

People v Rodriguez

2012 NY Slip Op 30563(U)

January 31, 2012

Sup Ct, Kings County

Docket Number: 13576/95

Judge: Deborah A. Dowling

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M E M O R A N D U M

**SUPREME COURT: KINGS COUNTY
(Criminal Term, Part 1)**

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PEOPLE OF THE STATE OF NEW YORK,

DECISION AND ORDER
By: Justice Deborah A. Dowling

-against-

Dated: January 31, 2012

Indictment No: 13576/95

JUAN RODRIGUEZ,
Defendant(s).
-----X

The defendant submitted the instant motion, *pro se*, seeking to vacate, set aside or correct his sentence pursuant to Criminal Procedure Law §440. The defendant contends his conviction and resulting sentence were imposed in violation of his constitutional rights. Specifically, the defendant contends his Sixth Amendment rights and his right to effective assistance of counsel were violated. The People submitted opposing papers to the defendant’s motion. For the reasons stated herein the defendant’s motion is denied in its entirety.

PROCEDURAL HISTORY

The defendant was charged in the instant indictment with Criminal Sale of a Controlled Substance in the Third Degree (P.L. § 220.39(1)), Criminal Possession of a Controlled Substance in the Third Degree (P.L. §220.16(1)) and Criminal Possession of a

Controlled Substance in the Seventh Degree (P.L. §220.03). The charges arose out of a buy and bust operation which occurred in Kings County, on October 20, 1995. The indictment alleged the defendant sold an undercover officer six black top vials of crack cocaine in exchange for fifteen (\$15) dollars in pre-recorded buy money. After the undercover operation, the defendant was apprehended and law enforcement recovered six black top vials containing crack cocaine, thirty-seven dollars in United States currency (\$37), fifteen dollars (\$15) in pre-recorded buy money and a beeper from the defendant's person.

The defendant plead guilty, on January 19, 1996, to Attempted Criminal Sale of a Controlled Substance in the Third Degree (P.L. §110/220.39(1)) in exchange for a reduced sentence of one year incarceration. On February 5, 1996, the defendant was sentenced to one year incarceration and has presumably served his time on that sentence. It appears the defendant is now presently incarcerated on an unrelated matter. The defendant now serves the instant motion, fifteen (15) years post-conviction, seeking to vacate the conviction and resulting sentence.

The defendant never appealed his original sentence nor did he seek to vacate his conviction anytime prior to this motion. The defendant contends he accepted the plea offered at the time of his conviction but was incompetent to do as he suffered from a "disorder or learning disability" and his attorney at the time failed to adequately advise him of the proceedings. Moreover, the defendant argues, while he plead guilty to the charge of attempted sale of a controlled substance charge, he should have been offered a plea under

a possession offense based upon the allegations in the indictment. The defendant failed to offer any basis for that theory.

CONCLUSIONS OF LAW

The question presented is whether the defendant's conviction and subsequent sentence should be vacated based upon the particular facts and circumstances of this case and whether the defendant's trial attorney was ineffective as a matter of law. The answer to both questions is a resounding no. The defendant's motion is denied in its entirety.

In determining a defendant's motion on the asserted grounds of ineffective assistance of counsel, the defendant must establish the two prong test set forth in *Strickland v. Washington*, 466 US 668 (1984). Namely, the defendant must establish defense counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's errors, the proceeding would have been different. *Strickland*, supra. The *Strickland* standard requires any judicial scrutiny brought to bear upon defense counsel's performance be highly deferential in an effort to avoid the distorting effects of hindsight.

In the instant case, it is clear the defendant has failed to meet the two-prong test of *Strickland*. The defendant submitted this motion approximately fifteen years after being sentenced and presumably fourteen (14) years after serving his sentence. The delay in submitting the motion has placed the People and the Court in a precarious position in so far as it relates to obtaining the plea minutes in this case to discern what occurred at that time.

The reporter who transcribed the minutes of the defendant's plea submitted correspondence to the court indicating the plea minutes are inexplicably unavailable.

However, the Court file and the particular facts and circumstance of this case provide ample evidence of the level of representation provided by the defendant's trial attorney. It is clear the defendant faced significant jail time if convicted of the crimes charged in the indictment and the evidence against the defendant was overwhelming. It is equally apparent that rather than risk significant jail time upon being convicted the defendant elected to plea guilty in return for a significantly reduced sentence. It appears the defendant elected to avail himself of the favorable plea arrangement in light of the fact that the evidence against him was substantial in so far as illegal narcotics and pre-recorded buy money were recovered from the defendant's person when he was apprehended.

Although, the minutes relating to the defendant's plea are unavailable, evidence of the defendant's attorney representation in this matter can be gleaned from the sentencing minutes. It is clear the defendant had the benefit of effective assistance by virtue of the favorable plea agreement his attorney negotiated wherein the defendant was sentenced to one year incarceration when he faced a maximum of fifteen (15) years of jail time if convicted.

Further, at the time of sentencing defense counsel strenuously argued for the sentencing court to designate the defendant as a youthful offender. While the argument was denied by the sentencing court, it is illustrative on the issue of defense counsel's effectiveness and the quality of counsel's representation. The attempt by counsel provides

pivotal evidence of the quality and character of the representation available to the defendant at the time of this action. Defense counsel was zealous in advocating for the defendant's interests as noted in the sentencing minutes.

There is no evidence the attorney in this case did anything more than try to obtain the most favorable result for the defendant, from negotiating a favorable plea arrangement to arguing for a youthful offender status for the defendant. The defendant now proposes that this court look back fifteen years in the past and find defense counsel's actions wanting. There is no basis to do so and even if the court found defense counsel's representation erroneous, an assertion not supported by the record, there is no evidence establishing but for counsel's alleged errors the result of this case would have been different. The facts of the case remain the same in so far as the defendant was apprehended after a buy bust operation where the prerecorded buy money and illegal narcotics were recovered from the defendant's person.

In his moving papers, the defendant also claims his learning disability prevented him from understanding the proceedings and advocating that his attorney negotiate for a plea involving a drug possession charge rather than a drug sale charge. It appears the defendant is now relieved of this disability which previously prevented from putting forth this argument and is now in a position to make said argument. However, the argument is wholly without merit. Again, this case dealt with a pre-arranged buy and bust narcotics operation and the defendant was the alleged dealer in this case. The defendant was also the person in

possession of the pre-recorded buy money when he was arrested. The defendant may suffer from some sort of learning disability but that fact alone doesn't change the circumstances of this case. The defendant was afforded the opportunity to submit to a favorable plea arrangement and availed himself of that opportunity. Accordingly, there is no basis to defendant's claim. It is hereby,

ORDERED, the defendant's motion is denied. It is further,

ORDERED, the defendant's right to appeal from this order is not automatic except in the single instance where the motion was made under CPL §440.30(1-a) for forensic DNA testing of evidence. For all other motions under Article 440, you must apply to a Justice of the Appellate Division for a certificate granting leave to appeal. This application must be filed within 30 days after your being served by the District Attorney or the court with the court order denying your motion. It is further,

ORDERED, the application must contain your name and address, indictment number, the questions of law or fact which you believe ought to be reviewed and a statement that no prior application for such certificate has been made. You must include a copy of the court order and a copy of any opinion of the court. In addition, you must serve a copy of your application on the following parties;

APPELLATE DIVISION, 2ND Department
45 Monroe Place
Brooklyn, NY 11201

Kings County Supreme Court
Criminal Appeals

320 Jay Street
Brooklyn, NY 11201

Kings County District Attorney
Appeals Bureau
350 Jay Street
Brooklyn, NY 11201

This shall constitute the decision and order of this Court.



Deborah A. Dowling, J.S.C

ENTERED
FEB 1 2012
NANCY T. SUNSHINE
COUNTY CLERK