

People v Almanzar

2020 NY Slip Op 34767(U)

May 27, 2020

Supreme Court, Westchester County

Docket Number: Indictment No. 19-0091

Judge: Barry E. Warhit

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SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER
Indictment No.: 19-0091

OSCAR ALMANZAR,

Defendant.

-----X
WARHIT, J.

FILED

July 15, 2020

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

Defendant moves by counseled motion to withdraw his previously entered plea of guilty to attempted robbery in the second degree. The People oppose the application in its entirety.

In contemplation of this motion, the Court read and considered the following papers:

Notice of Motion to Withdraw Plea, Affidavit/Motion to Withdraw and Affirmation of Defense Counsel; Affirmation in Opposition, Memorandum of Law and Exhibit 1

Relevant Procedural Background

Oscar Almanzar ("Defendant") stands charged under the instant indictment with, on or about December 12, 2018, having committed one count each of robbery in the first degree and robbery in the second degree. On October 31, 2019 Defendant appeared in the Trial Assignment Part ("TAP") personally and by counsel, Edward Barrett, Esq. of the Legal Aid Society of Westchester County. Subsequent to a complete allocution, Defendant pleaded guilty to a reduced count of attempted robbery in the second degree in full satisfaction of the indictment in exchange for a sentence promise of, *inter alia*, six (6) years in state prison followed by five (5) years post-release supervision (*see generally*, Transcript of the Plea Proceeding ("Plea Minutes"), October 31, 2019 (Warhit, J.) pp. 2-4).

At the outset of the plea allocution, the Court placed Defendant under oath and confirmed his fluency in English (*Id.*, p. 4, lines 12-18). The Court confirmed Defendant

wanted to avail himself of the plea and that he understood the sentencing promise would be imposed solely with respect to the instant indictment and would not cover federal charges Defendant was then facing (*Id.*, p. 3, lines 24-25 and p. 4, lines 1-8 and 19-24). Defendant replied in the affirmative when asked, in relation to entering a plea of guilty to attempted robbery in the second degree, "is that what you want to do?" (*Id.* at p. 4, lines 23-24).

Before permitting Defendant to enter a plea of guilty, the Court specifically inquired of Defendant whether he had enough time to speak to his attorney and whether he was happy with counsel's representation (*Id.*, p. 4, line 25 and p. 5, lines 1-4). Defendant replied "yes" to each inquiry (*Id.*). Relevant to the instant motion, the Court informed Defendant: "I don't want you to ask for your plea back later or blaming your lawyer. Can I reply upon your statement made under oath that you satisfied with his work?" (*Id.*, p. 5, lines 5-8). Defendant gave the Court his assurance (*Id.*, p. 5, line 9). The Court also inquired of Defendant whether he had taken any drugs or medication or used any alcohol that day which could be affecting his ability to comprehend the proceeding (*Id.*, p. 5, lines 10-14). Under oath, Defendant denied having used any of these substances (*Id.*, p. 5, line 15).

During the plea allocution, the Court carefully reviewed the Constitutional and other rights Defendant was required to relinquish in order to avail himself of the negotiated plea deal. In particular, the Court informed Defendant, who acknowledged he understood, that by entering a plea of guilty he would be giving up his right to a trial, whether by a judge or jury, as well as his right to require the People to prove each and every element of each crime charged beyond a reasonable doubt (*Id.* at p. 5, lines 16-22). Defendant unambiguously indicated he understood that by entering a plea of guilty he was satisfying the People's burden, absolving the prosecution of its obligation to call witnesses against him, forfeiting his right to cross-examine the People's witnesses, to present a defense and giving up his right to remain silent (*Id.* at p. 5, lines 23-25 and p. 6, lines 1-5). Defendant specifically acknowledged he understood his plea of guilty would result in a conviction just as if he had gone to trial and been found guilty of attempted robbery in the second degree after verdict (*Id.*, p. 5, lines 6-10).

Defendant indicated clear understanding of this Court's promise that, as a consequence of pleading guilty, he would be sentenced, *inter alia*, to six (6) years imprisonment followed by five (5) years post-release supervision (*Id.*, p. 6, lines 11-13). Defendant further acknowledged he understood the negotiated plea deal was without effect upon charges he was then facing in federal court (*Id.*, p. 6, lines 14-18 and p. 8, lines 13-25 and p. 9, lines 1-8).

Of import, Defendant categorically denied his plea of guilty was the result of a promise made by anyone other than the Court or that he had been threatened or forced to plead guilty (*Id.*, p. 6, lines 19-24). During the plea allocution, Defendant unequivocally maintained he was entering his plea freely and voluntarily and because, in fact, he is guilty (*Id.*, p. 6, line 25 and p. 7, lines 1-7).

During the plea *voir dire* this Court specifically informed Defendant that, as a condition of this negotiated plea and to the extent permitted by law, he was being asked to waive his appellate rights (*Id.*, p. 10, lines 1-25 and p. 11, lines 1-10). In addition to affording Defendant an explanation of the purpose and function of the appellate court, the Court assured Defendant had discussed this waiver with counsel before finding his waiver of appellate rights to have been freely and voluntarily given (*Id.*). As part of the plea allocution, the Court also informed Defendant of the potential immigration consequences of his plea of guilty in the event he is not a citizen of the United States (*Id.*, p. 11, lines 11-25 and p. 12, lines 1-13).

Only after discussion of each of the aforementioned rights he would waive and ramifications he would face be entering a plea of guilty did this Court permit Defendant to admit, with factual detail, his guilt as to the crime of attempted robbery in the second degree (*Id.*, p. 12, lines 19-25 and p. 13, line 12). Specifically, Defendant admitted that on or about December 12, 2018 he attempted to forcibly steal property from another person in the vicinity of 156 Palisade Avenue in the City of Yonkers, County of Westchester and State of New York by “placing an object into the victim’s back and indicating with words along the lines of shooting him if he didn’t give [you] his phone” (*Id.*, p. 12, lines 19-25 and p. 13, lines 1-2 and p. 14, lines 9-25 and p. 15, lines 1-3). As part of the plea *voir dire*, Defendant acknowledged his status as a predicate violent offender based upon his having previously been convicted of robbery in the first degree on or about November 30, 2015, in Bronx County Supreme Court (*Id.*, p. 13, lines 3-23).

Pertinent to the present motion, before accepting Defendant’s plea of guilty as having been knowingly and voluntarily given, this Court specifically halted the proceeding and afforded Defendant the opportunity to ask questions of the Court (*Id.*, p. 15, lines 6-8). Only after Defendant declined to ask any questions did the Court accept his plea of guilty (*Id.*, p. 13, lines 9-11).

Upon acceptance of Defendant’s plea of guilty, the Court set a sentencing date of January 9, 2020 (*Id.*, p. 13, line 12). Nevertheless, sentencing did not proceed on that date as Defendant indicated an intention to withdraw his previously entered plea of guilty. Upon this representation, this Court relieved the Legal Aid Society and appointed Roger S. Kraminitz, Esq. to assist Defendant in pursuing this application.

The within counseled motion was filed on March 12, 2020. Herein, Defendant seeks permission to withdraw his plea of guilty on grounds that, having been informed of the plea offer only the day prior to the plea proceeding, he “did not have enough time to consider it” or understand the “strengths and weaknesses of the District Attorney’s case” (Affidavit/Motion to Withdraw, ¶¶ 4 and 9). Defendant claims counsel only teleconferenced with him and never showed him “videos of . . . the incident and the interrogation” and that, especially in light of his “history of depression and substance abuse”, “not enough time and effort was (sic) spent to make sure [he] understood [his] rights and the nature of the plea and the promised sentence (*Id.*, ¶¶ 6-8). Defendant also alleges he “felt pressured to enter the guilty plea and did not feel like [he] could

interrupt the proceedings to object" (Affidavit/Motion to Withdraw, ¶ 5). In sum, Defendant submits, that upon reflection, he wants to withdraw his plea and proceed to trial (*Id.*, ¶ 10).

By Affirmation in Opposition and Memorandum of Law, dated March 18, 2020, the People oppose Defendant's application in its entirety.

Findings of Law

A guilty plea is intended to signify the end of a criminal case not to serve as a "gateway" to further litigation (*see, People v. Hansen*, 95 NY2d 227, 230 [2000]; *and see, People v Taylor*, 65 NY2d 1, 5 [1985]). Although applicable statute sets forth a procedure by which a defendant may seek to withdraw a previously entered plea of guilty, it is well settled that such applications are to be granted sparingly in cases where there is evidence of innocence or where the plea was induced by fraud or mistake (*People v. Smith*, 54 AD3d 879 [2d Dept. 2008]; *and see, People v. Pillich*, 48 AD3d 1061 [2008]). The determination as to whether a particular defendant should be permitted to withdraw his previously entered plea of guilty rests squarely in the discretion of the trial court (CPL § 220.60[3]; *and see, People v. Alexander*, 97 NY2d 482 [2002]; *People v. Elmendorf*, 45 AD3d 858, 859 [2d Dept. 2007]). Of significance, Defendant herein does not professes his innocence or allege his plea of guilty is the result of fraud or mistake.

As a general rule, a plea of guilty that has been knowingly, voluntarily and intelligently entered should be upheld (*see, Elmendorf*, 45 AD3d at 859; *and see, Fiumefreddo*, 82 NY2d 536 [1993]). The transcript of the plea proceeding at issue amply demonstrates Defendant's plea, which was entered subsequent to a comprehensive allocution, was knowingly, voluntarily and intelligently given. While under oath Defendant assured the Court he understood each of the rights he was relinquishing and the consequences of entering a plea of guilty (*see generally, Plea Minutes*, pp. 2-15). Despite the claims belatedly raised in the within motion, throughout the plea *voir dire*, Defendant explicitly expressed satisfaction with trial counsel and specifically, acknowledged he had been given sufficient time to speak with him (*Id.*, p. 4, lines 6-25. Indeed, Defendant indicated he was happy with counsel's work and assured the Court his plea of guilty was being made freely and voluntarily absent threats or coercion (Plea Proceeding, p. 4, line 25, p. 5, lines 1-9 and p. 6, lines 19-25 and p. 7, lines 1-2). Indeed, Defendant assured the Court it could rely upon his representation that he was satisfied with counsel and would not later come before the Court seeking the return of his plea of guilty and blaming his counsel for providing less than satisfactory representation (*Id.*, p. 5, lines 3-9).

In considering Defendant's present contentions which include complaints about counsel's representation, and that he felt pressured to enter a plea of guilty, the Court is "entitled to rely on the record to ascertain whether any promises, representations,

implications and the like were made to the defendant" and the extent to which they induced his plea of guilty (*People v. Ramos*, 65 NY2d 640, 642 [1984](internal citations omitted). "A plea is voluntary if it represents a choice freely made by a defendant among legitimate alternatives (*Id.*; citing *People v. Grant*, 61 AD3d 177, 182 [2d Dept. 2009]). A conveyance of facts by the court or counsel, which accurately represents the legal peril and potential outcomes a defendant faces, does not constitute threats or coercion (see, *People v. Jones*, 44 NY2d 76, 81 [1978]; *People v. Fisher*, 70 AD3d 114 [1st Dept. 2009]:

Under the plea offer extended in the instant case, Defendant was permitted to enter a plea of guilty to a reduced count of attempted robbery in the second degree in full satisfaction of the indictment in exchange for a sentence, as a predicate violent offender, of six (6) years in state prison followed by five (5) years post release supervision. If convicted of robbery in the first degree at trial, Defendant would have faced a maximum sentence of 25 years in state prison (PL §§ 70.04(2), 70.04(3)(a), 70.00(6) and 70.45(2)). Nothing alleged in the herein motion suggests misinformation or threats played a role in Defendant's decision to enter a plea of guilty. Rather, the advice counsel is alleged to have given appears to represent an accurate portrayal of the peril Defendant faced (see, *Jones*, 44 NY2d at 81). Consequently, Defendant has not set forth a legally cognizable basis upon which he is entitled to withdraw his previously entered plea of guilty.

To the extent Defendant alleges he felt pressured to accept the negotiated plea deal or at the time he entered his plea of guilty, these claims do not warrant the return of his plea. As of the time Defendant appeared in TAP in connection with this indictment, motion practice was complete, prior plea negotiations had been had and he was on the precipice of being sent out to trial. Situational pressure which arises when a defendant must decide whether to enter a plea of guilty or go to trial does not qualify as "undue pressure" and does not require the return of a knowing and voluntary plea of guilty (see, *People v. Sparbanie*, 158 AD3d 942, 944 [3d Dept. 2019]; and see, *People v. Merck*, 242 AD2d 792 [3d Dept. 1997]; see also, *People v. Montgomery*, 27 NY2d 601 [1970]). This premise is unchanged where the source of the alleged pressure is an attorney who advises his client to plead guilty to avoid the possibility of a harsher sentence after trial or where a relative offers similar advice (see, *People v. Mann*, 32 AD3d 865 [2d Dept. 2006]; see also, *People v. Manor*, 27 NY3d 1012, 1014 [2016]; and see, *People v. Burdo*, 1 AD3d 793, 794 [3d Dept. 2003]).

In further support of his application to withdraw his plea of guilty, Defendant contends his plea was not freely and knowingly given as he "did not feel he could interrupt the [plea] proceedings to object" and because "not enough time and effort was spent to make sure that [he] understood [his] rights and the nature of the plea and the promised sentence" (Affidavit/Motion to Withdraw, ¶¶ 8). This claim is wholly contradicted by the plea minutes which amply establish that, in the face of many opportunities to indicate a lack of understanding, Defendant repeatedly assured the

Court he understood the concepts explained and questions posed to him (*see generally*, Plea Minutes, pp. 2-15). Furthermore, even accepting as true for the sake of argument, that counsel for Defendant did not properly explain the terms of the plea and sentence promise to Defendant prior to the court appearance, this Court conducted a searching and comprehensive *voir dire* which addressed these topics in detail and, throughout same, Defendant provided responsive answers to inquiries (*Id.*). Consequently, the plea minutes belie Defendant's present claim that he lacked understanding of the terms of the plea or sentence promise.

Additionally, the fact that Defendant alleges a history of substance abuse and depression do not warrant the return of his plea of guilty. While under oath during the plea allocution Defendant specifically denied having used alcohol, medication or any substance which could impair his understanding of the proceeding (*Id.*, p. 10-15). Moreover, a defendant is presumed competent and this presumption cannot be rebutted by a mere claim that a defendant has a history of mental illness (*see, People v Gelikkaya*, 84 NY2d 456, 459 [1994]; *People v. Hansen*, 269 AD2d 467 [2d Dept. 2000], citing *People v Dover*, 227 AD2d 804, 805 [3d Dept. 1996]). Defendant herein has not set forth any evidence to demonstrate that, on the date of his plea, he lacked capacity to understand the proceedings (*Id.*; and *see, People v. Polimeda*, 198 AD2d 242 [2d Dept. 1993](finding no basis to disturb a plea of guilty in the absence of medical evidence to establish defendant's mental state was impaired at the time he entered his plea and where the defendant gave cogent answers during a plea proceeding). Significantly, throughout the plea proceeding, Defendant demonstrated no visible signs of mental illness and was fully engaged and provided cogent responses to inquiries (*see generally*, Plea Minutes, pp. 2-15).

Finally, Defendant's present claim, that trial counsel provided ineffective assistance by allegedly failing to fully explain the plea proceeding and review items of Discovery with him, is self-serving and lacking in support from the record or other sworn documentation. Importantly, the transcript of the plea proceeding reveals Defendant was afforded meaningful representation (*see, People v. Volfson*, 69 AD3d 1123 [3d Dept. 2010] citing, *People v Rivera*, 71 NY2d 705, 708-709 [1988]; *People v Baldi*, 54 NY2d 137, 146-147 [1981]). In the context of a guilty plea, where nothing in the record casts doubt on counsel's apparent effectiveness, meaningful representation can be inferred from a highly favorable plea agreement negotiated by counsel (*People v. Pearson*, 170 AD2d 786 [2d Dept. 1992], appeal denied, 80 NY2d 836). As above discussed, Defendant herein availed himself of a negotiated plea deal under which he entered a plea of guilty to a reduced count of attempted robbery in the second degree in full satisfaction which charged him with respective counts of robbery in the first degree and robbery in the second degree.

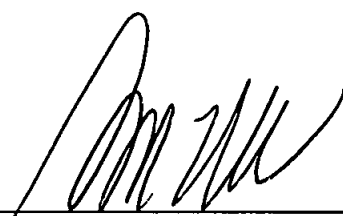
The record of the plea proceeding conclusively demonstrates that Defendant, who is not an ingenué to the criminal justice system, entered his plea of guilty knowingly and voluntarily after an inquiry that established his understanding of each of his rights

and each right he was forfeiting by entering a plea of guilty. While under oath during the plea *voir dire* Defendant expressed satisfaction with counsel and categorically denied his plea was the result of any threat or promise other than the sentence commitment. Accordingly, it is an appropriate exercise of this Court's discretion to summarily deny Defendant's motion to withdraw his previously entered plea of guilty (see, *People v. Hansen*, 269 AD2d [2d Dept. 2000] citing *People v Rosa*, 239 AD2d 364 [2d Dept. 1997]); *People v. Avery*, 18 AD3d 244 [1st Dept. 2005]; *People v. Sain*, 261 AD2d 488, 489 [2d Dept. 1999] citing CPL § 220.60[3]).

Accordingly, and based upon the foregoing, Defendant's motion is summarily denied in its entirety.

The foregoing constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York
May 27, 2020



Honorable Barry E. Warhit
Supreme Court Judge

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