[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 10
----------x
THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Ruth Shillingford

Date: July 2, 2012

-against-

DECISION & ORDER
Indictment Nos. 6313/1993
14540/1993
14591/1993

LOVE BROOKS,
----------x

Defendant moves to "void his convictions ab initio". In his papers, he fails to cite to any provision in the Criminal Procedure Law, but instead asks the court to address his grievances pursuant to the First, Fifth, Sixth and Ninth Amendments to the Constitution. Accordingly, this Court shall treat defendant's application as a motion to vacate the judgment of his conviction pursuant to CPL § 440.10.

PROCEDURAL HISTORY

Defendant was charged, *inter alia*, under indictment number 6313/1993, with Criminal Possession of a Weapon in the Second Degree (PL § 265.03) arising from his arrest for pointing a loaded handgun at a police officer. He was charged, *inter alia*, under indictment number 14540/1993, with Robbery in the First Degree (PL § 160.14[4]) arising from his arrest, while acting in concert with co-defendant Jose Vega, for a gunpoint robbery of Rosa Echevarria and Dario Reyes. Lastly, he was charged, *inter alia*, under indictment number 14591/1993, with Robbery in the First Degree (PL § 160.14[4]) arising from his arrest, while acting in concert with unapprehended others, for the gunpoint robbery of a store.

On May 19, 1994, defendant pled guilty to Criminal Possession of a Weapon in the Third Degree, in satisfaction of indictment number 6313/1993, Robbery in the First Degree, in

satisfaction of indictment number 14540/1993, and Robbery in the Second Degree, in satisfaction of indictment number 14591/1993 (Garson, J., at plea and sentence).

DISCUSSION

Defendant now moves to vacate his 1994 judgment of conviction due to the ineffective assistance of counsel. Specifically, he alleges that his attorney at the time of sentence, "failed to inform [him] of the enhancements [he] could receive in a Federal Case in regards to [his] state charges" and further that "[his] counsel assured [him his] state plea would only always count as one felony" (Brooks Affidavit ¶ 1-2).

The People contend that defendant's motion should be denied because he has provided no affidavits or evidence in support of his claim; his claims are belied by the minutes of his plea; and even if defendant's allegations are true, it does not establish the ineffective assistance of counsel. The People also indicate in their papers, that they spoke with defendant's prior attorney and she indicated that, "she could not recall whether she discussed with defendant the fact that his convictions in these cases might enhance his sentencing in a future case" (Feldman Affirmation ¶ 21).

CPL § 440.30(4)d)(i) provides that a court may deny a motion to vacate judgment without conducting a hearing where, as here, "an allegation of fact essential to support the motion is contradicted by a court record...or is made solely by the defendant and is unsupported by any other affidavit or evidence." Conclusory allegations do not constitute sworn allegations of fact but merely stand as unsubstantiated claims (*People v. Lake,* 213 AD2d 494, 496 [2d Dept 1995]).

With respect to defendant's contention that counsel affirmatively misrepresented that his

pleas would count as one felony, the Court finds the transcript of defendant's plea allocution instructive. For instance, the trial court thoroughly questioned defendant, including the following colloquy:

THE COURT:	Do you feel you have had ample time to consult with your lawyer before deciding to plead guilty?
DEFENDANT BROOKS:	Yes.
THE COURT:	Are you satisfied with the services of your lawyer?
DEFENDANT BROOKS:	Yes.
THE COURT:	Do you wish to change your plea from not guilty to guilty under Indictment number 6313-93 to criminal possession of a weapon in the third degree, a Class D violent felony. Under indictment number 14540-93, you are pleading guilty to robbery in the second degree, a Class – no, robbery in the second degree, a Class C violent felony and under Indictment number 14549-9, robbery in the second degree, a Class C violent felony?
DEFENDANT BROOKS:	Yes...

(P: 12, 17 & 18).[1]

In addition to the above excerpts, the transcript of the plea is replete with references that defendant was pleading guilty to distinct crimes under separate indictments (*see generally* P: 3, 4, 20, 23-24). Moreover, defense counsel was specifically asked about any promises she may have made to defendant:

THE COURT:	Ms. Kaplan, other than the agreed upon sentence of two to six years incarceration, have you made any other promise?

[1]Numbers preceded by "P" refer to pages of the Plea minutes dated May 19, 1994 contained in People's Exhibit "A".

MS. KAPLAN: No, your Honor.

(P: 15). Yet defendant stood mute. Accordingly, this Court is not persuaded by defendant's argument that he believed that these three separate pleas would only count as one felony.

Defendant's contention that counsel erred when she failed to advise him that his sentence would be enhanced with respect to future cases is similarly belied by the record. The Court and the Clerk of the Court both addressed the issue of potential enhancement:

THE COURT: Mr. Brooks, under Indictment number 6313-93, do you understand that you will be subject to additional punishment if the conviction is one which carries greater punishment because of a previous conviction?

DEFENDANT BROOKS: Yes.

***

THE COURT: Gentlemen, both of you have said a great many things including matters dealing with the absence of threats and promises other than the sentence, comments on the satisfaction of your individual lawyers, descriptions of the case and many other matters and statements which each of you swore to at this proceeding. I trust each of you understand the importance of an oath and if at some future time you gave different statements about the matters, which each of you swore to here, it would put you in a position where you would be open to perjury charges. For that reason, if either of you have said anything not true or wants to retract your statement, I will give you an opportunity to do it now because of the serious consequences that might result in any changes in either of your statements at a later time...Mr. Brooks, do you understand that?

DEFENDANT BROOKS: Yes, sir.

THE COURT: Do you reaffirm everything you have said?

DEFENDANT BROOKS: Yes.

***

THE CLERK: Before accepting your pleas of guilty, you are advised if you have been previously convicted as a predicate felon...that fact may be established after your conviction or plea of guilty now before this Court and you may be subject to different or additional punishment. Do you understand that?

DEFENDANT BROOKS: Yes.

(P: 17-18; 21-23).

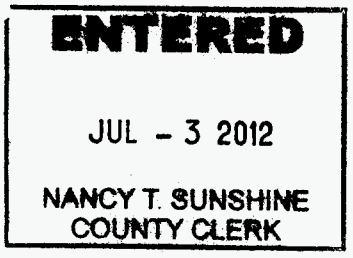
Furthermore, as the Second Department has recognized, a claim that a defendant "was not advised that the crime of which he was convicted constituted a violent felony which could result in an enhanced sentence for a subsequent conviction [is] not a basis to set aside his plea of guilty" (*People v. Brinkhuis*, 44 AD3d 677 [2d Dept. 2007]; *see also People v. Rodriguez*, 49 AD3d 903 [2d Dept.], *lv denied* 11 NY3d 794 [2008] ["The possibility of enhanced punishment for a crime that may be committed in the future is a collateral consequence of the plea and the court has no duty to inform the defendant of such a consequence"]). Indeed, "[t]he predicate consequences of a felony conviction can be of no significance to a defendant unless he is bent on a life of crime. [This Court] cannot accept as a serious proposition that a defendant not so inclined would actually consider rejecting an offered plea on the basis of advice that by accepting

it he would be exposing himself to enhanced penalties 'the next time around'" (*People v. Silvers,* 163 AD2d 71 [1st Dept.], *appeal denied* 76 NY2d 865 [1990]). Accordingly, defendant's motion is denied.

CONCLUSION

Based upon the foregoing reasons, the Court denies defendant's motion in its entirety.

This Decision shall constitute the Order of the court.



ENTER,

Ruth Shillingford, A.J.S.C.

You are advised that your right to an appeal from the order determining your motion 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.

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 District Attorney. Upon proof of your financial inability to retain counsel and to pay the costs and expenses of the appeal, you may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Application for poor person relief will be entertained only if and when permission to appeal or a certification granting leave to appeal is granted.[2]

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

---

[2]22 NYCRR § 671.5 .