

People v Azor

2012 NY Slip Op 32558(U)

September 11, 2012

Supreme Court, Kings County

Docket Number: 11337/2008

Judge: Patricia DiMango

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 15

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THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. Patricia M. DiMango

Date: September 11, 2012

-against-

DECISION & ORDER

JEAN AZOR

Indictment No. 11337/2008

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Defendant moves, pro se, to vacate his judgment of conviction pursuant to CPL § 440.10(1)(h) on the grounds of ineffective assistance of counsel. The motion is denied on procedural grounds.

On the evening of October 16, 2008, defendant was pulled over for making an illegal right turn from the left lane of the street. When asked for his driver's license and registration, defendant did not have a license and produced only photocopies of the insurance information and registration. The police officers asked defendant to turn off the car, and when defendant did so, they saw the ignition cylinder and keys pop out of the steering column. Believing the car to be stolen, the officers asked defendant to step out of the car. One officer frisked defendant and recovered a large knife from his waist area. Another officer approached the hood in order to inspect the VIN number and noticed that the hood was damaged as if it had been crinkled up in a head-on collision. He shined his flashlight into the visible portion of the engine compartment, where he saw what appeared to be the butt of a gun. The officer opened the hood of the car and recovered a loaded .38 caliber revolver, at which point defendant was placed under arrest.

Defendant was indicted and charged with criminal possession of a weapon in the second degree (PL § 265.03[3]), criminal possession of a weapon in the third degree (PL § 256.02[1]), criminal possession of a weapon in the fourth degree (PL § 265.01[1]), and other related charges. On July 19, 2010, the court commenced a Dunaway/Mapp hearing which was adjourned to July 21, 2010 without decision. On July 21, 2010, before the court's decision on the hearing, defendant entered a guilty plea to attempted criminal possession of a weapon in the third degree, with a promised sentence of two to four years' imprisonment.

On August 10, 2010, defendant stated in court that he wished to withdraw his plea on the grounds that he was innocent and that had taken the plea under duress from his attorney. He then filed a formal motion to withdraw his guilty plea on September 7, 2010, in which he alleged that he was innocent of the charges and that his attorney had unduly pressured, threatened and coerced him to plead guilty. After the People answered defendant's motion, defendant made the additional claim in his reply that he did not understand that the promised sentence of two to four years would run consecutively, and not concurrently, with the time defendant owed to parole, and that he should be therefore allowed to withdraw his plea. On October 19, 2010, defendant stated in court that the duress had come from his family and not his counsel, Stuart Rubin. Nevertheless, Mr. Rubin was relieved and Amy Rameau, Esq. was assigned to represent defendant. The court granted defendant's motion on December 17, 2010 and sent the case to Justice Patricia DiMango to commence new plea proceedings.

On January 14, 2011, the court offered defendant a plea to attempted criminal possession of a weapon in the third degree with a promised sentence of imprisonment of one and one-half to

three years. The defendant accepted the offer, pleaded guilty, and was sentenced as a predicate felony offender on that same date. He also waived his right to appeal. Defendant stated on the record that he had discussed the plea with his attorney and that he was satisfied with her advice and assistance.

On May 3, 2011, in connection with his notice of appeal, the Second Department denied defendant's motion for poor person relief and motion to assign counsel with leave to renew. Defendant was to provide information about how he paid for his retained counsel in order to justify assigning counsel on appeal.

Defendant filed a motion to vacate his judgment of conviction and to set aside his sentence on July 21, 2011, alleging that his plea was not knowing, voluntary and intelligent and that he did not understand that his sentence would run consecutively with parole. This court denied the motion on both procedural and substantive grounds.

On May 15, 2012, defendant filed the instant motion stating that the judgment was obtained in violation of his constitutional rights. Specifically, he claims that both his attorneys provided him with ineffective assistance of counsel when they failed to preserve the "pretextual stop defense." Defendant further alleges that that even though both attorneys found the testimony of Officer Kienle contradictory, neither "preserved the argument that his testimony was patently tailored to nullify constitutional objections." Defendant argues that he suffered prejudice as a result of these alleged deficiencies because the outcome of the proceeding would have been different had the proffered defense been made.

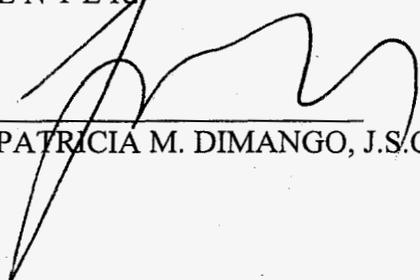
By his guilty plea defendant forfeited the right to raise these issues, both of which relate

to the counsel's conduct in the pre-trial Dunaway/Mapp hearing. It is well established that a valid guilty plea generally "marks the end of a criminal case, not a gateway to further litigation (*People v Hansen*, 95 NY2d 227, 229 [2000]; *People v Taylor*, 65 NY2d 1, 5 [1985]). Alleged errors that are normally forfeited by a guilty plea, whether constitutional, statutory or factual, include an assertion of ineffective assistance that is not directly related to the plea bargaining process or the voluntariness of the plea (*see People v Parilla*, 8 NY3d 654, 660 [2007]). Thus, "where a defendant has by his plea admitted commission of the crime with which he was charged, his plea renders irrelevant his contention that the criminal proceedings preliminary to trial were infected with impropriety and error; his conviction rests directly on the sufficiency of the plea, not on the legal or constitutional sufficiency of any proceedings which might have led to conviction after trial (*People v DiRaffaele*, 55 NY2d 234, 240 [1982]). In this instance, where he was permitted to withdraw his original plea and re-consider his decision to plead guilty, defendant had more than ample opportunity to raise his objections before the court. His claims of ineffectiveness were forfeited as a consequence of the disposition.

Defendant's claims are also procedurally barred from collateral review. Pursuant to CPL § 440.10(2)(b), "the court must deny a motion to vacate a judgment when...the judgment is, at the time of the motion, appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal." In this instance, a detailed factual record exists that makes this case suitable for direct appeal. The alleged omissions of counsel are based solely on the record that is available to the Appellate Division on direct review. Furthermore, that defendant has filed a

notice of appeal indicates that he plans to pursue a direct appeal in the near future. Accordingly, the court need not reach the merits of the instant motion (*see People v Williams*, 5 AD3d 407 [2d Dept 2004]; *People v Cooks*, 67 NY2d 100, 500 [1986] [motion to vacate judgment may not be used as a substitute for direct appeal]).

ENTER:



PATRICIA M. DIMANGO, 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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