

**People v Linyear**

2012 NY Slip Op 33168(U)

August 10, 2012

Supreme Court, Kings County

Docket Number: 2224/93 & 2225/93

Judge: Desmond A. Green

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: CRIMINAL TERM, PART 38

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

**Decision**

Against

BY: GREEN, J.

DATED: August 10, 2012

SHAUL LINYEAR,  
Defendant.  
-----X

INDICT NO: 2224/93 &  
2225/93

Defendant moves pro se for an order to set aside his sentence pursuant to CPL article 440.10.

Based on a review of the motion papers, such other papers on file with the Court, and the proceedings had prior thereto, the decision and order of the Court on defendant's motion is summarily denied in its entirety for the following reasons.

Defendant filed an appeal in this matter. The claims made by defendant in his appeal were unanimously rejected in a decision and order without opinion dated March 20, 1995 by the Appellate Division affirming defendant's judgment of conviction and sentence. *People v Linyear*, 213 AD 2d 1088 (2<sup>nd</sup> Dept 1995)

Defendant was convicted of Murder and Robbery pursuant to a negotiated plea agreement (as discussed with his attorney and his mother), before the Hon. Robert Kreindler.

Defendant plead guilty willfully, voluntarily and with full knowledge of the rights he was giving up as a result of his plea as the court record confirms by the plea and sentencing minutes of April 14, 1993, May 5, 1993 and May 11, 1993.

All of defendant's claims herein involve matters within defendant's knowledge at the time of his plea and sentence. Such information related to defendant's claims are matters that appear on the face of the record and he could have raised these claims on his appeal, but he did not do so, nor does he put forth any justifiable reason for failing to do so; as such defendant is now procedurally barred from raising these claims in a 440 motion to vacate his judgment of conviction.

Further, defendant's claims lack merit as they are disputed by the record in that defendant claims Hon. Robert Kreindler breached the negotiated plea deal and that his defense attorney never objected or remind the court about the original negotiated plea agreement. Defendant, who was 15 years old at the time of the crime, also claims that the sentencing court did not provide him an opportunity to withdraw his plea and that he and his mother was not so advised.

The remedy defendant now seeks is for this court to impose the agreed upon sentence or allow defendant to withdraw his guilty plea.

Defendant makes the instant motion almost 20 years subsequent to his conviction and sentence. CPL section 220.60(3) provides that at any opportunity prior to sentencing, defendant can withdraw his plea. Defendant is procedurally barred from withdrawing his plea pursuant to CPL section 220.60(3).

The record of the plea minutes dated April 14, 1993 reflects that the court discussed a bargained plea with a sentence of five years to life for Murder, defendant's attorney and his mother were present at the proceedings. Defendant's attorney stated the promised sentence and in addition to the detailed allocution by Judge Kreindler, which defendant agreed and admitted his part in the crime, the judge warned that based on defendant's pre-sentence report conditions could occur which impacted on the bargained for plea.

The sentencing minutes of May 5, 1993 records victim impact statements made by the wife of the deceased and that the court was disturbed that the pre-sentence report stated that defendant showed no remorse. At page 15 of the transcript, the court indicated that the agreed upon sentence for defendant's guilty plea was not fair and that the court would not be able to keep the promise.

Defendant's attorney advocated for him and argued that [despite the report] defendant was remorseful and that the court should stick to the agreed plea. Instead, the underlying court, as reflected on page 19 of the sentencing transcript, allowed the defendant to withdraw his prior plea and go to trial or

accept a renegotiated sentence for the plea. The renegotiated sentence was seven years to life for the murder charge with a concurrent sentence of three and a third to ten years on the robbery charge. This agreement saved two years off the top maximum and allowed defendant to serve out his sentence for the robbery charge at the same time.

Defendant's attorney requested an adjourn date to continue to discuss the matter with the defendant and confer with defendant's mother. The court adjourned the matter to May 11, 1993 for sentencing or withdrawal of plea.

The court's minutes of May 11, 1993 reflect on page 3, that defense attorney stated that the defendant was still contemplating what course of action he would take. Defendant's attorney conferred with defendant and his mother again and defendant decided to accept the renegotiated plea. The court explained that the plea was so structured because of defendant's age and that the court was bound by the legal limits of sentencing for a juvenile. The legal maximum for the crime defendant pled to is nine years to life. The court also accepted a letter from defendant's mother expressing great sorrow. Defendant did not accept the court's opportunity to make a statement on his own.

Defense counsel had also argued for and requested that defendant receive youthful offender treatment because of his age, however the court did not grant the request because of the seriousness of the crime.

The court instructed defense attorney and the court clerk to advise defendant of his right to appeal within 30 days of his sentence and defense counsel indicated on the record that he would file a notice of appeal on defendant's behalf.

Defendant's claims in his instant motion are without merit and wholly incredible as reflected by the aforementioned official court record of the plea and sentencing minutes.

Defendant's claims here could also have been raised in defendant's prior appeal as such claims are based on facts that appear in the record adequate for appellate review. Defendant failed to raise these claims on appeal and makes no valid justification for failing to do so. Further, a motion to vacate a judgment of conviction cannot be used as a substitute for a direct appeal or as a vehicle for additional appeals. *People v Donovan*, 107 AD 2d 433 (App Div 2<sup>nd</sup> Dept 1985); *People v Williams*, 5 AD 3d 407 (App Div 2d Dept 2004)

This court finds that defendant's claims are procedurally barred and without merit. Defendant's claims are procedurally barred because they involve issues known to the defendant at the time, from information contained in the record and defendant failed to present them in his prior motion.

As supported by the court record, defendant was adequately represented by counsel and counsel provided meaningful representation to defendant in this matter. Defendant's claims inferring ineffective assistance of counsel are unsubstantiated and without merit. *People v Stultz*, 2 NY 3d 277 (2004) ; *Strickland v Washington*, 466 US 689 (1984)

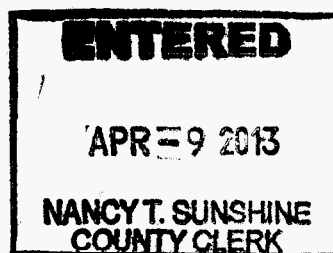
For the aforementioned reasons and for the reasons enunciated in the People's opposition papers as substantiated by record of the official court minutes and prior judicial orders relevant to the issues herein, defendant's motion is summarily denied on its merits.

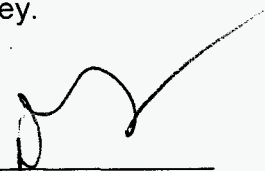
This shall constitute the Decision, Opinion and Order of the Court.

**Notice of Right to Appeal for a Certificate Granting Leave to Appeal**

Defendant is informed that his right to appeal from this order determining the within 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, defendant 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.



  
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Hon. Desmond A. Green,  
Acting J.S.C.