

**People v Garay**

2011 NY Slip Op 33493(U)

October 21, 2011

Supreme Court, Kings County

Docket Number: 6936/09

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- :  
 :  
 PEDRO GARAY, :  
 :  
 :  
 Defendant :  
 :  
-----X

MOTION TO SET ASIDE  
SENTENCE  
DECISION AND ORDER

IND. NO. 6936/09

DANNY K. CHUN, J.

The defendant moves, *pro se*, to set aside the sentence imposed upon him under the above-captioned indictment pursuant to CPL 440.20, claiming that his attorney's advice not to take the initial plea offer made by the People constituted ineffective assistance of counsel. The People oppose the defendant's motion.

On August 24, 2009, the defendant was indicted under the above-captioned indictment on three counts of Burglary in the Second Degree and other relevant charges for three separate alleged burglaries. On September 27, 2010, the defendant, with his counsel Ms. Wadeedah Sheeheed standing next to him, pleaded guilty to Burglary in the Second Degree in full satisfaction of the indictment. On October 18, 2010, the defendant was sentenced to a determinate sentence of five years in prison, followed by five years of post-release supervision.

The defendant argues that his initial lawyer misadvised him regarding the plea offer made by the People. Specifically, the defendant contends that his counsel told him not to take the initial offer made by the People, which was three years in prison with five years of post-release supervision, promising the defendant that counsel would get him a better offer, i.e., either a lower offer or participation in an in-patient program. The defendant claims that, however, after he

followed his attorney's advice and rejected the People's three-year offer, he only learned, from his newly assigned counsel, that the People's offer went up to seven years and that three years was off the table.

The defendant's claim of ineffective assistance of counsel should have been brought under CPL 440.10, motion to vacate judgment (*see* CPL 440.10[1][h]). Considering that the defendant's motion is made *pro se*, this court treats his motion as if brought under 440.10 and reviews the merits of his claims.

The court denies the defendant's motion under CPL 440.30(4)(d). Criminal Procedure Law section 440.3(4)(d) provides that the court may deny a defendant's 440 motion if "[a]n allegation of fact essential to support the motion (I) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true."

Here, the record shows that the defendant's initial counsel, Ms. Danielle Feman from the Legal Aid Society, had negotiated with the People a favorable plea for the defendant, three years in prison with five years of post-release supervision, but that the defendant refused to take this offer and requested the court for a different lawyer. Contrary to the defendant's claims, the record indicates that it is the defendant, not defense counsel, who decided not to take the People's three-year offer, despite counsel's efforts to work out a favorable deal for him. The defendant now cannot turn around and argue that he wanted to take the three-year offer, but did not due to counsel's misadvice when, in fact, the defendant was the one who rejected the offer.

The record shows that on September 23, 2009, the defendant was arraigned in Supreme Court, where the People offered him four years in prison with five years of post-release

supervision (transcript, September 23, 2009, at 3). The defendant rejected the offer, but Ms. Feman asked the court for a second call for a possible disposition. When the case was recalled, Ms. Feman stated that the parties were going to work on a deal, and that it was her understanding that the People's offer would go up on the following court date if there were no disposition, and that she had explained such fact to her client (*id.* at 4-5).

On November 24, 2009, after a bench conference, the court stated to the defendant, who agreed to be on a video conference for that calendar call, that his counsel worked out a disposition with the People and that the case would be adjourned to December 4, 2009.

On December 4, 2009, the defendant requested to be assigned a new lawyer because "they are making me take three years for something I didn't do. I feel like I'm being pressured to take the three years" (transcript, December 4, 2009 at 2). The court relieved Ms. Feman and assigned Mr. Sam Militello as the defendant's new lawyer. The case was adjourned to January 6, 2010.

On January 6, 2010, the People stated on the record that their offer was now six years' jail with five years' post-release supervision. Mr. Militello inquired on the record whether the previous offer of three years was available, and the People answered "no" (transcript, January 6, 2010, at 2).

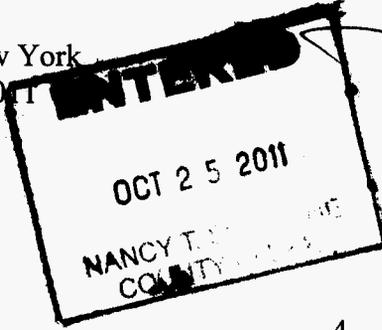
On September 27, 2010, the defendant claimed that his previous counsel advised him not to take the People's three-year offer, promising him to get a better deal, but that counsel failed to do so. The court advised the defendant that the three-year offer was off the table, and that the court's offer, that day only, would be five years' jail. The defendant took the court's offer and pleaded guilty to Burglary in the Second Degree for the court's promised sentence of five years in prison, followed by five years of post-release supervision. The defendant was sentenced according to the court's promise on October 18, 2010.

As such, the court record clearly shows that it is the defendant, not any of his defense counsel, that rejected the People’s initial favorable offer. The defendant even stated on the record that he felt forced by the People and his counsel to take the three-year offer and that he wished not to do so. He even requested the court to assign him a new lawyer based upon that reason and was granted of such request. The defendant cannot now turn around and argue that his judgment of conviction based on his guilty plea should be vacated because he received ineffective assistance of counsel. The plea minutes also lack any indicia of illegality or invalidity of the guilty plea the defendant took before this court. The defendant clearly stated on the record that he was pleading guilty voluntarily, knowingly and intelligently.

The defendant’s motion is also denied on its merits. The evidence, law, and the circumstances of this case, viewed in the totality as of the time of the representation, reveals that defense counsel provided meaningful representation (*see People v Baldi*, 54 NY2d 137, 147 [1981], *quoted in People v Turner*, 5 NY3d 476, 480 [2005]; *People v Berroa*, 99 NY2d 134, 138 [2002]). Defense counsel worked out a very favorable deal for the defendant, especially considering that he was a non-violent predicate and had three separate burglary charges against him under the indictment. Ms. Feman lowered the People’s initial offer of four years to three years. The defendant chose not to take it.

Wherefore, the defendant’s motion to vacate his judgment is denied. The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York  
 October 21, 2011



*[Handwritten Signature]*  
 DANNY K. CHUN, 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.

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