SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 40
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THE PEOPLE OF THE STATE OF NEW YORK

Decision and *Order*

-against-

Indictment *4002/09*

CHRISTOPHER CHAN

CPL 440 Decision

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6/10/13

JUSTICE MARTIN P. MURPHY

Defendant moves, *pro se*, to vacate his judgment of conviction and his sentence pursuant to *CPL sections 440.10* and *440.20* on the grounds that he received ineffective assistance of counsel; that the court's plea allocution was factually insufficient; and that his sentence constituted cruel and unusual punishment. For the following reasons, *defendant's* motion is *DENIED.*

On *May 2, 2009*, *defendant* entered the *Fu Xing Grocery Store* with *co-defendants Jonathan Hernandez* and *Ching Wu. Defendant* was carrying an electric stun gun. *Defendant* then placed *Ju Lin*, a store employee, in a choke hold and held the stun gun to his neck, stunning him and causing him to fall to the ground. *Defendant* continued to hold *Lin* in a choke hold while *co-defendant Wu* kicked him in the chest and stomach. Meanwhile, *co-defendant Hernandez* held an air pistol to the head of *Xiuyi Chen*, who was eight months' pregnant at the time. *Hernandez* repeatedly demanded money from *Chen* and struck her in the head and hands with the air pistol. He then held the air pistol to her stomach and demanded to know whether she wanted to have her baby. In compliance with *Hernandez's* demands, *Chen* handed over *$1,600* in cash from a box behind the store's counter. *Hernandez* also took a box of quarters valued at

$400, lottery tickets worth *$100*, and a laptop. He placed the stolen items in a black duffle bag and fled with his *co-defendants*. Within minutes, police stopped their vehicle and arrested the three occupants. A stun gun and an unloaded air pistol were recovered from the vehicle. *Defendant*, *Hernandez* and *Wu* all gave statements admitting their various roles in the robbery.

For his participation in the robbery, *defendant* was charged under *Indictment 4002/09* with one count of robbery in the first degree; four counts of robbery in the second degree ; one count of robbery in the third degree; two counts of assault in the second degree; two counts of assault in the third degree and two counts of criminal possession of a weapon in the fourth degree.

On *July 1, 2010*, defendant, represented by *Curtis Farber, Esq*., pleaded guilty to attempted robbery in the first degree in full satisfaction of the indictment and in exchange for a promised sentence of four years imprisonment to be followed by five years post-release supervision. At the plea proceeding, *defendant* stated that he was satisfied with the representation provided by counsel and that he was pleading guilty voluntarily. On *September 13, 2010*, *defendant* was sentenced to the promised sentence of four years' imprisonment, followed by five years' post release supervision. (*Murphy, J.* at plea and sentence).

Defendant failed to take a direct appeal from the judgment of conviction.

Defendant now challenges the conviction and sentence, arguing that he was treated unfairly because he was the "least culpable among all the robbers..." According to *defendant*, counsel should have moved to dismiss the top count of the indictment and negotiated the same

favorable plea agreement that *defendant* alleges *co-defendant Hernandez* received.

Whether or not counsel filed a motion to dismiss the first count of the indictment is a matter of record that *defendant* could have raised on direct appeal and is thus barred from collateral review. *CPL 440.10[2][c]* ; *also see People v Cooks*, 67 NY2d 100 [1986]. Similarly, as to *defendant's* assertion that counsel failed to negotiate a favorable plea bargain is procedurally barred because it is contradicted by the court record and there is no reasonable probability that it is true. *CPL 440.30[4][d]*. According to the record, counsel negotiated a plea in *July, 2009* in which *defendant* would plead guilty to attempted robbery in the second degree in exchange for a sentence of two and one-half years of incarceration and three years' post release supervision. That offer, which was identical to the one made to *co-defendant Hernandez*, remained available to *defendant* for several months. *Defendant*, however, elected instead to reject that offer, at which point the People withdrew it.

Defendant further claims that his plea was not knowing, voluntary and intelligent because the court failed to ensure that he was knowingly waiving an allegedly affirmative defense that the weapon was inoperable. In his moving papers, *defendant* states that the weapon employed during the robbery was an unloaded bb-gun and he suggests that such a weapon did not constitute a "dangerous instrument" under the *Penal Law*. However, the court record reveals that *defendant* admitted that, in the course of committing the instant robbery or in his immediate flight therefrom, he or one of his *co-defendants* threatened the immediate use of a "dangerous instrument," namely, a stun gun. Thus, there is no evidence to support *defendant's* bare allegation that the weapon was a bb-gun. Moreover, sufficient facts appear on the record of the

plea proceeding to have permitted review of this claim on appeal, yet defendant failed to challenge the sufficiency of the plea allocution before an appellate court.; this claim is thus procedurally barred pursuant to *CPL 440.10(2)(c)*.

The claim that *defendant* unknowingly waived an affirmative defense based upon the in-operability of the weapon also appears to rest on *defendant's* misapprehension of the particular statute under which he was charged. *Defendant* pleaded guilty to attempted first-degree robbery pursuant to *PL 160.15(3),* based upon the use of a stun gun, a dangerous instrument which proved to be in and operable condition, during the course of the robbery. That statutory provision, *ie.,PL 160.15(3)* does not provide for the potential applicability of any affirmative defense(s). The defense to which *defendant* refers is potentially applicable to a conviction under *PL 160.15 (4)* and thus was inapplicable to him.

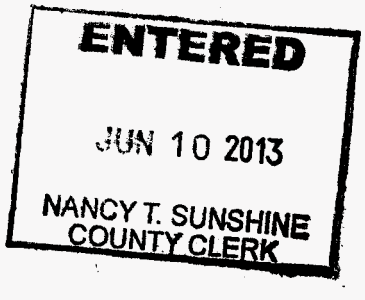
Finally, *defendant's* sentence did not constitute cruel and usual punishment. *Defendant* argues that his sentence was cruel and unusual because *co-defendant Hernandez* received a lesser sentence, despite his allegedly playing a greater role in the robbery. *Defendant* also maintains that he received a longer sentence because he did not accept a plea offer as quickly as *Hernandez.* Under *CPL 440.20(1)*, a sentence may be set aside upon the ground that it was "unauthorized, illegally imposed or otherwise invalid as a matter of law." *CPL 440.20(1)* does not encompass claims of harshness or excessiveness which must be raised on appeal. *People v Cunningham*, 305 AD2d 516 [2nd Dept 2003]. Regardless of its length, a sentence that is within the limits of a valid statute does not ordinarily constitute cruel and unusual punishment, absent exceptional circumstances. *See People v Jones*, 39 NY2d 694 [1976]; *also People v Brathwaite*, 263

AD2d 89 [2nd Dept,2000].

Here, *defendant* has failed to demonstrate any "exceptional circumstances" that warrant *vacatur* of his sentence. *Defendant's* sentence, which he accepted only after first rejecting a better offer, was the result of an advantageous plea bargain. Had he been convicted of first-degree robbery after trial, *defendant* would have faced a potential prison term of *five* to *twenty-five* years. The imposed sentence of *four years* for attempted first-degree robbery was also much lower than the potential statutory maximum of *fifteen years*. Moreover, contrary to *defendant's* assertions, "equal protection does not require identity of treatment" and *defendant* was not entitled to receive a sentence identical to that of his *co-defendant* .*People v Miller*, 74 AD3d 1097 [2nd Dept., 2010]; *People v Semkus*, 122 AD2d 287 [2nd Dept., 1986] ["co-defendants need not be sentenced equally"].

Accordingly, *defendant's vacatur* motion is *DENIED* in its entirety without a hearing.

This *decision* shall constitute the *order* of the court.



MARTIN P. MURPHY, A.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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