

**People v Brooks**

2013 NY Slip Op 30452(U)

March 5, 2013

Supreme Court, Kings County

Docket Number: 6110/12

Judge: Elizabeth A. Foley

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SUPREME COURT OF THE STATE OF NEW YORK  
KINGS COUNTY: CRIMINAL TERM: PART 30

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THE PEOPLE OF THE STATE OF NEW YORK,

Present:  
Hon. Elizabeth A. Foley

v.

INDICTMENT  
NO. 6110/12

TYRE BROOKS,

DECISION  
AND ORDER

Defendant.

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Defendant moves to vacate his judgment of conviction, obtained by his plea of guilty to Attempted Robbery in the Second Degree, pursuant to CPL §440.10(1)(h), claiming his plea was not voluntary due to several mental illnesses including bipolar disorder, depression and attention deficit hyperactivity disorder, and because he received ineffective legal representation from his former attorney due to a failure to seek youthful offender status as part of his plea agreement. After a review of the moving papers, the People’s opposition, the pertinent Supreme Court file and relevant statutory and caselaw authority, defendant’s motion is denied.

On August 31, 2010, defendant, then sixteen years of age, was arraigned in Supreme Court on the instant Indictment and charged with various felonies with respect to his alleged participation in the robbery of two victims on separate dates,

including two counts of Robbery in the Second Degree, Attempted Robbery in the First Degree, Robbery and Attempted Robbery in the Third Degree, and Grand Larceny the Fourth Degree, as well as related misdemeanor and violation charges. Following his arraignment, defendant consulted with his former attorney, Michael Colihan, Esq., and subsequently pleaded guilty to Attempted Robbery in the Second Degree in full satisfaction of the pending Indictment, in exchange for the promise that defendant would be sentenced to a definite term of imprisonment of one year with a waiver of early release (DiMango, J.). In his moving papers, defendant acknowledges that at the time of his plea no other promises were made with respect to sentence, and that Court was not asked to consider affording youthful offender status to defendant. Thereafter, defendant appeared before this Court on September 20, 2011 for the imposition of the promised sentence. In pertinent part, prior to the pronouncement of sentence, the attorney for defendant inquired whether or not application of youthful offender status was mandatory; when the Court indicated affording youthful offender status to defendant was not noted in the Supreme Court file, and the People concurred, counsel asked whether or not this Court would consider sentencing defendant as a youthful offender; whereupon the following exchange took place:

The Court: If you wish, I'll send you back to Judge DiMango, she can

make the decision. It's her case. I don't even see that. Do you see the probation record?

Mr. Colihan: I didn't say they recommend it, but I don't think there's any -- but Mr. Brooks says he's ready to be sentenced today.

The Court then imposed the negotiated sentence.

Here, defendant claims that his former attorney did not adequately explain the ramifications of the plea agreement and failed to request consideration of defendant as a youthful offender, and that in speaking with such counsel, defendant "believed that because of my age I would not end up with a permanent felony conviction," and in addition, because of his mental illness, defendant was unable to understand the consequences of his guilty plea.

Upon the record before the Court, including, *inter alia*, the minutes of the plea proceeding, defendant, with the aid of counsel, negotiated a plea bargain and knowingly and intelligently pleaded guilty to Attempted Robbery in the Second Degree (PL §110/160.10[1]) as a violent "D" felony in exchange for a promised definite term of imprisonment of one year. Significantly, when asked by Judge DiMango whether or not he understood that by his plea he would have a violent felony conviction on his record, and that if he was arrested and convicted of another felony in the future, he would be considered a violent predicate felon,

defendant unequivocally responded in the affirmative. Moreover, when questioned by that Court during his plea allocution, defendant confirmed he was satisfied with his attorney, was physically and mentally able to proceed, had not been coerced or threatened to accept a plea and was voluntarily waiving his right to a trial by jury, understood the Court's questions and all the terms of his plea agreement, and admitted he was, in fact, guilty. In addition, there is no dispute either that by his plea, defendant's attorney secured a plea bargain that was extremely advantageous to defendant, or that defendant thereby shielded himself from the possibility of receiving a longer term of imprisonment upon a conviction of the same charge to which he pleaded guilty or of any of the other more serious felony charges in the Indictment, following a jury trial. *People v. Ladelokun*, 192 AD2d 723 (2<sup>nd</sup> Dept.), *lv denied*, 81 NY2d 1075 (1993); *People v. Moore*, 155 AD2d 696 (2<sup>nd</sup> Dept. 1989).

The Court finds that the pre-plea conversations defendant alleges he had with his former attorney are vaguely described and de hors the record, and moreover, defendant's claim that he did not understand he would have a permanent felony conviction as a result of his plea, because of a purported belief to the contrary upon conferring with his prior attorney, and/or because he was unable to understand due to a variety of mental illnesses, is not only

unsubstantiated, but is flatly contradicted by the record. As there is no evidence defendant was unable to comprehend the plea proceedings, and because the minutes of that proceeding do indicate defendant understood and was coherent, this Court finds defendant's claims to be without basis. It is clear from the record of the plea proceeding defendant understood the terms of his plea bargain, acknowledged his understanding when asked by Judge DiMango, and affirmed there were no other promises made as to the sentence he would receive. Notably, the plea agreement was entered into upon consultation with and approval of defendant's mother, who was present in court at the time of defendant's plea. Thus, there is no credible dispute that the terms of the plea agreement were not understood by defendant or his attorney, and, as his plea was not baseless, his wholly unsubstantiated contentions are devoid of merit warrant no further consideration. *See, generally, People v. Ramos*, 63 NY2d 640 (1984); *People v. Hernandez*, 239 AD2d 359 (2<sup>nd</sup> Dept.), *lv denied*, 90 NY2d 894 (1997); *People v. Drummond*, 194 AD2d 416 (1<sup>st</sup> Dept.), *lv denied*, 82 NY2d 893 (1993).

Prior to his plea, defendant was exposed to a substantially greater period of incarceration had he instead gone to trial and been convicted under the original charges. When a defendant receives an advantageous plea and the record does not cast doubt on the apparent effectiveness of counsel, defendant is deemed to have

been furnished meaningful representation. *People v. Boodhoo*, 191 AD2d 448 (2<sup>nd</sup> Dept. 1993); *People v. Moore, supra*. In the Court's opinion, the record demonstrates that defendant was not deprived of effective assistance of counsel as a result of his former attorney's failure to request a youthful offender determination at the time of sentence. *People v. Reyes*, 213 AD2d 253 (2<sup>nd</sup> Dept.), *lv denied*, 85 NY2d 979 (1995); *People v. Saggese*, 135 AD2d 669 (2<sup>nd</sup> Dept. 1987).

The assertion by defendant's current counsel, *i.e.*, that this Court failed to consider youthful offender status at the time of sentence, is misplaced, because this Court clearly offered to adjourn the pronouncement of sentence and refer the matter back to the Judge who allocuted defendant during his plea, in order for that Judge to consider defendant's eligibility for such status in light of the plea agreement that had already been accepted, a situation acknowledged in defendant's moving papers and substantiated by the minutes of the sentence proceeding and which, under the circumstances, was appropriate. However, the offer of an adjournment was declined, and defendant indicated, through his attorney, he was "ready to be sentenced today" in strict accordance with the specific terms of his plea agreement, after he openly consented to being sentenced by this Court. Contrary to defendant's assertion, there was no failure by this Court

to determine defendant's eligibility for youthful offender treatment. *Compare, People v. Miles*, 244 AD2d 433 (2<sup>nd</sup> Dept. 1997).

Mindful that "mere eligibility for youthful offender status does not mandate youthful offender treatment," and that such a determination lies within the sound discretion of the sentencing court (*People v. Colon*, 267 AD2d 319 [2<sup>nd</sup> Dept. 1999], *lv denied*, 94 NY2d 946 [2000]), here, defendant voluntarily and knowingly decided to proceed to sentence even though he had been given the opportunity for a determination of this issue by the Judge who permitted the acceptance of the terms of defendant's plea bargain, and who could have then imposed sentence. Defendant did not move to withdraw his plea, and moreover, confirmed the terms of his bargain by accepting them on the date of sentence, thereby waiving any argument pertaining to a determination of his eligibility for youthful offender status. *See, e.g., People v. McGowen*, 42 NY2d 905, *rearg denied*, 42 NY2d 1015 (1977); *People v. Maybeck*, 157 AD2d 861 (2<sup>nd</sup> Dept.), *lv denied*, 75 NY2d 968 (1990); *People v. Gregory*, 290 AD2d 810 (3<sup>rd</sup> Dept.), *lv denied*, 98 NY2d 675 (2002).

On a final note, the validity of the waiver of his right to appeal -- which defendant executed at the time of his plea -- has not been called into question by defendant. To the extent defendant's current claim regarding the alleged



ineffective assistance of his former attorney implicates the voluntariness of his plea, such claim may survive his appeal waiver, but because defendant did not appeal his conviction, the instant application may be denied on this basis alone. CPL 440.10(2)(c); *People v. Cuadrado*, 9 NY3d 362 (2007); *see also, People v. Soria*, 99 AD3d 1027 (2<sup>nd</sup> Dept. 2012); *People v. Wright*, 95 AD3d 1046 (2<sup>nd</sup> Dept.), *lv denied*, 19 NY3d 978 (2012); *People v. Smith*, 93 AD3d 955 (3<sup>rd</sup> Dept.), *lv denied*, 19 NY3d 977 (2012).

The Court has reviewed the defendant's remaining arguments and finds them to be without merit.

Accordingly, it is hereby

ORDERED, that defendant's motion is denied.

ENTER

Dated: March 5, 2013

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ELIZABETH A. FOLEY, J.S.C.