent terms of 1 to 3 years and given a written notice of his waiver of right to appeal.

On June 9, 2017, the defendant moved *pro se* in the Appellate Division for leave to file a late notice of appeal, poor person relief, and the assignment of counsel. The motion was granted, and that appeal is still pending.

The defendant now brings the instant application.

## Discussion

"In moving to vacate a judgment of conviction, a defendant must come forward with allegations that raise a triable issue of fact sufficient to challenge the presumed validity of a judgment of conviction...Mere conclusory allegations of ultimate facts are insufficient to warrant a hearing" (*People v Vasquez*, 134 AD3d 742, 744 [2d Dept 2015] *citing People v. Waymon,* 65 A.D.3d 708, 709, 883 N.Y.S.2d 911; CPL 440.10; 440.30[4] [d][i]; *People v. Session,* 34 N.Y.2d 254, 255–256, 357 N.Y.S.2d 409, 313 N.E.2d 728). In the absence of any evidence supporting claims set forth in the defendant's affidavit, the Court may summarily deny a defendant's motion pursuant to CPL 440.10 (*id.*).

Defendant argues his judgment should be vacated under CPL 440.10 because his speedy trial rights under CPL 30.30 were violated. He argues the People did not bring him to trial or declare readiness for trial within 6 months of commencement of the action. Defendant claims that this period expired before he signed a waiver of any speedy trial time on May 13, 2015. This argument is without merit. The record demonstrates all the adjournments in this matter, except for the one-day adjournment after his arraignment, were at the Defendant's request. Thereafter, he affirmatively and expressly chose to waive his speedy hearing and trial time in order to take advantage of the immunity agreement and to engage in proffer sessions to mitigate his financial liability. Thus, he cannot claim, now that he has obtained the benefit of said immunity agreement, that his speedy trial rights were violated. This is especially so as the adjournments that were not related to the proffer sessions were at the defendant's express request, on the record, for health reasons (*see* CPL 30.30[4][b]).

Defendant cites to *People v Zinke*, 76 NY2d 8 (1990), and argues that his relationship with NYG was that of a partner, not an employee, and thus as co-owner of NYG's property, he could not be charged with larceny for misappropriating partnership funds. This argument is also without merit. The defendant's conclusory allegation that he was a partner rather than an employee of NYG is insufficient to raise a triable issue of fact to merit a hearing. This is especially so as this allegation is unsupported by any evidence in the record or in the papers submitted (*see Vasquez* at 744; CPL 440.30[4][d][i]). Similarly, unsupported is the defendant's claim for the first time that a .53% membership in the subject limited liability corporation gave the defendant a claim of right made in good faith.

Defendant argues that his counsel provided ineffective assistance in that (1) he failed to move to dismiss the felony complaint but instead recommended he sign the waiver of speedy trial rights on May 13, 2015 and (2) advised defendant to plead guilty despite his purported defenses that he was a partner and that he had a claim of right to the funds he plead guilty to stealing. This argument is without merit.

*Strickland v Washington* (466 US 668 [1984]) lays out a two-prong test to determine whether or not there was ineffective assistance of counsel: (1) whether there is a showing counsel's representation fell below an objective standard of reasonableness and (2) a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*see id.*).

Here, the defendant has made no showing to satisfy either prong of the *Strickland* test. First, as described above, there was no speedy trial violation as the adjournments granted at the defendant's request. Thus, there was no meritorious motion to be made by counsel to support a finding that his representation fell below an objective standard of reasonableness.

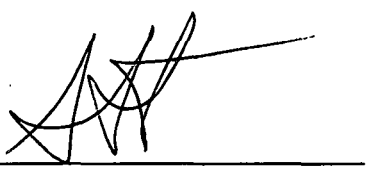
Second, also as discussed above, the defendant offers no evidence to support his claim in his moving papers that he was a partner or that he had a good faith basis to appropriate the funds under a claim of right. Third, the defendant received an advantageous plea of concurrent sentences of one to three years for grand larceny in the second and criminal tax fraud in the third. Since the greatest sentence the grand larceny charge, a Class C Felony, was an indeterminate sentence of 5 to 15 years, the defendant's counsel provided him with meaningful representation in negotiating the plea and sentence he received, representation that was not below an objective standard of reasonableness (*see People v Fiumefreddo*, 188 AD2d 546 [2d Dept 1992]). This is especially so as the record demonstrates the defendant and his counsel were provided in proffer sessions with detail about the misappropriated funds in question and the defendant was able to reduce his alleged financial liability to NYG from $790,135.76 to an agreed-to restitution amount of $435,000 as a result.

As to the second prong of the *Strickland* test, the defendant has made no showing that the defendant's counsel made unprofessional errors. The transcript of the proceedings demonstrates the defendant understood and acknowledged he was pleading guilty to grand larceny in the second degree and criminal tax fraud in the third degree, in full satisfaction of the indictment. Thus, the defendant is not entitled to relief under CPL 440.10 on this basis.

In light of the foregoing, the defendant's application for relief pursuant to CPL 440.10 is denied in its entirety.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
December 12, 2018



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RALPH GIDDENS
*Pro-se*