

**People v Kirkland**

2025 NY Slip Op 35375(U)

June 13, 2025

County Court, Westchester County

Docket Number: Indictment No. 15-0868

Judge: Anne B. Bianchi

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This opinion is uncorrected and not selected for official publication.

COUNTY COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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

**FILED and ENTERED**  
  
**WESTCHESTER  
COUNTY CLERK**

-against-

**FILED**

**JUN 16 2025**

**TIMOTHY C. DONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER**

**DECISION AND ORDER**

Indictment No. 15-0868

TARENCE KIRKLAND,

Defendant.

-----X  
BIANCHI, J.

In disposing of the instant *pro se* motion submitted by defendant pursuant to CPL 440.20, seeking an order of this Court setting aside the sentence imposed under this indictment, the Court has considered the notice of motion, affidavit in support with annexed exhibits and reply affidavit of defendant, and the Court has further considered the affirmation in opposition and memorandum of law with annexed exhibit of Assistant District Attorney Alexandra Krueger. Upon these submissions, the instant motion is decided as follows:

Factual Findings

By Indictment Number 15-0868, defendant was convicted, after a jury trial, of two (2) counts of criminal sale of a controlled substance in the third degree (Penal § Law § 220.39 [1]) for selling cocaine to an undercover police detective on February 10 and February 18, 2015. On November 9, 2016, defendant was produced with trial counsel, Kevin Griffin, Esq., in County Court, Westchester County (Minihan, J.) at which time, trial counsel was relieved of representing defendant based on defendant's grievances with counsel, and Mark Fitzmaurice, Esq. was assigned to represent defendant. On August 31, 2017, Mr. Fitzmaurice was relieved as counsel, and Max DiFabio, Esq. was assigned to represent defendant. On September 1, 2017, defendant was produced before County Court, Westchester County (Minihan, J.) with counsel, Max

DiFabio, Esq., for a predicate felony hearing.

At the hearing, the People argued that defendant should be sentenced as a predicate felony offender because on or about December 16, 2002, in Westchester County Court, defendant was convicted, upon his plea of guilty, under SCI 02-1113, of rape in the second degree, at the time, a non-violent felony (Penal Law § 130.30 [1]). Pursuant to this conviction, on April 7, 2003, defendant was sentenced to 10 years of shock probation (with time served). At the hearing, the People introduced a certified record from the Department of Parole showing that defendant had a final parole revocation hearing on October 4, 2006, resulting in revocation of parole and parole jail time from May 5, 2006 to October 24, 2006. The People also introduced a certified transcript of that final parole revocation hearing, which memorialized that defendant was present at the hearing, as was an attorney who was assigned to protect defendant's interests. Defendant testified on his own behalf and claimed that he never had a parole revocation hearing and was not afforded counsel in the revocation proceedings, thereby allegedly rendering the period of incarceration from that parole revocation hold (May 5, 2006 to October 24, 2006) to have been an unlawful detainment and as such, argued the tolling pursuant to Penal Law § 70.06 (1) (b) (v) was inaccurately calculated and that his rape in the second degree conviction fell outside of the requisite 10 years (*see* Penal Law § 70.06 [1] [b] [iv]).

On September 1, 2017, after the predicate felony hearing, defendant was adjudicated a second felony offender, and sentenced on each count, to a determinate prison term of six years plus one and a half years post-release supervision; the court ordered these sentences to run concurrently with each other.

On September 18, 2017, counsel Max DiFabio, Esq. and David M. Colgan, Esq. filed a notice of appeal on behalf of defendant. On March 16, 2022, defendant's judgment of conviction

was unanimously affirmed upon direct appeal to the Appellate Division, Second Department in *People v Kirkland* (203 AD3d 951, 953), therein, among other things, rejecting defendant's claim, on the merits, that the period of time defendant was in jail – May 5, 2006 to October 24, 2006 – was unjustified and should not be used as a toll for purposes of calculating his sentence as a second felony offender. On July 29, 2022, the New York Court of Appeals denied defendant's application seeking leave to appeal therefrom in *People v Kirkland* (38 NY3d 1134).

By papers dated July 24, 2018, defendant filed a CPL 440.10 motion, claiming that the People were improperly permitted to offer evidence of uncharged drug sales during their direct case, and that, as a result, defendant received ineffective assistance of counsel and an unfair trial, and that the prosecutor committed misconduct by eliciting certain trial testimony. By Decision and Order dated November 7, 2018, County Court, Westchester County (Minihan, J.) summarily denied the motion on procedural grounds, and notwithstanding the procedural bars, on the merits. By decision and order dated March 20, 2023, the Appellate Division, Second Department dismissed defendant's appeal on the grounds that the County Court's November 7, 2018 order is not appealable as of right.

By papers dated March 17, 2019, defendant filed a *pro se* CPL 440.20 motion to set aside his sentence arguing, *inter alia*, that the court wrongfully sentenced him as a violent or second felony offender and his counsel was ineffective. Defendant also claimed that he “never had [his] 30 day appeal” and that “Mr[.] Kevin Griffin said he was going to do [his] 30 day appeal but he left the case.” Moreover, defendant also argued that the sentence was illegally imposed because he never had a final parole revocation hearing. On June 6, 2019, the County Court, Westchester County (Minihan, J.) summarily denied defendant's motion, stating, “the evidence at the [predicate felony] hearing demonstrated that defendant had a final parole revocation hearing

while being represented by counsel” (*id.* at 2). The Court also denied the claims of ineffective assistance as procedurally barred because defendant raised them in his prior CPL 440.10 motion. The Appellate Division, Second Department denied leave to appeal (*People v Kirkland*, 2019 NY Slip Op 86880[U] [2d Dept 2019]).

By papers dated November 10, 2021, defendant filed a second *pro se* CPL 440.20 motion to set aside his sentence (later adopted by retained counsel) arguing, *inter alia*, his prior claim that he never had a parole revocation hearing, thereby allegedly rendering the period of incarceration from that parole revocation hold to be an unlawful detainment and as such, improperly used for tolling purposes. By Decision and Order dated June 1, 2022, the Supreme Court, Westchester County (Neary, J.), summarily denied defendant’s motion, noting that defendant previously filed a CPL 440.20 motion claiming that he was wrongfully sentenced as a violent or second felony offender, which was summarily denied by decision and order of the County Court, Westchester County (Minihan, J.), dated June 6, 2019. Further, the Court found that defendant’s claim that he was not present at a parole violation hearing, and therefore, improperly incarcerated for several critical months relating to the tolling period for predicate felony purposes is “conclusively refuted by unquestionable documentary proof in the form of a transcript of the parole hearing in question” (*id.* at 3, citing CPL 440.30 [3] [c]). By decision and order dated March 20, 2023, the Appellate Division, Second Department dismissed defendant’s appeal on the grounds that the Supreme Court’s June 1, 2022 order is not appealable as of right and, after extending defendant’s time to seek leave to appeal, denied defendant’s application for leave to appeal by decision and order dated January 5, 2024.

In the instant *pro se* motion, defendant now moves for a third time pursuant to CPL 440.20, alleging, yet again, that his sentence was illegally imposed because he never had a final

parole revocation hearing, and thus, was unjustly imprisoned, and as such, that period of incarceration could not be considered as part of the tolling calculation to determine his second felony offender status; and that his counsel failed to file a notice of appeal from his judgment of conviction.

#### Conclusions of Law

Pursuant to CPL 440.20 (2), a reviewing court “must” deny a motion pursuant to CPL 440.20 when the ground or issue raised was previously determined on the merits upon an appeal from a judgment, unless since the time of such appellate determination there has been a retroactive change in the law controlling such issue (CPL 440.20 [2]). Additionally, pursuant to CPL 440.20 (3), a court may deny a motion to vacate “when the ground or issue raised thereupon was previously determined on the merits upon a prior motion . . . unless since the time of such determination there has been a retroactively effective change in the law controlling such issue” (CPL 440.20 [3]).

In the present case, defendant raised on direct appeal the issue that he never received a final parole revocation hearing and as such, his sentence was improperly enhanced based on his prior rape conviction and the tolling provisions of Penal Law § 70.06 (1) (b) (v). The Appellate Division specifically rejected this argument on its merits in its decision, affirming the judgment of conviction (*People v Kirkland*, 203 AD3d 951 [2d Dept 2022]). Defendant also raised this same claim in two prior CPL 440.20 motions. By decisions dated June 6, 2019 (Minihan, J.) and June 1, 2022 (Neary, J.), the courts denied both motions on the merits. Accordingly, defendant’s claim in his instant CPL 440.20 motion is hereby denied pursuant to CPL 440.20 (2) for having been raised on direct appeal and subsequently rejected on the merits and pursuant to CPL 440.20.

(3) based on the County and Supreme Courts' previous denial of this claim on the merits.

As for defendant's claim of a Sixth Amendment violation, namely, that Kevin Griffin, Esq., who represented him at trial, but not at the time of sentence, failed to file a notice of appeal of defendant's judgment of conviction to the Appellate Division, at the outset, the Court notes that pursuant to CPL 440.20, a defendant may move to set aside a sentence solely "upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law," and an order pursuant to this statute will "not affect the validity or status of the underlying conviction" (CPL 440.20 [4]). As defendant's claim concerns a notice of appeal, which challenges the entire judgment of conviction, defendant's claim is not recognizable under CPL 440.20. In any event, defendant's claim is without merit.

Pursuant to CPL 440.10 (3) (b), a court may deny a motion when, as relevant, "The ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state, other than an appeal from the judgment . . . ; unless since the time of such determination there has been a retroactively effective change in the law controlling such issue" (CPL 440.10 [3] [b]). Here, defendant filed a CPL 440.10 motion alleging ineffective assistance of counsel based on counsel's alleged failure to seek limiting instructions, which was denied by County Court, Westchester County (Minihan, J.) on both procedural grounds and the merits. Furthermore, in a subsequent CPL 440.20 motion, defendant again made an allegation of ineffective assistance of trial counsel, alleging that he was never afforded his 30-day appeal because his assigned attorney, Kevin Griffin, Esq., failed to file an appeal and subsequently abandoned his case – the exact same claim of ineffective assistance defendant asserts in the instant motion. County Court, Westchester County (Minihan, J.) likewise denied defendant's ineffective assistance of counsel claim, ruling it non-cognizable and

procedurally barred as it had been raised and denied in his previous CPL 440.10 motion.

Consequently, the Court finds that the summary denial of the instant vacatur motion is proper pursuant to CPL 440.10 (3) (b) based on this Court's previous denial of this claim on the merits.

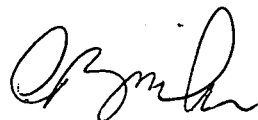
Of similar effect, article 440 of the CPL further authorizes the reviewing court to dismiss a motion seeking the vacatur of a judgment and to set aside sentence upon the grounds prescribed in CPL 440.30 (4) (a)-(c), including where "an allegation of fact essential to support the motion . . . is contradicted by a court record or other official document . . . and under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true" (CPL 440.30 [4] [d]). Here, the record shows that Mr. Griffin was no longer defendant's attorney at the time of sentence and in the 30 days that followed defendant's judgment of conviction, having been relieved by the court. Notably, defendant's sentencing counsel, Mr. DiFabio and Mr. Colgan, did file a timely notice of appeal on September 18, 2017. On March 16, 2022, defendant's judgment of conviction was unanimously affirmed upon direct appeal to the Appellate Division, Second Department in *People v Kirkland* (203 AD3d 951). Based upon the foregoing, this Court finds that the summary denial of the instant vacatur motion is also proper upon this record pursuant to CPL 440.30 (4) (d).

Finally, to the extent defendant has raised the additional claims that his first CPL 440.20 motion dated March 17, 2019 was successfully appealed and that his second CPL 440.20 motion was successful, the Court summarily denies these claims pursuant to CPL 440.30 (4) (d).

Based upon the foregoing, as the claims raised in this motion have been previously raised on appeal and in previous CPL 440 motions and are without merit, the motion is denied in its entirety. As such, defendant's CPL 440.20 motion is summarily denied.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York  
June 13, 2025



Honorable Anne Bianchi  
County Court Judge

**Hon. Anne B. Bianchi**  
**County Court Judge**

TO:

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