COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER
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THE PEOPLE OF THE STATE OF NEW YORK

-against-

ANGELO MELENDEZ,

Defendant.
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DECISION & ORDER

Ind. No.: 19-367S

ZUCKERMAN, J.

Defendant is awaiting sentencing upon his conviction by plea, under Superior Court Information No. 19-367S, to one count of Grand Larceny in the Fourth Degree (Penal Law §155.30[1]) and one count of Petit Larceny (Penal Law §155.25.) By Notice of Motion dated May 25, 2021, with accompanying Affirmation, Defendant moves to vacate his plea and to dismiss all charges "in the interests of justice" (Defendant's Notice of Motion). In response, the People have submitted an Affirmation in Opposition, dated June 7, 2021, urging the court to deny the motion.

The motion is disposed of as follows:

PROCEDURAL HISTORY

On or about October 2, 2018, Defendant was arrested for, *inter alia*, his participation in a fraud involving real estate closings, including one theft amounting to $36,000.00 from which Defendant purportedly received over $3,000.00 in cash. He was charged with Grand Larceny in the Third Degree (Penal Law §155.30), a Class D Felony.

Following his arraignment in local court, at Defendant's

request, a Superior Court Information ("SCI") conference was held before another judge of this court. As a result of that conference, on November 6, 2019, Defendant was arraigned on an SCI and pled guilty to one count of Grand Larceny in the Fourth Degree (Penal Law §155.30[1]) and one count of Petit Larceny (Penal Law §155.25.) in full satisfaction of the outstanding charges from his arrest. At the time of the plea, all parties agreed that the court would place Defendant on Interim Supervision Probation (ISP) for a period of one year, with a requirement that he make monthly restitution payments of $88.88. The parties stipulated that, if Defendant was successful in both ISP and payment of restitution, his felony plea would be vacated and he would be sentenced (on the Petit Larceny charge) to 3 years probation (less one year credit for his time on ISP) with an additional requirement that he pay $2,133.44 in restitution over the two years of probation. The parties further stipulated that, if Defendant was not successful in either ISP or the payment of restitution, he would be sentenced on the Grand Larceny in the Fourth Degree count to 5 years probation (again less the one year for his time on ISP) with a requirement that an additional $3,200.00 in restitution be paid over the four remaining years of probation. In either case, the court would also issue a Restitution Judgment Order for $36,170.13, the balance owed in restitution. After a number of adjournments, many of them due to the COVID public health emergency, Defendant now moves for dismissal in the interest of justice.

CONTENTIONS OF THE PARTIES

Defendant moves to dismiss the SCI in the interest of justice. With respect to the facts, Defendant argues that his participation was initiated by another person who has not been charged and that said other person sought Defendant's assistance in obtaining funds to help his church. Defendant adds that, believing that the transaction of funds was legitimate, he assisted the uncharged party in the theft of funds and, in fact, accepted a portion of the funds himself.

Defendant argues that he has paid "full restitution" and has cooperated with the People - while simultaneously conceding that he faces a civil judgment of $36,000.00 for the restitution balance. He further argues that his life until now has been "exemplary:" he has been employed since school and provides care for his mother (with whom he lives). He also claims that he has contributed to his community by creating an athletic league through his church which counsels and guides young men. While he concedes the seriousness of the offense, he argues that he "hardly warrants punishment" due to his cooperation and payment of restitution, his spending one week in jail, and the $36,000.00 judgment which he must bear. He also asserts that there is no need for either further punishment or deterrence and that he will be stigmatized for life due to his conviction. In short, Defendant argues that this is a single, isolated event in an unblemished life and dismissal is clearly warranted.

The People argue that Defendant has failed to present a compelling reason to support dismissal in the "furtherance of justice" (CPL §210.40). They note that Defendant, through counsel, negotiated a very favorable disposition. The People add that, notwithstanding Defendant's prior misdemeanor conviction and being charged here with a Class D Felony, he was afforded the opportunity to receive a non-jail resolution; far better, they argue, than the possibility of up to seven years imprisonment.

The People also note that Defendant concedes that the charged offense was serious and that the victim of his offense was deprived of almost $40,000; well less than 10% of which will be paid back by the time his anticipated period of probation is completed. The People also assert that, even apart from Defendant's admission of guilt during his plea allocution, prosecutors have obtained considerable proof of Defendant's guilt. They add that, despite Defendant's assertion that he previously led an "exemplary" life, he, in fact, has a previously been convicted of a Class A Misdemeanor: Endangering the Welfare of a Child (Penal Law §260.10). And, as they properly point out, dismissal now would relieve Defendant of having to pay restitution over the remaining years of his probation, which condition serves a valid purpose and effect (as to both rehabilitation for Defendant and reparation for the victim). Finally, they argue, dismissal would have a negative effect on public safety and the public's perception of the criminal justice system.

DISCUSSION

1. Defendant's Motion is Improper.

As a preliminary matter, Defendant's motion, insofar as it seeks *vacatur* of his guilty plea, is procedurally improper. The Criminal Procedure Law provides two vehicles for setting aside a finding of guilt, CPL Articles 330 (for motions prior to sentencing) and 440 (for post-sentencing motions).

Even if Defendant had denominated his motion as one to set aside the plea pursuant to CPL Article 330, the court would be compelled to deny it. As noted in *People v Ponnapula*, 229 AD2d 257, 266-67 (1st Dept 1997)

> A trial court's power to set aside a verdict is "far more limited" than that granted to an intermediate appellate court on direct appeal. (*People v Carter*, 63 NY2d 530, 536.) CPL 330.30(1) authorizes a trial court to set aside or modify a verdict only in the case of error, which, "if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court." (*See, People v Carter*, supra, 63 NY2d, at 536.)

Here, Defendant moves to vacate his guilty plea in the interests of justice - not for any cognizable legal error. Such grounds are hardly those which "if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court." CPL §330.30 [1].

Further, as the court noted in *People v Prato*, 182 Misc2d 558, 560-61 (Dist Ct 1999), *affd* 186 Misc2d 528 (App Term, 2nd Dept 2000)

"an interest of justice rationale....is not a basis upon

which a trial court can set aside a verdict." *Ponnapula*, supra, at 267.

See also People v Broughton, 3 Misc3d 1104(A) (Supreme Court, Westchester County, 2004), *affd* 40 AD3d 107 (2d Dept 2007), *lv den* 9 NY3d 921 (2007)(motion to vacate pursuant to CPL §330.30(1) on interest of justice grounds denied as procedurally improper, quoting *Prato* and citing to *Ponnapula*).

A motion pursuant to CPL Article 440 is similarly unavailing. CPL §440.10(1) provides that such motion may be made

"At any time after entry of judgment..."

Here, there is, in fact, no "judgment of conviction" to vacate. Rather, since Defendant has not been sentenced, the instant matter is pending before, not after, entry of judgment. *See* CPL §1.20(15)--Judgment comprised of conviction and sentence (*emphasis added*). Thus, the instant matter is not ripe for a CPL §440 motion to set aside Defendant's conviction as she has not yet been convicted.

To the extent the instant application is treated as a "*Clayton* motion," *see People v Clayton*, 41 AD2d 204 (2nd Dept 1973), it is untimely as it was not brought within the statutorily mandated time frame and Defendant has failed to assert good cause for the untimeliness. Defendant may move for dismissal in furtherance of justice "[a]fter arraignment upon an indictment[1]." CPL

[1]Defendant's motion is styled as a motion to dismiss in the interests of justice. While his Notice of Motion indicates that relief is sought "pursuant to CPL 215 and 210.45," such motions

§210.20(1)(I). CPL §210.20(2) specifies, however, that "[a] motion pursuant to this section ... should be made within the period provided in section 255.20." That period, as prescribed in CPL §255.20(1), must be "within forty-five days after arraignment and before commencement of trial...." The instant motion was filed on May 25, 2021, more than eighteen months after his arraignment on the SCI and well more than one year beyond the statutory time limit. Therefore, even given the toll granted by Executive Order 202.8 for time limitations periods which was in effect between March and November 2020 due to the COVID emergency, the motion must be denied. *People v. Pittman*, 228 AD2d 225 (1st Dept 1996), lv denied 88 NY2d 992 (1996)(delay in filing motion to dismiss charges until well beyond the statutory period was not adequately excused).

Particularly applicable is *People v Field*, 161 AD2d 660 (2nd Dept 1990). In *Field*, the defendant submitted a *Clayton* motion after verdict but before sentence. The court held that it must be denied as untimely. See also *People v Agha*, 239 AD2d 930 (4th Dept 1997)(untimely Clayton motion properly denied); William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, Criminal Procedure Law §210.40.

In sum, this court has no power, under either CPL Article 330 to set aside a plea on the grounds asserted (namely, interest of

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are regularly brought pursuant CPL §210.40. Although that statute only provides for dismissal of "[a]n indictment or any count thereof...," pursuant to CPL §200.15, "all procedures and provisions of law applicable to indictments are applicable to superior court informations."

justice), under CPL Article 440 to vacate a conviction prior to sentence, or to consider an untimely *Clayton* motion to dismiss in the furtherance of justice. Therefore, Defendant's motion must be summarily denied.

2. Motion to Dismiss in Furtherance of Justice.

In any event, even had this motion been timely brought, it nonetheless would be denied on its merits. Defendant's motion to dismiss in the furtherance of justice is governed by CPL §210.40. CPL §210.40(1) provides

> An indictment, or any count thereof may be dismissed in furtherance of justice...when...such dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstances clearly demonstrating that conviction or prosecution of the defendant upon such indictment or count would constitute or result in injustice.

This statute, relied upon by Defendant, is codification of *People v Clayton, supra; see People v Belge*, 41 NY2d 60 (1976). While the power to dismiss an indictment in the furtherance of justice is committed to the court's discretion, it should be "exercised sparingly and only in those rare cases where there is a compelling factor that clearly demonstrates that prosecution of the indictment would be an injustice." *People v Candelaris*, 50 AD3d 913, 913 (2nd Dept 2008), quoting *People v Sherman*, 35 AD3d 768, 768 (2nd Dept 2006); *People v M.R.*, 43 AD3d 1188 (2nd Dept 2007), *app*

den 9 NY3d 1008 (2007); *People v Ward*, 300 AD2d 418 (2nd Dept 2002), *app den* 100 NY2d 600 (2003). The "compelling factor" language found in CPL §210.40(1) mandates that "the facts and circumstances must be of a nature that denial of the relief would be such an abuse of discretion as to shock the conscience of the court." *People v Stern*, 83 Misc 2d 935 (NY Crim Ct 1975). As one court has opined, the severity of the relief dictates that it should be used "as sparingly as garlic." *People v Boyer*, 105 Misc 2d 877 (Syr City Ct 1980).

In determining whether dismissal is warranted, a court must consider the circumstances of the case and, individually and collectively, the ten statutory criteria set forth in CPL §210.40(1) in order to determine whether any "compelling factor" which justifies dismissal exists. *Holtzman v Goldman*, 71 NY2d 564 (1988); *People v Sherman, supra; People v McAlister*, 280 AD2d 556 (2nd Dept 2001), *app den* 96 NY2d 803 (2001). In so doing, the court must conduct "a sensitive balancing of the interests of the individual and of the People." *People v Rickert*, 58 NY2d 122, 126-127 (1983); *People v Hudson*, 217 AD2d 53 (2nd Dept 1995); *People v Brown*, 194 AD2d 548 (2nd Dept 1993). Such analysis, however, "is in no way intended to be a substitute for trial." *People v Prunty*, 101 Misc 2d 163 (NY Crim Ct 1979).

After considering the parties' arguments and evaluating them against each of the statutory criteria, the court finds that Defendant has failed to sustain his initial burden of making a

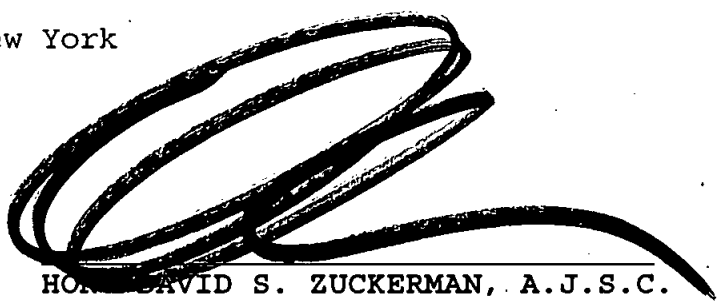
prima facie showing of "some compelling factor, consideration or circumstance which would render his conviction or prosecution on the underlying charges unjust." *People v Schlessel*, 104 AD2d 501, 502 (2nd Dept 1984); *People v Brown, supra; People v. Thomas*, 108 AD2d 884 (2nd Dept 1985). Defendant pled guilty to one count of Grand Larceny in the Fourth Degree (Penal Law §155.30[1]) and one count of Petit Larceny (Penal Law §155.25) in connection with his active participation in a scheme to wrongfully, by fraud, obtain thousands of dollars. As the People properly note, Defendant has a prior conviction and presumably fails to appreciate the seriousness of, and corrupt circumstances involving, this offense. While Defendant attempts to minimize the extent of harm from the offense by emphasizing his unwitting participation, it appears that he made earnest efforts to acquire the stolen funds. Presumably, he did so for larcenous purposes. And, as the People note, dismissal would deprive the victims of this theft of the restitution payments ordered over the period of probation, amounts which may be significant in ameliorating the losses from Defendant's larcenous activities here.

Regarding the proof against Defendant, not only did he already plead guilty, there is also extensive bank and other witness evidence of his commission of the crimes charged. Regarding Defendant's history, character, and condition, he has a prior conviction for endangering the welfare of a child. While he has submitted letters from his pastor and his mother, neither

recommends that he not be sentenced for his participation in this criminal act. The People correctly assert that the impact of dismissal upon public confidence in the criminal justice system would be significant, given the lack of other factors militating in Defendant's behalf, his prior criminal record, and the fact that Defendant seeks not to withdraw his plea and go to trial, but outright dismissal. In sum, even if the court were to consider the merits of Defendant's motion to dismiss in furtherance of justice, it would be denied as he has not set forth a compelling factor justifying such relief.

In short, Defendant has failed to posit sufficient facts to convince the court that vacatur and/or dismissal is warranted. Accordingly, Defendant's motion to set aside his plea of guilty and dismiss the Superior Court Information is denied.

Dated: White Plains, New York
October 7, 2021



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