

**People v Corrica**

2012 NY Slip Op 32649(U)

October 22, 2012

Supreme Court, Kings County

Docket Number: 4143/1995

Judge: Carolyn E. Demarest

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM PART CV19

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

By: Hon. Carolyn E. Demarest

Date: October 5, 2012

-against-

DECISION & ORDER

TOUSSAINT CORRICA

Indictment No. 4143/1995

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Defendant moves, pro se, for an order vacating his judgment of conviction and setting aside his sentence pursuant to CPL §§ 440.10 and 440.20 on the grounds that he received ineffective assistance of counsel. Defendant, who was sentenced after a trial to a term of imprisonment of fifteen years to life, now alleges that his attorney failed to inform him during plea negotiations of his maximum sentencing exposure upon conviction at trial. For the following reasons, the motion is denied.

On April 4, 1995, at approximately 9:30 P.M., a police officer observed defendant break a security gate and climb through the window of an apartment on Avenue O in Brooklyn. The officer called for backup assistance and confronted defendant inside the apartment, where he identified himself as a police officer. Defendant ran out the front door and was immediately apprehended by fellow officers. The occupant of the apartment, an eighty-three-year old woman, had recently left the premises.

For these acts, defendant was charged with burglary in the third degree (PL § 140.25[2]), possession of burglar's tools (PL § 140.35), and criminal mischief in the third and fourth degrees (PL §§ 145.05, 145.00[1]).

The People offered defendant a plea bargain with a promised sentence of five to ten years' imprisonment. During a discussion on the record on June 25, 1992, defense counsel informed the court that, despite consulting with his client about the possibility of being adjudicated a persistent felony offender, defendant did not want to accept the People's plea offer. The court replied: "As long as he understands. If this defendant has committed as many crimes, some of which are very very violent, I would certainly be inclined to adjudicate him a persistent. He has a right to a trial and we will afford him all his rights. The offer is refused and we will proceed."

After a jury trial, defendant was convicted of burglary in the second degree and criminal mischief in the second degree (Demarest, J. at trial and sentence).

At sentencing on September 28, 1995, the court reviewed defendant's prior convictions and noted that he had previously been adjudicated a predicate felon. The court remarked:

"At this time we have another conviction on the felony, so he is a second predicate on this conviction, and he has also [be] [sic] convicted at least twice previously of felonies. In fact, he has been convicted many other times of felonies. I have a very lengthy record here, and I have apprised you in advance on the prior date my consideration of the discretionary persistent adjudication."

The court determined that, based upon his prior juvenile offender adjudication in New York and a grand larceny conviction in Florida, defendant qualified as a persistent felony offender. Defendant was granted an opportunity to speak before the imposition of sentence, at which time he stated that, with respect to his juvenile offender case in 1984, "I was only 15 years old. I didn't understand as far as the cop-out and all that. My lawyer had told me what to say." Defendant asked no questions about his status as a persistent felony offender or about the corresponding maximum prison term he faced. Noting the violent circumstances of the instant robbery case, a "very substantial pattern of criminal behavior which continues" and a need for

“long-term supervision,” the court proceeded to sentence defendant as a persistent felon to a term of fifteen years to life in prison.

Defendant subsequently appealed from his judgment of conviction, claiming that the trial court erred in limiting the scope of defendant’s summation, that prosecutorial misconduct denied him the right to a fair trial, and that the trial court abused its discretion in sentencing him.” On October 27, 1997, the Appellate Division affirmed defendant’s judgment of conviction (*People v Corrica*, 243 AD2d 722 [2d Dept 1997]). Leave to appeal to the Court of Appeals was denied in two instances (*People v Corrica*, 91 NY2d 890 [1998]; *People v Corrica*, 91 NY2d 1006 [1998]).

Defendant also petitioned for a writ of habeas corpus, which was denied by the United States District Court for the Eastern District of New York on July 17, 2000.

In the instant motion to vacate the judgment and set aside his sentence, defendant alleges that counsel failed to inform him that he could be sentenced to a life term if found guilty at trial. Defendant claims that he was told by counsel that he only faced a maximum of fifteen years. According to defendant, had he known that he faced a potential life sentence based upon his adjudication as a persistent felony offender, he would have accepted the People’s plea offer of five to ten years.

With respect to the question of defendant’s diligence in raising his claim in a timely manner, defendant blames appellate counsel for her failure to raise a claim of ineffective assistance of trial counsel. Defendant has appended a letter written to him by Lynne Fahey of Appellate Advocates, who informed defendant that she did not believe his claim to be meritorious.

Defendant’s allegation of ineffectiveness is affirmatively refuted by the minutes of the

pretrial proceedings (CPL § 440.30[4][c] [the court may deny a motion to vacate the judgment where an essential allegation of fact necessary to support the motion is conclusively refuted by unquestionable documentary proof]). The transcript, quoted in part above, indicates that defendant was warned by both counsel and the court that he could be adjudicated a persistent felony offender if convicted at trial. Counsel stated to the court that he had discussed the possibility of persistent felony offender adjudication with his client and that defendant nevertheless insisted on going to trial in the face of this warning. Indeed, the court made clear that it “would certainly be inclined” to adjudicate defendant a persistent felony offender if he were convicted after trial. Having been previously adjudicated a second felony offender, defendant knew that his criminal history could be taken into account in order to impose an enhanced sentence. Thus, his allegation that he did not understand the import of the warnings he received from both counsel and the court in the instant case is not credible.

As defendant’s primary claim is refuted by the record, his secondary claim that counsel told him he faced a maximum fifteen-year sentence is simply not credible either. The record contains no mention of a fifteen-year maximum sentence, by either the court, counsel or defendant. Here, where an allegation of fact essential to support the motion is made solely by the defendant and is unsupported by any other affidavit or evidence, there is no reasonable possibility that defendant’s claim is true (CPL § 440.30[4][d]).

Finally, defendant’s assertions are severely undermined by his seventeen-year delay in filing the instant motion. When given an opportunity to address the court at sentencing, following a discussion about whether defendant should be adjudicated a discretionary persistent felony offender, defendant accepted that invitation. Nevertheless, he failed to assert that counsel had

misadvised him during the plea bargaining process. He raised an objection only to the convictions considered as predicate felonies. At the sentencing proceeding, defendant was in the best position to raise questions about his adjudication as a persistent felony offender and the length of his sentence, or to highlight any misconceptions arising from the plea bargaining process. That he remained silent and waited seventeen years to allege wrongdoing by counsel only diminishes the credibility of his present allegations.

The Court of Appeals has held that “revelatory of the seriousness of defendant’s present claims, is that defendant waited over a decade before asserting them. In stale cases, defendants have all to gain by reopening old convictions, retrial being so often an impossibility. These are factors to consider in determining how valid the assertions are....” (*People v Nixon*, 21 NY2d 338, 352 [1967]). Thus, a lengthy delay can be considered in evaluating the validity and legitimacy of a post-judgement claim (*People v Melio*, 304 AD2d 247, 252 [2d Dept 2003]; *People v Hanley*, 255 AD2d 837, 838 [3d Dept 1998]). The weakness of defendant’s position is compounded by his failure to offer a reason for the extremely long delay. In light of the absence of any explanation and given that the relevant facts should have been long known to defendant, the delay is unjustifiable (see *People v Degondea*, 3 AD3d 148, 160 [1st Dept 2003]).

Accordingly, the motion is denied in its entirety.

This decision shall constitute the order of the court.

**ENTERED**  
 OCT 22 2012  
 NANCY T. SUNSHINE  
 COUNTY CLERK

ENTER:



CAROLYN E. DEMAREST, J.S.C.