People v Brodus
2019 NY Slip Op 33964(U)
March 25, 2019
County Court, Broome County
Docket Number: 14-92
Judge: Kevin P. Dooley

[* 1]

STATE OF NEW YORK
COUNTY COURT :: COUNTY OF BROOME

THE PEOPLE OF THE STATE OF NEW YORK

-v-

WILLIE J. BRODUS,
Defendant.

DECISION & ORDER
Indictment No. 14-92

KEVIN P. DOOLEY, J.

On December 20, 2018, the above-named defendant filed a Motion for an Order, pursuant to CPL 440.20, setting aside the sentences imposed upon his conviction for four counts of Burglary in the Second Degree as a Second Violent Felony Offender. The prosecutor filed his response to the defendant's motion on February 15, 2019[1]. The following constitutes the Decision and Order of the Court.

Procedural History

On February 13, 2014, the defendant appeared in Broome County Court, executed a waiver a waiver of indictment and was arraigned on SCI No. 14-92, charging him with four counts of Burglary in the Second Degree, class C felonies. The Superior Court Information alleged that on October 12, 2013, October 28, 2013, October 30, 2013, and November 13, 2013, in the City of Binghamton, the defendant knowingly and unlawfully entered residences with the intent to commit a crime inside. At his arraignment, the defendant pleaded guilty to the four count Superior Court Information, in satisfaction of thirteen pending felony complaints charging Burglary in the Second Degree or Burglary in the Third Degree and nine criminal complaints under investigation by the Binghamton and Johnson City Police Departments, with the understanding he would be sentenced as a Second Violent Felony Offender to concurrent determinate terms of imprisonment of ten year and five years of post-release supervision.

At the time of the defendant's arraignment and plea, the prosecutor filed a Predicate Violent Felony Conviction Statement alleging that on or about November 6, 2000, the defendant was convicted in Broome County Court of Assault in the Second Degree and was incarcerated in

[1] A special prosecutor was assigned to respond to the defendant's post-conviction motion because the defendant's trial attorney is currently a prosecutor with the Broome County District Attorney's Office.

a New York State correctional facility for approximately five years, from November 23, 2000, to June 29, 2004, and from October 1, 2008, to April 30, 2010.[2] The defendant waived the reading of the Statement, stated that he did not wish to contest the legality or constitutionality of the conviction and admitted the allegations contained in the Statement.

On April 23, 2014, the defendant was sentenced in accordance with the plea agreement to concurrent determinate terms of ten years with five years post-release supervision.

On May 5, 2014, a Notice of Appeal was filed on the defendant's behalf. On appeal, the defendant argued that the sentence imposed was harsh and excessive and that the sentencing judge was "biased" against him because he had presided over the defendant's prior felony cases. By Memorandum and Order dated June 29, 2017, the defendant's judgment of conviction was affirmed. *People v. Brodus*, 151 AD3d 1469 (3d Dept., 2017).

In the meantime, on November 12, 2015, the defendant filed County Court a motion pursuant to CPL 440.20 for an Order setting aside the sentence imposed on November 6, 2000, for his conviction after trial for Assault in the Second Degree. In that case, the defendant was initially sentenced to a determinate term of imprisonment of five years with three years post-release supervision.[3] On or about November 15, 2000, the Court received a letter from an inmate records coordinator at the correctional facility where the defendant was incarcerated, advising that the mandatory period of post-release supervision for a second felony offender convicted of a violent felony was five years, not three years. (Defendant's Exhibit 1). By Order dated January 11, 2001, the Court "amended" the period of post-release supervision from three years to five years, which was the mandatory period of post-release supervision for a Second Felony Offender convicted of a class D violent felony.[4]

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[2] Under Penal Law §70.04 (1) (v), in calculating the ten-year period between the defendant's predicate conviction and his commission of the present violent felony, any time in which the defendant was incarcerated for any reason is excluded from the ten-year period. According to the defendant's criminal history, the defendant served approximately 3 ½ years in prison before being released onto parole, and then served approximately another 1 ½ years after being returned to prison on a parole violation.

[3] The defendant was also sentenced to concurrent terms of one and one-half to three years on related charges of Hindering Prosecution in the Second Degree and a definite term of six months for Resisting Arrest.

[4] The legality of the January 11, 2001, Order was not raised on the defendant's direct appeal of his Assault conviction or in the defendant's *pro se* post-conviction motion filed on May 31, 2001. On July 31, 2003, the defendant's judgment of conviction and the County Court's denial of the post-conviction motion was affirmed. *People v. Brodus*, 307 AD2d 643 (3d Dept., 2003), *lv. denied,* 100 NY2d 618 (2003).

In his post-conviction motion to County Court, the defendant argued that the Court erred by "amending" the period of post-release supervision imposed without giving the defendant and counsel an opportunity to appear and be heard before imposing the "amended" sentence. By Decision and Order dated October 25, 2016, County Court denied the defendant's post-conviction motion. Although the Court agreed that the defendant should have been returned to Court for re-sentencing, the Court held that the issue of the legality of the sentence was "moot" because the defendant had completed his sentence and found that "(t)he defendant has failed to establish that the law should require that he be brought back to this court to be re-sentenced for a procedural error occurring 15 years ago."

Current Motion

The defendant moves for an Order vacating the concurrent sentences imposed in connection with his conviction for four counts of Burglary in the Second Degree under SCI No. 14-92, on the ground the sentences were unauthorized, illegally imposed and otherwise invalid because he was denied the effective assistance of counsel.[5] The defendant argues that his sentences should be set aside because his defense attorney failed to investigate whether the amended sentence imposed in connection with the defendant's assault conviction in 2000 was imposed in violation of the defendant's constitutional or statutory rights, failed to advise the defendant of his right to challenge the constitutionality or legality of the amended sentence that was imposed, and failed to object to the Predicate Violent Felony Conviction Statement filed with the Court at the time of the defendant's plea on February 13, 2014.

Findings of Fact and Conclusions of Law

A criminal defendant is guaranteed the effective assistance of counsel under both the state and federal constitution. While the state standard focuses on "the fairness of the process as a whole rather than its particular impact on the outcome of the case, and is met when defense counsel provides meaningful representation, the federal standard requires a showing that the defendant was prejudiced by defense counsel's alleged error or errors." *People v. Turner,* 5

[5] The defendant has not moved for an Order vacating his judgment of conviction and does not challenge the validity of the underlying conviction. *CPL 440.20 (4).*

NY3d 476 (2005); *People v. Canales*, 110 AD3d 731 (2d Dept., 2013); *People v. Georgiou*, 39 AD3d 155 (2d Dept., 2007). While prejudice to the defendant is a necessary factor under the federal standard, embodied in a "but for" test of *Strickland v Washington*, 466 US 668 (1984), under the state standard, a defendant's showing of prejudice is a significant, but not indispensable element in assessing meaningful representation. *People v. Stultz*, 2 NY3d 277 (2004). The defendant must still demonstrate that there was no strategic or legitimate reason for defense counsel's alleged errors.

In this case, defense counsel's failure to challenge the predicate felony offender statement, on the ground the defendant was improperly re-sentenced in connection with his 2000 Assault conviction, does not rise to the level of ineffective assistance of counsel. Under the circumstances of this case, nothing was to be gained by challenging the predicate felony offender statement on this ground. Even if defense counsel had successfully controverted the predicate violent felony offender statement and the Court determined that the defendant was a "first time" violent felony offender, the defendant still could have received the agreed-upon concurrent sentences of ten years in prison and five-years post-release supervision. The range of a determinate sentence imposed for a class C violent felony, such as Burglary in the Second Degree, is five to fifteen years, and the range of the term of post-release supervision is two and one-half to five years. Inasmuch as the defendant's plea to four counts of Burglary in the Second Degree was made in satisfaction of thirteen pending felony complaints charging Burglary in the Second Degree or Burglary in the Third Degree and nine criminal complaints, there was no reason for defense counsel to believe the prosecutor would agree to offer anything less than the determinate term of ten years and five years post-release supervision if the defendant was not adjudicated a Second Violent Felony Offender. *People v. Mosby,* 78 AD3d 1371 (3d Dept., 2010); *People v. Ochs*, 16 AD3d 971 (3d Dept., 2005); *People v. Barton*, 200 AD2d 888 (3d Dept., 1994).

The defendant has failed to demonstrate that he was prejudiced by defense counsel's failure to challenge the allegations contained in the predicate violent felony offender statement filed in this case. Defense counsel negotiated a favorable plea agreement that substantially reduced the defendant's exposure, as a predicate violent felony offender, to a much longer term of imprisonment, and there is no basis to find that defense counsel did not provide meaningful

representation in this case. *People v. Bassett,* 36 AD3d 968 (3d Dept., 2007); *People v Crippa*, 245 AD2d 811 (3d Dept., 1997); *People v. Barton, supra.*

Conclusion

Pursuant to CPL 440.30 (4) (a), the defendant's motion for an Order setting aside the concurrent sentences imposed for his convictions for four counts of Burglary in the Second Degree is denied.

It is so Ordered.

Dated: Binghamton, New York
March 25, 2019

HON. KEVIN P. DOOLEY
Broome County Court Judge

NOTICE AS TO FURTHER APPEAL

The defendant may appeal this Decision and Order denying his motion pursuant to Criminal Procedure Law §440.20 only if he is issued a certificate granting leave to appeal pursuant to Criminal Procedure Law §460.15. An application for such certificate must be made within 30 days of service of this Decision and Order to the Appellate Division, Third Department as set forth in Criminal Procedure Law §460.15[1] and [2] and 22 NYCRR 800.3. Should leave be granted, upon proof of financial inability to retain counsel to pay the costs and expenses of the appeal, defendant may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person. (22 NYCRR 821.3)