

**People v Barber**

2021 NY Slip Op 31181(U)

March 2, 2021

County Court, Wayne County

Docket Number: 19-55

Judge: John B. Nesbitt

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STATE OF NEW YORK  
COUNTY COURT COUNTY OF WAYNE

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THE PEOPLE OF THE STATE OF NEW YORK,

-vs-

KENNETH BARBER,

Defendant.

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*Indictment No. 19-55*  
*Indictment No. 19-111*  
*Indictment No. 20-W06*

**APPEARANCES:** Michael D. Calarco, Esq.  
Wayne County District Attorney  
(Scott J. Kadien, Esq., Assistant District Attorney, of counsel)

Joseph J. Sapio, Esq.  
*Attorney for the Defendant*

**MEMORANDUM-DECISION**

John B. Nesbitt, J.

Defendant moves pursuant to Criminal Procedure Law (“CPL”) §220.60(3) to withdraw certain guilty pleas entered to satisfy two indictments and one superior court information against him.<sup>1</sup> The first indictment (19-55), issued at the April 2019 Grand Jury Term, charged the defendant with Criminal Contempt 1<sup>st</sup> (Penal Law [“PL”] §215.51[b][v]) and Harassment 2<sup>nd</sup> (PL§240.26 [1]). The second indictment, issued at the October 2019 Grand Jury Term, charged the defendant with two counts of Criminal Possession of a Controlled Substance (“CPCS”) 3<sup>rd</sup> (PL §220.16[1]), one count of CPCS 4<sup>th</sup> (PL §220.09[1]), and six counts of CPCS 7<sup>th</sup> (PL §220.03). The superior court information filed on March 12, 2020, pursuant to CPL Art. 195 and §200.15 charged the defendant with Driving While Impaired By Drugs (D Felony)(V&T L §1192(4) and 1193(1)(c)(ii) and CPCS 3<sup>rd</sup> (PL §220.16[1]).

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<sup>1</sup> CPL §220.60(3) provides:

3. At any time before the imposition of sentence, the court in its discretion may permit a defendant who has entered a plea of guilty to the entire indictment or to a part of the indictment, or a plea of not responsible by reason of mental disease or defect, to withdraw such plea, and in such event the entire indictment, as it existed at the time of such plea is restored.

On February 13, 2020, with the People's concurrence, the defendant plead guilty to the first count of Indictment 19-55 charging him with Criminal Contempt 1st and the first count of Indictment 19-111 charging him with CPCS 3<sup>rd</sup>, in full satisfaction of all counts of both indictments, subject to specified and concurrent sentences. On March 12, 2020, the defendant plead guilty to the sole count of the Superior Court Information charging him with CPCS 3<sup>rd</sup> subject to a sentence no greater than, and concurrent with, that promised for the CPCS 3<sup>rd</sup> charge to which defendant plead guilty on February 13, 2020.

Sentencing was scheduled for May 21, 2020, and the defendant was released pending sentence. Defendant did not appear for sentencing at the scheduled date or thereafter. Eventually, defendant's presence was secured pursuant to warrant and remand to custody. The matter was scheduled for sentence on November 20, 2020. On November 19<sup>th</sup>, the day before the scheduled sentencing, the defendant, through his counsel, moved for certain relief, those being orders allowing defendant to withdraw his guilty pleas, to release him on his own recognizance or reasonable bail, and relieving present counsel and appointment of new counsel to represent the defendant. On November 20<sup>th</sup>, with the consent of the defendant, the Court relieved his present counsel and appointed new counsel. Over the objection of defendant, the Court denied his request to be released upon his own recognizance or upon bail. The Court ordered an evidentiary hearing to be held regarding the merits of defendant's application for permission to withdraw his guilty pleas, with representation by new counsel at such hearing.<sup>2</sup> Such hearing was held on January 21, 2021.

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<sup>2</sup>See *People v Miller*, 42 NY2d 946, 947 (1977) ("Upon such a motion the court may, in its sound discretion, determine to hold an evidentiary hearing" [citations omitted]). There are cases, however, where a hearing is required. For example, "where ...the record raises a legitimate question as to the voluntariness of the plea, an evidentiary hearing is required" (*People v Brown*, 14 NY3d 113, 116 [2010]). The allegations in his attorney's affirmation supporting the defendant's application to withdraw his guilty pleas did raise a voluntariness issue. Enumerated paragraph 7 of the November 19, 2020, Canzano Affirmation reads:

"Here the defendant claims that he was under the influence of alcohol and/or drugs during the times of his pleas and did not as a result fully comprehend his actions in accepting said pleas. Accordingly, this Court should find that his pleas were not knowingly, voluntarily and intelligently made, and should order his pleas withdrawn, or in the alternative, order a hearing to determine the same."

Upon the record developed at the hearing, the prior proceedings and filings had in these matters, as well as the Court's own observations of defendant at the times of his guilty pleas, the present application to allow defendant to withdraw his guilty pleas is denied.

It is well settled that, in order to be valid and enforceable, a guilty plea must be entered voluntarily, knowingly and intelligently. A guilty plea is voluntary only if it represents an informed choice freely made by defendant among other valid alternatives (*People v Brown*, 14 NY3d 113, 116 [2010][citations omitted]).

On both February 13<sup>th</sup> and March 12<sup>th</sup>, 2020, the dates of defendant's guilty pleas, and before those pleas, defendant's counsel did in open court and on the record, clearly and succinctly state the conditions upon which those pleas would be made. Thereafter, defendant did enter his guilty pleas, thereafter sworn, and engaged in the colloquy necessary to assure the Court that his pleas were knowingly, voluntarily, and intelligently made. Among other things, on each occasion, in response to judicial inquiry, the defendant did swear under oath that:

- (1) He was not under the care of any doctor.
- (2) He had not taken any drugs or alcoholic beverages within the last forty eight hours.
- (3) He felt in reasonably good physical and mental health at that time.
- (4) He had discussed the case, plea, and outcome thoroughly with his attorney, was confident that he fully understood everything, and any questions he may have had had been answered.
- (5) He acknowledged that the facts underlying the charges to which he had just plead were true, after having being read those facts as set forth in the respective indictments and superior court information.
- (6) He stated that there were no conditions attached to his pleas except as expressly put forth on the record, and that he had no different understandings or expectations.
- (7) He stated that he was not threatened or otherwise pressured to plead guilty.
- (8) He acknowledged that he was not required to plead guilty, that he had the absolute right to have a trial, one by jury should he so choose, and at that trial he had the right to remain silent and enjoy the presumption of innocence, that the burden was on the People to prove him guilty by legally competent proof that would establish his guilt beyond reasonable doubt, failing which he would be acquitted without consequence.

(9) He acknowledged his understanding that at any trial he would have the benefit of counsel, who could challenge the proof being presented against the defendant by cross-examining witnesses, impeaching evidence, and affirmatively putting before the jury any evidence germane to his defense.

(10) He acknowledged he fully understood his appellate rights after being fully advised of the same by the court, that he understood the effect of a waiver of those rights, that he had discussed such a waiver with counsel, that he was waiving those rights in accordance with the negotiated plea, and that he was doing so voluntarily and of his own free will.

On both February 13<sup>th</sup> and March 12<sup>th</sup>, following its colloquies with the defendant, the Court found that the defendant's pleas of guilty were knowing, voluntary, and intelligent. Defendant's present motion before the Court argues that defendant "was under the influence of alcohol and/or drugs during the times of his pleas and did not as a result fully comprehend his actions in accepting said pleas." Accordingly, "his pleas were not knowingly, voluntarily and intelligently made." Further, "his pleas were induced by fraud, abuse, or mistake," and he "claims innocence related to the charges he faces herein." A hearing was held on the merits of defendant's application on January 21, 2021, and the sole witness was the defendant. Defendant was represented at the hearing by counsel assigned after his prior counsel was relieved on November 20, 2021. Regarding his February 13, 2020, plea, defendant testified that he was "bullied" by his attorney, "misused," "mistreated," "tricked," and "railroaded" into pleading guilty on that date, at which time defendant was "nervous" and "scared," as well as "under the influence of K2 and other beverages," K2 being a synthetic cannabis and the beverage being beer branded as Natty Daddy. Defendant also testified that he was in the same state of mind and under the influence of the same substances on March 12, 2020, when he plead guilty as well.


Of course, a guilty plea, to be valid, must be knowing, voluntary, and intelligent (*Boykin v Alabama*, 395 US 238 [1969]). The record of this defendant's pleas on both February 13<sup>th</sup> and March 12<sup>th</sup>, 2020, reveal thorough inquiries into the issues necessary to sustain valid guilty pleas. There is nothing in the record that would indicate that his guilty pleas were anything other than knowing, voluntary, and intelligent. Neither the defendant nor his counsel point to any errors or omissions by the Court in the proceedings on those two days that would vitiate the validity of the defendant's

guilty pleas. This Court notes that there was nothing in the defendant's appearance, demeanor, manner of speech, or content of responses to questions posed indicating any issue regarding the defendant's competence, understanding, and voluntary election to proceed with the negotiated guilty pleas on both days. Defendant was fully engaged with the proceedings on each occasion.

The Court does not find the defendant's testimony credible that he was impaired by drugs or alcohol at the time of his guilty pleas. Further, the Court does not credit the defendant's conclusory testimony that his guilty pleas were the product of misrepresentation by counsel or anything other than knowing, voluntary, and intelligent. The Court notes that the defendant has an extensive history with the criminal justice system, and exhibited a level of sophistication with how it works beyond many defendants. In short, defendant's testimony lacks credibility and does not warrant this Court to now permit the defendant to withdraw his guilty pleas.

Accordingly, the defendant's application for permission to withdraw his pleas of guilty is denied.

Dated: March 2, 2021  
Lyons, New York



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John B. Nesbitt  
County Court Judge