SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 50

THE PEOPLE OF THE STATE OF NEW YORK	:	MOTION TO VACATE SENTENCE
-against-	:	DECISION AND ORDER
GUY GIULIANO,	:	IND. NO. 8131/2010
	:	0337/2012
Defendant.	:	7805/2012

DANNY K. CHUN, J.

The defendant moves to vacate his sentence for the sole purpose of authorizing a mental health examination under C.P.L. § 390. The people oppose the defendant's motion.

The defendant was indicted under three separate indictment numbers. Under Kings County Indictment Number 8131/2010, the defendant was charged with one Grand Larceny in the Second Degree (P.L. § 155.40[1]), two counts of Criminal Possession of a Forged Instrument in the Second Degree (P.L. § 170.25), seven counts of Offering a False Instrument for Filing in the First Degree (P.L. § 175.35), eight counts of Falsifying Business Records in the First Degree (P.L. § 170.10), and two counts of Criminal Possession of a Forged Instrument in the Third Degree (P.L. § 170.20).

Under Kings County Indictment Number 337/2012, the defendant was charged with one count of Grand Larceny in the First Degree (P.L. § 155.42), one count of Grand Larceny in the Third Degree (P.L. § 155.35[1]), one count of Petit Larceny (P.L. § 155.25), three counts of Offering a False Instrument for Filing in the First Degree (P.L. § 175.35), three counts of Falsifying Business Records in the First Degree (P.L. § 175.10), and three counts of Falsifying Business Records in the Second Degree (P.L § 175.05[1]).

Under Kings County Indictment Number 7805/2012, the defendant was charged with two counts of Grand Larceny in the Second Degree as a Hate Crime (P.L. §§ 155.40[1], 485.05[1][b]), two counts of Grand Larceny in the Second Degree (P.L. § 155.40[1]), one count of Scheme to Defraud in the First Degree (P.L. § 190.65[1][b]), and two counts of Petit Larceny (P.L. § 155.25).

On December 20, 2012, the defendant pleaded guilty to every count in each indictment before the Honorable Judge Walsh. Before the defendant pleaded guilty on that date, Judge Walsh stated that with regards to the gambling issue raised, he would recommend that the defendant participate in whatever programs available in prison (Plea proceeding at 4-5). However, Judge Walsh made it clear that that was just a recommendation and the sentence would not be conditioned upon the defendant completing a program (Plea proceeding at 5). When the defendant entered a plea of guilty, Judge Walsh states again that "... the Court is going to recommend the Comprehensive Alcohol and Substance Abuse Treatment program and gambling addiction treatment programs that are, whatever program are in place in the state system." (Plea proceeding at 50). Notably, during the plea proceeding, the Court did not mention that as part of the plea, the defendant would undergo an examination pursuant to C.P.L. § 390.30(2), and no such examination was ordered.

On February 25, 2013, the defendant was sentenced before this court to a prison term of (1) four to twelve years on the B and C felonies that the defendant pleaded guilty to; (2) two and a third to seven years on the D felonies that the defendant pleaded guilty to; (3) one and a third to four years on the E felonies the defendant pleaded guilty to; and (4) one year on the A misdemeanors the defendant pleaded guilty to, all to run concurrently. At the sentencing, this court stated that "[t]he Court is recommending defendant be given every opportunity for treatment, especially with gambling addiction, while incarcerated." (Sentencing at 16).

As a general principle, a sentence cannot be changed once a defendant begins to serve it if the "sentence is in accordance with law." See C.P.L. § 430.10; People v. Williams, 14 N.Y.3d 198, 212 (2010). However, it is well established that courts have "inherent power to correct their records, where the correction relates to mistakes or errors, which may be termed clerical in nature, or where it is made in order to conform the record to the truth." People v. Gammon, 19 N.Y.3d 893, 895 (2012); People v. Williams, 14 N.Y.3d at 212. The Court of Appeals of New York has recognized that courts can exercise this authority "in circumstances where it clearly appears that a mistake or error occurred at the time a sentence was imposed." People v. Gammon, 19 N.Y.3d at 895, quoting People v. Richardson, 100 N.Y.2d 847 (2003).

Here, there is no evidence that there was a mistake or an error regarding the sentence . The defendant is correct in that during the December 6, 2012 court proceeding, Judge Walsh mentioned that he would order a 390 examination with the defendant's probation report. However, that was not the date the defendant entered the guilty plea, and the parties were still negotiating. The defendant pleaded guilty on December 20, 2012. On that date, there was no mention regarding a mental examination pursuant to C.P.L. § 390.30(2). At that time, the defendant was represented by four attorneys he had retained, and not one of them nor the People mentioned that a 390 examination was promised as part of the plea. Regardless of whatever negotiations went on before the defendant entered the guilty plea, this court must rely on what was promised when the defendant actually took the plea. As a 390 examination was never mentioned when the defendant actually entered a plea of guilty, and the sentence otherwise being legal, the court denies the defendant's motion to vacate the sentence.

Wherefore, the defendant's motion is denied in its entirety. The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York
June 17, 2013

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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