People v Potter
2019 NY Slip Op 33958(U)
October 18, 2019
Supreme Court, Westchester County
Docket Number: 17-1086
Judge: Barry E. Warhit

SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DAVID POTTER,

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DECISION AND ORDER
Indictment No.: 17-1086

WARHIT, J.

The within Decision and Order addresses separately filed *pro se* motions of David Potter ("Defendant"). Through the first motion, filed pursuant to New York State Criminal Procedure Law ("Criminal Procedure Law" or CPL") § 420.40 and received by this Court on August 12, 2019, Defendant seeks an Order deferring the mandatory surcharge and fees imposed under the within indictment. Through the second motion, brought pursuant to CPL § 440.10, Defendant seeks an Order of this Court vacating his judgment of conviction and setting aside his sentence.

In consideration of these motions, this Court read the following:

Notice of Motion for a Financial Hardship Hearing Deferring Fees Imposed at Sentencing and *Affirmation in Opposition to Defendant's Motion to Defer Mandatory Surcharge; Notice of Motion; Affirmation, Poor Person Application and Affidavit and Annexed Exhibits; Affidavit in Opposition and Memorandum of Law and Annexed Exhibit 1*

RELEVANT PROCEDURAL HISTORY

On September 8, 2015, Defendant was convicted in Suffolk County of Burglary in the third degree and was sentenced to an indeterminate term of two (2) to four (4) years in state

prison (*see,* Affidavit in Opposition, Exhibit 1, p. 3). Approximately two years later, on September 30, 2017, Defendant and an accomplice used a sledgehammer to break a glass window and gain entry into a Verizon store located at 86 Purchase Street in the City of Rye and County of Westchester. Once inside, Defendant and his cohort stole iPhones and iPads. Defendant was arrested within hours of committing this offense. That arrest led to the instant indictment and to filing of a parole violation (Defendant's Affirmation, ¶ 5). On November 21, 2017, a parole violation hearing was held which resulted in a determination that Defendant would be held until his maximum expiration date of October 21, 2018 (*Id.* at ¶ 6).

Defendant appeared personally and by counsel before this Court in the Trial Assignment Part ("TAP") on August 8, 2018. Subsequent to a complete plea *voir dire* Defendant entered a plea of guilty to the crime of Attempted Burglary in the third degree in full satisfaction of the within indictment. During Defendant's allocution, this Court made no mention as to how the negotiated sentence under this indictment would run in relation to the undischarged portion of Defendant's parole hold.

On December 12, 2018, this Court sentenced Defendant according to the negotiated plea agreement to an indeterminate term of one and one-half (1 ½) years to three (3) years in state prison and imposed a mandatory surcharge of $300, a $50 DNA fee and a $25 Crime Victim Assistance Fee. During sentencing this Court referred to Defendant's 2015 conviction only with respect to the fact that it rendered him a predicate felon (Affidavit in Opposition, Exhibit 1, p. 3). This Court did not discuss how the sentence being imposed under this indictment would run in relation to any undischarged portion of that sentence. Notably, this Court did specify its sentence was to run concurrent to, and in any event would merge with, a one year sentence Defendant received in connection with a criminal proceeding that had

been pending in Suffolk County at the same time as this Westchester matter (*see*, *Affidavit* in Opposition, Exhibit 1, p.5).

On July 19, 2019 Defendant moved for an Order of this Court directing deferment of the mandatory surcharge and fees imposed in relation to this indictment. Defendant contends these obligations pose a financial hardship for him since he only earns $3.62 weekly in prison wages and the facility takes a substantial portion of these funds to satisfy the imposed mandatory fees and surcharge. Defendant contends that the remaining balance, which amounts to about $1.50 weekly, is insufficient to supplement his dietary needs and cover the cost of hygiene products he alleges he requires to "reduce . . . exposure to viruses and bacteria (such as MIRSA and other contagions) that find harbor in large, enclosed institutions like [the] Correctional Facility" (Affidavit in Support of a Motion for a Financial Hardship Hearing Deferring Fees Imposed at Sentencing ("Affidavit in Support"), ¶¶ 11-12). Defendant contends this hardship is compounded by the fact that "25 percentage (sic) of all incoming receipts are being deducted from [his] inmate account". Defendant contends family members "go without to send [him] money, only to have their "Samaritan nature" beat back by the fact that all their hard earned money was (sic) taken by the State to satisfy [the] burden" of the imposed fees and surcharge (*Id.* at ¶ 13). The People deny Defendant suffers a financial hardship which entitles him to deferral of the court imposed fees.

While the above discussed motion remained pending, on or about August 29, 2019 Defendant filed a motion, pursuant to CPL § 440, seeking an Order of this Court vacating his judgment of conviction on grounds that his plea was involuntarily made. Specifically, in this regard, Defendant contends this Court's failure to advise him that the negotiated sentence under the within indictment "would run consecutively to [an alleged] undischarged sentence

on [his] prior conviction" renders his plea involuntary (*Id.* at ¶ 18). The People oppose Defendant's motion to set aside his conviction and sentence in its entirely.

FINDINGS OF LAW

The New York State Penal Law ("Penal Law" or "PL") requires that, at sentencing, criminal trial courts impose mandatory surcharges and fees upon defendants which include, among others, a DNA databank fee and a crime victim assistance fee (PL § 60.35[1][a][I]; CPL § 420.35[2]). Further, the statute directs correctional facilities to "cause any amount owing to be collected from such person during the term of imprisonment from moneys to the credit of an inmates' fund[1] or such moneys earned by a person in the work release program" (Penal Law § 60.35[5]). While Criminal Procedure Law § 420.40[3] directs sentencing courts to be "mindful of the mandatory nature" of these surcharges and fees and of "the important criminal justice and victim services" they sustain, CPL § 420.40[2] authorizes defendants to apply to defer all or part of their obligations to pay the court imposed assessments.

The within Defendant, while permitted to apply for a deferral of his obligation to pay the court imposed surcharge and fees, is not entitled to the ultimate relief sought. It is well settled that trial courts may not routinely waive or defer mandatory surcharges and fees and that waiver or deferral of these monetary sanctions should only be granted where a prisoner demonstrates circumstances of a "most unusual" and "exceptional" nature (*People v Jones*, 26 NY3d 730, 732 and 740 [2016]; *and see, People v. Tookes*, 52 Misc. 3d 956, 964, 32

[1]The 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]).

NYS3d 889, 895 [NY Co. Sup. Ct. 2016]). Incarceration is an insufficient basis upon which to grant waiver or deferral of mandatory surcharges or fees (*Id.*).

Defendant herein alleges the imposed financial obligations pose a hardship upon him. Defendant contends that, once the facility makes deductions from his prison earnings to satisfy the court imposed charges, he is left with only about $1.50 per week to purchase food he requires to supplement his diet and hygiene items he alleges he needs to avoid disease (Affidavit in Support, ¶¶ 11-12). Significantly, Defendant does not provide any explanation or evidence to support a conclusion that his needs exceed of other inmates. In fact, unlike other inmates, Defendant acknowledges he receives funds from family members. With respect to these funds, Defendant contends family members "go without" in order to send funds to him (*Id.* at ¶¶ 13-14).

Defendant has not submitted evidence to prove he is under a financial obligation to provide financial support to an immediate family member and has merely provided generalizations to support his claim of financial hardship. Defendant has not set forth "credible and verifiable information establishing that the surcharge [works] an unreasonable hardship on him over and above the ordinary hardship suffered by other indigent inmates" (*see*, *People v. Abdus-Samad*, 274 AD2d 666, 667 [3d Dept. 2000]; *and see*, *People v. Law*, 981 NYS2d 637 [Sup.Ct. Bronx Co. 2013]). Defendant's claims do not constitute a *prima facie* "showing of financial hardship" under the law (see, CPL § 420.40). Consequently, and as he has not meaningfully distinguished himself from the vast majority of prisoners, Defendant is not entitled to a financial hardship hearing or deferral of mandatory court ordered fees and surcharges (*see*, *Abdus-Samad*, 274 AD2d at 667).

Similarly, Defendant is not entitled to an Order setting aside his judgment of conviction.

Contrary to his claim, Defendant's plea of guilty is not infirm based upon the fact that this Court did not advise him the negotiated sentence would be imposed consecutive to any undischarged portion of a previously imposed prison sentence.

CPL § 440 is a procedural vehicle by which a defendant can inform the court of facts which do not appear in the record, which were unknown to the court at the time of judgment, which undermine the judgment (CPL § 440.10[2](c)). Specifically, CPL § 440.10 "provides that a court 'must deny' a motion to vacate a judgment of conviction when the ground or issue raised "was previously determined on the merits upon an appeal from the judgment" or there were sufficient facts on the record which would have permitted appellate review of the issue on direct appeal but no review occurred owing to the defendant's unjustifiable failure to perfect a direct appeal or raise the issue on direct appeal" (*see, People v Hamilton*, 115 AD3d 12, 20 [2d Dept 2014], quoting CPL 440.10[2][a] and [c]).

Defendant's plea, the associated *voir dire*, this Court's promise and the sentence imposed are matters of record. So too, as acknowledged by Defendant, is the fact that simultaneous to the within indictment he faced a parole violation and an additional criminal charge in Suffolk County (*see*, Defendant's Affirmation, ¶¶ 11 and 13; *and see*, Affidavit in Opposition, Exhibit 1, p. 6). Consequently, Defendant's claim that his plea of guilty is involuntary is a matter of record capable of appellate review and, therefore, not properly before the Court pursuant to a CPL § 440 motion. As such, this motion is properly denied without a hearing (440.10(2)[a];*see*, *People v Lebron*, 128 AD3d 851 [2d Dept 2015]).

Even assuming *arguendo* Defendant's claim is not procedurally barred, nevertheless, he is not entitled to an Order vacating his judgment of conviction. In support of his contention that his plea must be deemed involuntary based upon the fact that this Court did not advise

him his sentence under the within indictment would run consecutively to any undischarged portion of the sentence previously imposed upon him with respect to his September 2015 conviction, Defendant relies upon *People v. Morbillo* (56 AD3d 694 [2d Dept. 2008]). However, *Morbillo* is inapposite to this case.

This Court sentenced Defendant on December 12, 2018. His previous state prison sentence reached maximum expiration on October 21, 2018 (*see*, Defendant's Affirmation, ¶ 6). Accordingly, as of the date of sentencing in this case, no portion of his prior sentence remained undischarged. Thus, Defendant's argument is largely academic(*cf., Morabillo*,56 AD3d 694*)*.

Moreover, the Appellate Division's reasoning in *Morbillo* was subsequently determined to be faulty. In *People ex. rel Gill v. Greene,* the Court of Appeals expressly held that cases addressing post-release supervision (PRS), upon which the *Morbillo* court relied to reach its determination, are inapposite to matters, such as Defendant's case, in which the trial court merely remained silent regarding the fact that, by law, a newly imposed sentence must run consecutively to any undischarged sentence (12 NY3d 1, 5 [2009]); *see*, PL § 70.25 (2-a); *see also, Fuller*, 28 Misc3d 1144 [NY Co. Sup. Ct. 2010]; *Matter of Ramos v Connolly*, 74 AD3d 1080 [2d Dept 2010]; *Matter of Soto v Fischer*, 60 AD3d 1074, 875 NYS2d 809 [2d Dept 2009], lv denied 12 NY3d 900). Consequently, and contrary to Defendant's claims, it is of no legal moment that this Court did not advise him his sentence under the within indictment would run consecutive to any undischarged portion of his 2015 sentence. Moreover, the fact that this Court did not so state does not render Defendant's plea unknowing, involuntary, or unintelligent under Fifth Amendment due process standards (*see*, *Fuller*, 28 Misc.3d 1144)

Based upon the foregoing, Defendant's motions, bought respectively pursuant to CPL

§§ 420.40 and 440.10, are denied in their entirety without need for a hearing.

The foregoing constitutes the decision and order of this court.

Date: White Plains, New York
October 18, 2019

HONORABLE BARRY E. WARHIT
Supreme Court Judge,
Westchester County

HON. ANTHONY A. SCARPINO
District Attorney, Westchester County
111 Dr. Martin Luther King Jr. Boulevard
White Plains, New York 10601
By: John J. Sergi
John Carmody
Assistant District Attorneys

MR. DAVID POTTER (18A4824)
Defendant, *Pro se*
Attica Correctional Facility
PO Box 149
Attica, New York 14011-0149

CLERK OF THE COURT