

People v Briggs

2013 NY Slip Op 32127(U)

September 4, 2013

Supreme Court, Kings County

Docket Number: 4258-2008

Judge: Michael Gary

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 12

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THE PEOPLE OF THE STATE OF NEW YORK :

-against- : DECISION AND ORDER
 : *Pro Se* CPL 440 Motion
VERON BRIGGS aka Vernon Briggs :
 :
 : IND. NO. 4258-2008
Defendant :
-----X

MICHAEL A. GARY, J.

Defendant moves *pro se* by way of this written motion to vacate the judgment of conviction pursuant to CPL § 440.10. The People have opposed this motion in a written response, and Mr. Briggs filed a reply.

The defendant was convicted on October 8, 2009, by plea, of 1 count of Criminal possession of a weapon in the fourth degree (Penal Law § 265.01, a Class A misdemeanor) in satisfaction of the above-mentioned indictment. He was sentenced on October 21, 2009 to a definite sentence of one year of incarceration, time he had already served in jail.

The defendant did not appeal his case, and he has already served the sentence. A check with the records of the Appellate Division Second Department revealed that Mr, Briggs sought in 2012, an extension of time to permit him to file his appeal. That request was denied by the Second Department in December of 2012, and leave to appeal from that denial was denied in March, 2013 at 20 NY3d 1096 (Table). Mr. Briggs is presently on parole supervision stemming from a conviction in 2010 after a plea to Criminal sale of a controlled substance in the third degree, after serving his term of 3½ years of incarceration on New York County Indictment 06370N- 2009. He has now filed the instant motion

seeking to set aside the 2009 conviction alleging a violation of his constitutional rights, ineffective assistance of counsel, and that the plea was “involuntary, unknowingly and [sic] unintelligently rendered” (Defendant’s motion , page 1.) The People oppose the motion in its entirety.

This case arose after the execution of a search warrant, when a gun was recovered from the defendant’s abode. Defendant claims the basis for the search warrant was an allegation that he had conducted two separate drug sales to the informant. Though no drugs were recovered, the firearm in question was seized pursuant to the search warrant in defendant’s home. Defendant was indicted on the felony weapons charge, having been previously convicted of a felony in 2003 (and before then as well).

Following the defendant’s arraignment on the case, extensive motion practice ensued by defense counsel and the People, regarding a bail application, permission to take a DNA swab, and finally a motion to controvert the search warrant. When that motion was denied, the case was adjourned for a suppression hearing on the statement and for trial.

In the trial part, an offer was made to the defendant of dismissal of the felony count, a plea to the misdemeanor, and a term of one year incarceration (time which he had already served), in full satisfaction of the indictment. Mr. Briggs agreed to the offer, plead guilty, and waived his right to appeal as part of the plea bargain. The People agreed to dismiss the felony count in order for the defendant to plead guilty, and three weeks later, the defendant was sentenced as promised.

Mr. Briggs now seeks to vacate the conviction complaining that no charge relating to drugs was on the indictment, concluding that there could not have been probable cause to

issue the search warrant, and thus, the defense attorney's failure to investigate this constitutes ineffective assistance of counsel. Further, defense counsel's failure to mount this challenge also informed the advice to plead guilty, as the attorney relied on the People's representations of the quality of the case's evidence and did not independently vet the evidence.

The People counter the defendant's assertions and claim that counsel's performance was constitutionally sound, that counsel afforded the defendant meaningful assistance, that the plea was voluntary and knowing and in any event these issues are barred from consideration by the statutory mandate of CPL 440.10(2) (c), as most of the claims should have been raised in an appeal as the matters are on the record.

As the People note in their response, CPL § 440.10 governs the court's decision making capacity in regards to the motion to vacate the judgment of conviction. Upon examination of the record and all the previously filed motion papers, the court MUST deny the motion to vacate if : . . . The relevant section states. . .

2.(a) the ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, . . .

(b) 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; or

(c) although sufficient facts appear on the record of the proceeding underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion , . . . no such appellate review or determination occurred owing to the defendant's unjustifiable failure to . . . raise such ground or issue upon an appeal actually perfected by him;

The People in their response have attached the minutes of the plea confirming that the issue of voluntariness is a matter of the record and should have been raised on an appeal

notwithstanding defendant's waiver. Further, the People argue, and the court quite agrees, that even if it were to consider the issue on the merits, it would fail. The allocution by the court clearly shows that not only was the defendant thoroughly questioned, but also Mr. Briggs acknowledged that counsel had assisted him in explaining the consequences of his plea. The court notes, too, that the defendant had at least 3 prior convictions, also as a result of pleas, and was no stranger to the proceedings.

Motions alleging ineffective assistance of counsel, however, encompass both record-based allegations and those outside of the record, and thus, are properly considered under CPL § 440. Defendant contends that not only did defense counsel fail in his representation by neglecting to move to controvert the search warrant and by failing to follow up on the allegedly exculpatory discovery items, but relying on the above-listed "failures", advised him to plead guilty.

As to the merits of the allegations, the People point out quite correctly, that the defense attorney did move to controvert the warrant, and filed motion papers dated June, 2009; several court appearances dealt with that very motion. Further, it is precisely because of defense counsel's advocacy that the defendant is aware of the existence of the named discovery items in the first place, because they were requested as missing in a letter from defense counsel to the district attorney.

Most importantly, insofar as an allegation of the effectiveness of counsel is concerned, the court is mandated to view the representation defendant received in the totality of the circumstances to determine whether the defendant received meaningful representation *People v. Baldi*, 54 NY2d 137. In this case, as a convicted felon the defendant was facing mandatory upstate prison time; instead he was allowed to enter into a very favorable plea

deal netting hin only a misdemeanor conviction, and what amounted to “ time served”.
Counsel cannot be considered ineffective for failing to challenge the lack of a drug charge on the indictment, as how and what to charge in a particular case is a matter of prosecutorial discretion. There is no legal mandate to charge a defendant with particular crimes, and the defense attorney would have no legal basis to challenge this discretion.

After consideration of the defendant’s allegations, this court finds no basis to grant the defendant’s motion to vacate the judgment of conviction. Therefore, the motion is hereby denied on substantive and procedural grounds.

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York
September 4, 2013


MICHAEL A. GARY, J. S. C.

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