SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 20
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PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER
Indictment No: 8312/2010

-against-

MIGUEL CRUZ,

Defendant
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Miriam Cyrulnik, J:

Defendant moves for various forms of relief by multiple motions. The People oppose, addressing each of his applications in one comprehensive Affirmation in Opposition. In determining this motion, the court reviewed the following motions by defendant: Motion for Sentence Change, dated October 24, 2011; Motion for Re-sentencing, dated January 7, 2012; Motion to seal 1997 conviction, date July 19, 2012; Motion to Seal 1997 Conviction, undated; Motion for Deferment of Surcharge, dated January 19, 2012; Motion for Dismissal, dated April 3, 2012; and Motion for Dismissal and Discovery, dated May 12, 2012. The court also reviewed the People's comprehensive Affirmation in Opposition, dated December 21, 2012 and the People's Affirmation in Opposition, dated November 1, 2012, opposing defendant's Motion to Seal 1997 Conviction, dated July 19, 2012.

On March 11, 2011, defendant pled guilty to Conspiracy in the Second Degree and Criminal Sale of a Controlled Substance in the Second Degree in full satisfaction of this indictment. At that time, defendant waived his right to appeal and signed a waiver reflecting his decision to do so.

Defendant was sentenced on March 21, 2011, as a second felony offender, to a term of imprisonment of 7 to 14 years on the conspiracy charge, to run concurrently with a term of imprisonment of 8 years, with 5 years post-release supervision, on the criminal sale charge.

On March 24, 2011, defendant moved, *pro se*, for deferment of the mandatory surcharge. Defendant's motion was denied by this court's order, dated May 20, 2011, holding that the application should be made at the conclusion of his prison sentence.

On April 6, 2011, defendant moved, *pro se*, pursuant to CPL §440.20, to set aside his sentence, claiming that the indictment contained duplicitous counts, in violation of CPL §200.30 (1), and that the police entrapped him by not arresting him immediately following the first offense he committed during their investigation. By its Decision and Order, dated October 21, 2011, this court denied defendant's April 6, 2011 motion, holding that defendant's sentence was lawful and that defendant forfeited his right to raise the issues in his motion by pleading guilty.

On September 22, 2011, defendant moved, *pro se*, for a second time, for an order setting aside his sentence, pursuant to CPL §440.20. By its order, dated November 15, 2012, this court denied defendant's motion, relying upon its previous ruling that defendant's sentence was lawful and holding that defendant's additional claims were meritless and procedurally barred.

By *pro se* motion, dated October 27, 2011, defendant again sought deferral of the mandatory surcharge. This court denied defendant's motion as premature by its Decision and Order, dated November 9, 2011.

The court will address defendant's instant motions in the order in which they are attached to the People's Affirmation in Opposition.[1]

SENTENCE

With respect to defendant's: Motion for Sentence Change, dated October 24, 2011; Motion

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[1] Also determined herein is defendant's Motion to Seal 1997 Conviction, dated July 19, 2012, which is referred to in the People's Affirmation in Opposition, but not attached thereto.

for Re-sentencing, dated January 7, 2012; and Motion to Seal 1997 Conviction, undated (attached to the People's Affirmation in Opposition as Exhibits "1", "2" and "3", respectively) and Motion to Seal 1997 Conviction, dated July 19, 2012, the court relies upon and incorporates the holdings of its orders, dated October 21, 2011 and November 15, 2012, which deemed defendant's sentence lawful and precluded defendant from raising objections to his conviction as a result of his voluntary guilty plea. Defendant's instant motion raises no challenge to these holdings, and no new evidence or change in circumstance has been offered to justify renewal of argument on these issues.

However, even if the court were to hold differently on the issues of defendant's sentence and plea, defendant's instant motions are without merit, as they fail to address the legality of his sentence. Instead, defendant raises issues that well preceded his sentence and have nothing to do with its lawfulness. Since such issues are more appropriately addressed in the framework of a motion to vacate the judgment of conviction, the court will address them accordingly.

DEFENDANT'S VARIOUS CLAIMS ARE PROCEDURALLY BARRED

> CPL §440.10(3)(b) states, in pertinent part:
>
> (3)Notwithstanding the provisions of subdivision one, the court may deny a motion to vacate a judgment when:
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> (b) the 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, other than an appeal from the judgment, or upon a motion or proceeding in a federal court; unless since the time of such determination there has been a retroactively effective change in the law controlling such issue.

The issues raised in defendant's instant motions were previously determined by this court. By motions, dated April 6, 2011 and September 22, 2011, defendant moved to set aside his sentence. Those motions were denied on the merits by this court's orders, dated October 21, 2011 and

November 15, 2012, respectively. Therefore, pursuant to CPL §440.10(3)(b), defendant's instant motions to set aside his sentence are procedurally barred.

> CPL §440.10 (3) (c) states:
>
> Notwithstanding the provisions of subdivision one, the court may deny a motion to vacate a judgment when:
> (c) Upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.

By his *pro se* motions, dated April 6, 2011 and September 22, 2011, defendant sought to set aside his sentence, arguing, *inter alia*, that the indictment contained duplicitous counts, in violation of CPL §200.30 (1), and that the police entrapped him by not arresting him immediately following the first offense he committed during their investigation.[2] On October 21, 2011 and November 15, 2012, this court rendered its decisions denying defendant's motions to vacate in their entirety.

In his April 2011 and September 2011 motions, defendant made extensive arguments in support of his bid to set aside his sentence. However, although the information upon which he bases the instant motions was readily available to him in April and September 2011, defendant failed to include these issues and arguments when he made those motions. Additionally, defendant now offers no reason for the omission of his present arguments from his previous motions.

It is well settled that a court may summarily deny a motion to vacate, pursuant to CPL §440.10 (3) (c), where defendant presents arguments that could have been raised on a previous motion to vacate (*see People v. Cochrane*, 27 AD3d 650 [2d Dept 2006], *lv denied* 7 NY3d 787 [2006]; *People v. Brown*, 24 AD3d 271 [1st Dept 2005], *lv denied* 6 NY3d 846 [2006]; *People v.*

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[2] With respect to both motions, defendant failed to address the legality of his sentence and the court dealt with them as motions to vacate the judgment of conviction.

Dover, 294 AD2d 594 [2d Dept 2002], *lv denied* 98 NY2d 767 [2002]; *People v. Thomas*, 147 AD2d 510 [2d Dept 1989], *lv denied* 74 NY2d 669 [1989]). Defendant's failure to raise the grounds and issues presented in the instant motions when he made his previous motions to set aside his sentence, despite being in a position to do so, is a procedural bar pursuant to CPL §440.10 (3) (c).

EVEN IF DEFENDANT'S INSTANT MOTIONS WERE NOT PROCEDURALLY BARRED PURSUANT TO CPL §§440.10(3)(b) and 440.10 (3) (c), HIS CLAIMS ARE WITHOUT MERIT AND ARE BARRED PURSUANT TO CPL §440.30 (4) (d).

Criminal Procedure Law 440.30 (4) (d) states:

> Upon considering the merits of the motion, the court may deny it without conducting a hearing if:
> (d) An allegation of fact essential to support the motion is (i) 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.

In the instant motions to set aside his sentence, defendant's various claims are substantively without merit. In support of his claims, defendant offers nothing more than his own recollection of events and strained interpretations of police documents and court records, unsupported by any other affidavit or evidence. In contrast, the People's Affirmation in Opposition is supported by court records and official documents that clearly contradict defendant's claims, leaving no reasonable possibility that they are true. Thus, the defendant's instant motions are procedurally barred under CPL 440.30 (4) (d).

SURCHARGE

With respect to defendant's Motion for Deferment of Surcharge, dated January 19, 2012

(attached to the People's Affirmation in Opposition as Exhibit "4"), the court relies upon and incorporates its previous orders, dated May 20, 2011 and November 9, 2011, by which defendant's *pro se* motions, dated March 24, 2011 and October 27, 2011, respectively, were denied as premature.

Like defendant's previous motions to set aside his sentence discussed *supra*, defendant's instant motion to defer the mandatory surcharge was previously decided on the merits and is therefore procedurally barred, pursuant to CPL §440.10(3)(b).

DISMISSAL

Defendant's Motion for Dismissal, dated April 3, 2012 (attached to the People's Affirmation in Opposition as Exhibit "5"), claims the indictment should be dismissed, based upon ineffective assistance of defense counsel. As pointed out *supra*, defendant has made at least two previous CPL Article 440 motions, making various arguments to vacate his judgement of conviction. Defendant was in an adequate position to raise his instant claim of ineffective assistance of counsel in either or both of those motions, but he failed to do so. Therefore, defendant is procedurally barred from raising this claim, pursuant to CPL §440.10(3)(c).

Finally, defendant's Motion for Dismissal and Discovery, dated May 12, 2012 (attached to the People's Affirmation in Opposition as Exhibit "6"), seeks extensive discovery and dismissal in the interest of justice.[3]

In New York, discovery in a criminal proceeding is entirely governed by statute (*see People v. Copicotto*, 50 NY2d 222 [1980]; *Phillips v. Ramsey*, 42 AD3d 456 [2d Dept 2007]; *Hynes v. Cirigliano*, 180 AD2d 659 [2d Dept 1992], *lv denied* 79 NY2d 757 [1992]; *People v. Seeley*, 179

[3] Although defendant's motion includes the title "Motion to Dismiss in the Interest of Justice," defendant makes no substantive argument in support of such relief. Defendant simply relies upon information submitted in his previously filed motions in demanding dismissal.

Misc2d 42 [Sup Ct Kings County 1998]; CPL Article 240). There is no provision in CPL Article 240 for post-conviction discovery (*see People v. Gargiulo*, 13 Misc3d 1202[A] [Sup Ct Kings County 2006]; *People v. Callace*, 151 Misc2d 464 [Sup Ct Suffolk County 1991]). Furthermore, as "there is no general constitutional right to discovery in criminal cases" (*see Miller v. Schwartz*, 72 NY2d 869 [1988]), "discovery which is unavailable pursuant to statute should not be ordered based on principles of due process" (*see Brown v. Blumenfeld*, 296 AD2d 405 [2d Dept 2002]; *Pirro v. LaCava*, 230 AD3d 909 [2d Dept 1996], *lv denied* 89 NY2d 813 [1997]).

By his May 12, 2012 motion, defendant seeks post-conviction discovery for which there is no statutory authority. Therefore, this court is not empowered to grant defendant's motion for post-conviction discovery and it must be denied. That part of defendant's motion seeking dismissal in the interest of justice is, likewise, denied.

In the two years since he was sentenced, defendant has submitted a bevy of motions in which are raised a multitude of legal arguments to advance his claims that, *inter alia*, his conviction should be vacated. He has had a full opportunity to litigate his claims and his motions have received full consideration by this court. His arguments are repetitious and have consistently been found to be without legal basis. Defendant has reached the point where he has moved for all relief for which he might have a good faith basis (*see People v. LaRocco*, NYLJ, Jan 7, 2002 at 29, col. 5 [Sup Ct, Queens County 2002]).

In addition to six motions upon which it has previously ruled and the six motions that are the subject of the instant Decision and Order, this court is presently in receipt of at least ten pending motions from defendant. Defendant's motions and correspondence consist of repeated demands for

the same relief previously considered and denied by this court.[4] Also consistently repeated are defendant's arguments, which he advances, regardless of the form of relief sought. The court also notes that defendant regularly fails to serve and file his motions in compliance with statutory requirements. Nevertheless, the court has accepted defendant's motions, expending additional resources to ensure that they are correctly calendared and served upon the People.

In *People v. LaRocco*, *supra*, the court employed the following language, which is apt to the case at bar:

> This court finds that the defendant has engaged in a conscious pattern of baseless litigation which has resulted in vexation, harassment and needless expense, and has placed an unnecessary burden on this court and its supporting personnel. The court has expended countless hours to process and calendar these baseless applications, to read them and to issue and re-issue decisions on each application. This behavior works to the detriment of the honest litigant who is deprived of his or her fair share of these limited resources, and to the similar detriment of the administration of justice as a whole.

A court is "not without authority to curtail the waste of resources" resulting from frivolous *pro se* motions (*see People v. Moore*, 17 Misc3d 228 [Sup Ct, Kings County 2007]; *People v. Brown*, 14 Misc3d 1237 [A] [Sup Ct, Queens County 2007]; *People v. Rivera*, 159 Misc2d 556 [Sup Ct, Bronx County 1993]). A court has the inherent power to regulate court practices, which may include the imposition of sanctions for frivolous litigation (*see People v. LaRocco*, *supra*; *Matter of Diane D.*, 161 Misc2d 861 [Sup Ct, New York County 1994]; *Spremo v. Babchik*, 155 Misc2d 796 [Sup Ct, Queens County 1992], *aff'd as modified*, 216 AD2d 382 [2d Dept 1995], *lv denied*,

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[4] This court also notes that defendant has filed at least five motions related to his pending appeal before the Appellate Division, Second Department. This order addresses only those *pro se* motions filed by defendant in Supreme Court, Kings County.

86 NY2d 709 [1995], *cert denied*, 116 S Ct 1048 [1996]; *People v. I.L.*, 143 Misc2d 1061 [Sup Ct, Bronx County 1989]; *Plachte v. Bancroft*, 3 AD2d 437 [1st Dept 1957]).

A court's inherent jurisdiction encompasses anything reasonably necessary to control its business (*see Riglander v. Star Co.*, 98 AD 101 [1st Dept 1904], *aff'd* 181 NY 531 [1905]). The court's inherent powers have been described as "all powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective" (*see Matter of Diane D.*, 161 Misc2d 861 [1994], *supra*; *Matter of Little*, 89 Misc2d 742 [County Ct, Yates County 1977]).

Moreover, a court has the "duty and power to protect courts, citizens and opposing parties from the deleterious impact of repetitive *pro se* litigation," as such litigation deprives other litigants of their share of judicial resources (*see Spremo v. Babchik*, 155 Misc2d 796 [1992], *supra*). Although public policy mandates free access to the courts, "courts have imposed injunctions barring parties from commencing any further litigation where those parties have engaged in continuous and vexatious litigation" (*see Robert v. O'Meara*, 28 AD3d 567 [2d Dept 2006], *lv denied* 7 NY3d 716 [2006]; *Sassower v. Signorelli*, 99 AD2d 358 [2d Dept 1984]).

Accordingly, it is ordered that defendant is enjoined from instituting any further *pro se* proceedings before this court without the express prior approval of this court or the Administrative Judge of this court (*see People v. Moore*, 17 Misc3d 228 [2007], *supra*; *Robert v. O'Meara*, 28 AD3d 567 [2006], *supra*; *People v. Samuel Davis*, NYLJ, Jan 6, 2006 at 18, col. 3; *People v. LaRocco*, *supra*; *Sassower v. Signorelli*, 99 AD2d 358 [1984], *supra*).

Said approval shall be annexed by defendant as the cover page of any future *pro se* moving papers before they will be accepted for calendaring. Any papers submitted without such approval

will not be considered. Any request for such approval shall be limited to one page.[5] Additionally, any correspondence or documents defendant may send to this court or to court staff will not be answered unless they directly relate to moving papers for which defendant received express prior approval.

Violation of this order may result in a contempt hearing and may ultimately result in the imposition of a substantial monetary fine upon defendant, which will be levied upon his inmate funds (*see People v. LaRocco*, *supra*).

Defendant's right to an appeal from the order determining this 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 CPL Article 440, the 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 the defendant has been served by the District Attorney or the court with the court order denying this motion.

The application must contain the defendant's name and address, indictment number, the questions of law or fact which the defendant believes ought to be reviewed and a statement that no prior application for such certificate has been made. The defendant must include a copy of the court order and a copy of any opinion of the court. In addition, the defendant must serve a copy of his application on the District Attorney.

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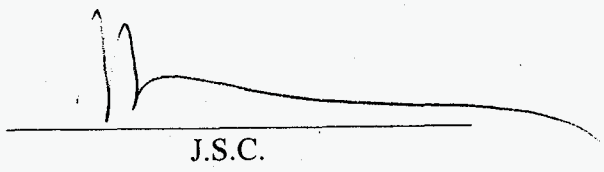
[5] "One page" shall consist of one side of a standard letter sized page, with double spaced text.

This constitutes the decision and order of the Court.

Dated: March 5, 2013



J.S.C.