

**People v Asse**

2012 NY Slip Op 32789(U)

November 15, 2012

Supreme Court, Kings County

Docket Number: 0042/1994

Judge: Danny K. Chun

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM PART 19

-----X

THE PEOPLE OF THE STATE OF NEW YORK :

-against-

HENOCK ASSE,  
a/k/a JEAN JOCELYN MERILIE

Defendant.

-----X

DANNY K. CHUN, J.

MOTION FOR DISCOVERY  
DECISION AND ORDER

IND. NO. 0042/1994

The defendant moves, *pro se*, to vacate his judgment pursuant to Criminal Procedure Law § 440.10 on a number of grounds, principally arguing that he was deprived of effective assistance of counsel. The People oppose the defendant's motion.

The defendant was charged, under Kings County Indictment Number 42/94, with Criminal Sale of a Controlled Substance in the Third Degree, Criminal Possession of a Controlled Substance in the Third Degree, and Criminal Possession of a Controlled Substance in the Fourth Degree. On June 2, 1994, the defendant pled guilty to Attempted Criminal Possession of a Controlled Substance in the Third Degree in full satisfaction of the indictment (Gerges, J. at plea). On July 14, 1994, the defendant was sentenced to a split sentence of a one day jail term and five years of probation (Gerges, J. at sentence).

The defendant did not appeal the judgment of conviction.

Subsequently, the defendant was convicted of a number of offenses in Georgia. On January 31, 2000, he was convicted of possessing a firearm. On October 2, 2005, he was convicted of the federal offense of misrepresentation. On June 9, 2006, the defendant was

sentenced to life in prison without the possibility of parole on two counts of murder. The defendant is currently incarcerated at Rutledge State Prison, Georgia, serving this sentence.

On August 13, 2010, the Kings County District Attorney's Office was informed by an Immigration Officer that a detainer order was filed against the defendant by the United States Department of Homeland Security.

The defendant previously filed another *pro se* motion to vacate his judgment pursuant to Criminal Procedure Law § 440.10. In papers dated February 24, 2010, the defendant claimed that (1) he did not knowingly, intelligently and voluntarily accept the plea because he was not apprised of his Boykin rights; (2) he was not provided with a Creole interpreter at the plea proceeding; (3) the People improperly granted the codefendant immunity; (4) the People were racially motivated in charging the defendant with the drug offenses; (5) the People failed to disclose any Brady material; (6) the indictment was defective because it did not specify the time and place of the crime; (7) the court failed to inform him of his rights under the Vienna Convention and Geneva Convention; and (8) he is innocent of the crime for which he was convicted.

In addition, the defendant argued in his previous § 440.10 motion that his attorney provided ineffective assistance of counsel because his attorney (1) misadvised him about the immigration consequences of pleading to a drug offense; (2) forced him to plead guilty to avoid a greater sentence; (3) neglected to inform the court that he was interested in pleading guilty to a crime other than the one he was alleged to have committed so that he would avoid deportation; (4) advised him to not notify the court that he was a victim of police brutality as it would result in his deportation; (5) failed to alert him of his rights under the Vienna Convention and Geneva Convention; (6) misinformed him that his conviction would be reduced to a misdemeanor once

he completed the sentence; (7) did not request a copy of the indictment, the People's witness list or any Brady material; (8) failed to prepare for trial by discussing the case with him and cross-examining the codefendant and other witnesses; (9) advised him that the money he paid did not cover a trial and that a court-appointed attorney would not adequately represent him at trial; and (10) neglected to file a demand for discovery, perfect an appeal or file a post judgment motion to reduce the conviction to a misdemeanor.

On December 17, 2010, the court denied defendant's motion to vacate his judgment of conviction (Gerge, J.).

The defendant now moves to vacate his judgment of conviction on similar grounds to those in his previous § 440.10 motion filed and denied in 2010. Once again, the defendant argues that he was deprived of effective assistance of counsel because counsel (1) misinformed him that his record would be sealed once he completed his sentence; (2) failed to advise him regarding immigration consequences; (3) neglected to file an appeal or file a post-judgment motion to vacate the judgment; and (4) neglected to request that the court allow him to withdraw his guilty plea if it impacted his immigration status. The defendant also claims as he did in his prior motion to vacate that (5) the court failed to advise him about immigration consequences; and (6) his guilty plea was unknowing and involuntary because the court failed to inform him about his Boykin rights.

In addition, the defendant newly claims that counsel was ineffective because counsel (1) failed to challenge the selection of the grand jurors where allegedly blacks, Hispanics and women were excluded from the grand jury list; and (2) failed to advise him of the right to appeal. The defendant additionally alleges that (3) the court failed to inform him of his right to a court-appointed attorney if he decided to withdraw his guilty plea; (4) his guilty plea was invalid

because he was under the influence of drugs and alcohol during the plea proceeding; (5) he was “unconstitutionally Mirandized”; (6) the People racially discriminated against him and falsely accused him of being convicted of misrepresentation in Georgia in October of 2005.

The People submit an affirmation from defense counsel in which counsel asserts that he discussed the case with the defendant at length, on at least ten court appearances and several out of court meetings. Counsel also asserts that before the defendant took the plea, he discussed with the defendant the pros and cons of proceeding to trial and trial strategy. Counsel states that although he does not have an independent recollection of all the conversation he had with the defendant back in 1994, having practiced criminal law since 1979, it was his standard practice to discuss immigration consequences with his clients. Counsel indicates that based on a discovery stipulation, he received police reports, grand jury testimony, grand jury synopsis, laboratory reports and a copy of the indictment. He recounted that the People stated they were unaware of any Brady material in their possession. Counsel denies threatening the defendant into pleading guilty or suggesting to him that his case would suffer if he was appointed an attorney by the court.

This court denies the defendant’s motion in its entirety for the following reasons.

#### Procedural Bars

C.P.L. § 440.10(2)(c) mandates that a court deny a motion to vacate a judgment where sufficient facts appear on the record to have permitted an issue to have been raised on appeal but the defendant unjustifiably failed to do so (People v. Cooks, 67 N.Y.2d 100, 103 [1986]). A § 440.10(1)(h) motion cannot be made as a substitute for a direct appeal from the judgment when the defendant could have but failed to raise his claims on appeal. Id.; People v. Williams, 5 A.D.3d 407, 407 (2d Dept 2004).

Issues that could have been raised on appeal but were not because of the defendant's failure to perfect an appeal include the issue of the voluntariness of his plea based on his failure to be apprised of his Boykin rights and being intoxicated. Accordingly, this court is now foreclosed from reviewing these claims. People v. Jossiah, 2 A.D.3d 877 (2d Dept 2003). In addition, the plea issue is barred by C.P.L. § 440.30(4)(d) because an allegation of fact necessary to support the claim is contradicted by the record. Similarly, the issue of whether the defendant was advised of his right to appeal is barred by § 440.30(4)(d) because that allegation is also contradicted by the record.

Furthermore, under C.P.L. § 440.10(3)(b), this court has the discretionary power to deny a motion if "[t]he 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." As listed above, out of the 12 claims the defendant is making, six were previously asserted in a § 440.10 motion the defendant filed back in 2010, and all six claims were denied on their merits by the court. Therefore, as for those six claims, this court denies the defendant's motion to vacate the judgment.

#### Ineffective Assistance of Counsel

A defendant in a criminal proceeding is constitutionally entitled to effective assistance of counsel. Strickland v. Washington, 466 US 668 (1984); People v. Linares, 2 N.Y.3d 507, 510 (2004); see U.S. Const., 6<sup>th</sup> Amend.; N.Y. Const., art. 1 §6. Under the two-prong test of the federal standard, a court must decide (1) whether the counsel's performance fell below an objective standard of reasonableness and (2) whether the defendant suffered actual prejudice as a result. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Strickland v. Washington, 466 U.S. 668, 687 (1984). In order to satisfy the second prong, a defendant must show that there is a reasonable

possibility that, but for the counsel's error, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart at 59.

In New York, “[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met.” People v. Baldi, 54 N.Y.2d 137, 147 (1981). “In the context of a guilty plea, a defendant has been afforded meaningful representation when he... receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel.” People v. Ford, 86 N.Y.2d 397, 404 (1995). Thus, “where a defendant, on the advice of counsel, has entered a plea of guilty and reaped the benefits of a favorable plea bargain which substantially limits his exposure to imprisonment, he has received adequate representation.” People v. McClure, 236 A.D.2d 633, 633 (2d Dept 1997).

A defendant must also satisfy the “prejudice” requirement by showing that absent counsel's alleged error, he would have insisted on a jury trial. People v. Rodriguez, 188 A.D.2d 623 (2d Dept 1992). In order to establish that the defendant would have insisted on going to trial, an affidavit setting forth the factors that a defendant considers in accepting a plea must be submitted to the court. People v. McDonald, 296 A.D.2d 13, 19-20 (3d Dept 2002). Some of the factors that must be set out in such an affidavit are the strength of the prosecution's case, the availability of a defense, the likelihood of success at trial, a comparison of the sentence promised with the potential incarceration the defendant faced if convicted after trial, counsel's advice as to the reasons to accept the plea bargain and a reason why the defendant admitted committing the act. Id. An unsubstantiated claim that the defendant would have insisted on proceeding to trial is insufficient. See People v. McKenzie, 4 A.D.3d 437, 440 (2d Dept 2004); People v. Melio, 304

A.D.2d 247, 251-52 (2d Dept 2003). There must be objective facts supporting such a claim.

Melio at 251-52.

Here, the defendant claims that he did not receive effective assistance of counsel because his attorney failed to challenge the selection of the grand jurors where allegedly blacks, Hispanics and women were excluded from the grand jury list. A grand jury proceeding is not open to the public. In addition, there is no record showing that the defendant testified at the grand jury and had an opportunity to personally observed the makeup of the grand jury. The defendant does not provide any basis for the allegation. As the defendant's claim is largely based upon unsubstantiated conclusory allegations, this court finds such allegation without merit. See People v. Coleman, 37 A.D.3d 491, 491 (2d Dept 2007); People v. Waymon, 65 A.D.3d 708, 709 (2d Dept 2009).

Furthermore, the defendant's claim that he did not receive effective assistance of counsel because his counsel failed to advise him of his right to appeal is without merit. It is clear on the record that during the plea proceeding on June 2, 1994, the court directed counsel to go over with the defendant the waiver of right to appeal. The record clearly states that the defendant conferred with his counsel. The defendant stated "yes" when asked by the court if he had enough time to go over the waiver, whereupon the defendant executed the waiver.

Therefore, this court denies the defendant's motion pertaining to his claims of ineffective assistance of counsel.

#### Right to an Attorney

The defendant's claim that the court failed to inform him about his right to a court-appointed attorney if he decided to withdraw his guilty plea is without merit. Up until and at the plea proceeding, the defendant was represented by a counsel he retained. There was no need for



the court to advise the defendant of his right to be represented by an attorney. Furthermore, during the plea proceeding, the court advised the defendant that he had “the right to a trial by jury with the assistance of an attorney.” (Plea proceeding at 9). Therefore, the defendant’s motion pertaining to the court’s failure to advise him of his right to an attorney is denied.

Miranda Claim

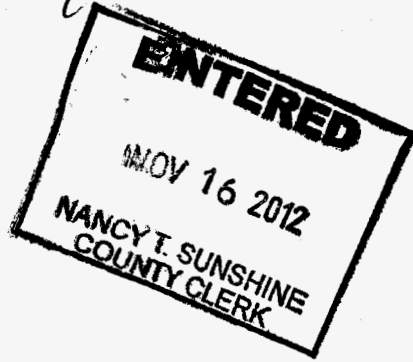
The defendant’s bare claim that he was “unconstitutionally Mirandized” is baseless and therefore denied. There is nothing in the record showing that the defendant was given Miranda warnings. Hence there is no basis to allege that he was “unconstitutionally Mirandized.”

Accordingly, the defendant’s motion to vacate his judgment of conviction is denied in its entirety. The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York  
November 15, 2012



DANNY K. CHUN, J. S.C.



**ENTERED**  
NOV 16 2012  
NANCY T. SUNSHINE  
COUNTY CLERK