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| <p>People v Pino</p> |
| <p>2018 NY Slip Op 33528(U)</p> |
| <p>December 19, 2018</p> |
| <p>County Court, Westchester County</p> |
| <p>Docket Number: 17-0566</p> |
| <p>Judge: Barry E. Warhit</p> |
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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER

Indictment No.: 17-0566

RICHARD PINO,

Defendant.

-----X

WARHIT, J.

FILED

DEC 19 2018

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

Defendant herein moves to withdraw his previously entered plea of guilty to Criminal Possession of a Weapon in the second degree. The People oppose the relief sought in its entirety. In contemplation of the motion, this Court read and considered the following papers:

Motion to Vacate Plea, Affirmation and Annexed Exhibits 1-2; Affirmation in Opposition of ADA Valerie A. Livingston, Memorandum of Law and Exhibit A

Relevant Procedural Background

Under the within indictment, Richard Pinto ("Defendant") is charged with committing the crimes of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree, reckless endangerment in the first degree and bail jumping in the second degree.

Defendant appeared before this Court in the Trial Assignment Part (TAP) on April 12, 2018. Plea discussions ensued on this date as they had on previous occasions. On this date, Defendant, a predicate violent felony offender, was offered a

negotiated plea under which in exchange for a plea of guilty to the crime of criminal possession of a weapon in the second degree, he would be sentenced, *inter alia*, to eight (8) years of imprisonment followed by a period of five (5) years post-release supervision (Affirmation in Opposition of ADA Valerie Livingston ("Affirmation in Opposition"), Exhibit A, Transcript of Plea Minutes ("Plea Minutes"), April 12, 2018 (Warhit, J.), p . 2).

Defendant indicated an interest in accepting this plea. Before permitting Defendant to do so, this Court placed Defendant under oath and the Court received his assurance that he had no difficulty understanding the English language (*Id.*, p. 2, lines 22-25 and p. 3, 1-7). This Court then inquired of Defendant, "Did you hear your attorney's application that you want to plead guilty to Count 1, criminal possession of a weapon in the second degree?" (*Id.* at p. 4, lines 8-11). Defendant replied "yes" and responded in the affirmative when the Court specifically inquired whether this was what he wanted to do (*Id.* at p. 4, lines 12-13). This Court then inquired, and Defendant again replied in the affirmative, to questions concerning whether he had been given enough time to speak to his lawyer about his decision to enter a plea of guilty (*Id.* at p. 4, lines 14-16). In response to this Court's pointed inquiries, Defendant acknowledged he was satisfied with his then counsel and, in particular, that said counsel had answered all of his questions and made himself available to him (*Id.* at p. 4, lines 17-21). In light of the fact that he faced up to fifteen (15) years in prison in connection with the charge of criminal possession of a weapon in the second degree and as the People had previously offered him a plea deal which included a sentence of ten (10) years

imprisonment, this Court inquired of Defendant whether he felt counsel had achieved a "reasonably good" result for him (*Id.*, p. 4, lines 22-25 and p. 5, lines 1-5). Defendant indicated he believed so (*Id.*, p. 5, line 6). Further, this Court advised Defendant, "I don't want an application from you later on that you want your plea back and it's because your lawyer did a poor job" . . . "Should I accept your representation made to me under oath that you're full satisfied with [your attorney's] work?" (*Id.*, p. 5, lines 3-9). Defendant replied in the affirmative (*Id.* at p. 5, line 10).

Before proceeding to the substantive portion of the plea, this Court inquired and Defendant denied he had taken any drugs or medication or had used any alcohol on the date of the plea (*Id.*, p. 5, lines 12-14). The Court then proceeded to review the Constitutional and other rights Defendant was required to relinquish in order to avail himself of the negotiated plea deal. In particular, this Court informed Defendant, who acknowledged he understood, that by entering a plea of guilty he would be giving up his right to a trial, whether by a judge or jury, as well as his right to require the People to prove each and every element of each crime charged beyond a reasonable doubt (*Id.* at p. 5, lines 15-23). Defendant unambiguously expressed understanding that, by entering a plea of guilty, he was absolving the People of their obligation to call witnesses against him, forfeiting his rights to cross-examine those witnesses or present witnesses in his own defense and also giving up his right to remain silent (*Id.* at p. 5, lines 24-25 and p. 6, lines 1-23).

In addition, Defendant indicated clear understanding of this Court's sentencing promise, namely that as a result of his plea of guilty he would be convicted of the crime

of criminal possession of a weapon in the second degree and that the agreed upon promised sentence would be imposed (see, *Id.* at p. 6, lines 24-25 and p. 6, lines 1-6).

Contrary to his present claims, during the plea *voir dire* Defendant categorically denied having been threatened or coerced in any manner and specifically denied his plea of guilty was the result of a promise made by someone other than the Court (*Id.* at p. 7, lines 7-15; *cf.* Motion to Vacate Plea, Affirmation of Philip Melea, Esq., ¶ 5 and Exhibit 1).

Significantly, during Defendant's allocution, this Court carefully insured that he was entering a plea of guilty because, in fact, he is guilty (*Id.*, p. 7, lines 16-21. Indeed, the Court informed Defendant, "I don't want to hear later that you want your plea back because you're not guilty . . . you're prepared and you are telling me under oath you're guilty of this charge, correct?" (*Id.*, p. 7, lines 22-25 and p. 8, line 1). Defendant replied in the affirmative (*Id.*, p. 8, line 2). It bears note that, through the present application, Defendant does not protest his innocence (*cf.* Motion to Vacate Plea, Affirmation of Philip Melea, Esq., ¶ 5 and Exhibit 1).

Of further import, during the plea allocution, this Court highlighted for Defendant that in addition to giving up trial rights by accepting a negotiated plea deal, he was also giving up separate appellate rights (*Id.*, p. 10, lines 15-23). This Court explained the purpose and function of the appellate court and also explained that, as a condition of the negotiated plea deal, to the extent permitted by law Defendant would be required to waive his appellate rights (*Id.* at p. 10, lines 13-25 and p. 11, lines 1-14). After acknowledging that he had spoken about this waiver with counsel and having indicated

he understood his appellate rights, Defendant freely and voluntarily waived his right to appeal (*Id.* at p. 11, lines 15-17 and p. 13, lines 8-18). In addition, during the plea *voir dire*, Defendant was informed of the potential immigration consequences of his plea of guilty in the event he is not a citizen of the United States (*Id.* at p. 12, lines 6-24).

The record reveals the Court engaged Defendant in a careful and precise plea allocution and that, prior to permitting Defendant to respond to specific questions concerning his guilt, this Court confirmed that Defendant had understood everything that had been asked of him and assured he had no questions (*Id.* at p. 12, line 25 and p. 13, lines 1-2). Only after Defendant acknowledged he had did this Court allow him to admit, with factual detail, to the crime of criminal possession of a weapon in the second degree (*Id.*, at p. 11, lines 1-17).

This Court accepted Defendant's plea of guilty as having been made freely, knowingly and voluntarily (*Id.*, p. 15, lines 19-25 and p. 16, lines 1-3). A sentencing date was set for June 21, 2018 (*Id.*, p. 16, line 3). Prior to that date, Defendant indicated an intention to withdraw his plea and requested the assignment of new counsel. However, on June 21, 2018, Defendant withdrew his request for new counsel and it was indicated to the Court that he did not intend to withdraw his plea. Sentencing was rescheduled to August 23, 2018.

Nevertheless, on August 23, 2018, Defendant appeared with newly retained counsel. On that date, Defendant's present counsel sought and received an adjournment of the sentencing. On November 15, 2018 Defendant filed the within counseled motion seeking to withdraw his plea of guilty. Through the within motion,

Defendant seeks to withdraw his plea upon a claim that he had accepted the negotiated plea deal upon the condition that he would have the opportunity to meet with the Westchester County District Attorney's Office "to discuss other cases and a mitigation package was to be brought to court to further lessen the agreed upon sentence" (Affirmation of Philip J. Mellea, ¶ 5). Defendant claims that, but for this promise, he would not have entered a plea of guilty.

By Affirmation in Opposition and Memorandum of Law, filed November 28, 2018, the People oppose Defendant's application in its entirety.

Findings of Law

A guilty plea is intended to signify the end of a criminal case and is not intended to serve as a "gateway" to further litigation (see, *People v. Hansen*, 95 NY2d 227, 230 [2000]; and see, *People v Taylor*, 65 NY2d 1, 5 [1985]). Although the law contemplates a procedure by which a defendant may move to withdraw a previously entered plea of guilty, any such application should be granted sparingly and only where there is evidence of innocence or where fraud or mistake played a role in inducing the plea (*People v. Smith*, 54 AD3d 879 [2d Dept. 2008]; and see, *People v Pillich*, 48 AD3d 1061 [2008]). The determination as to whether to grant a defendant's application to withdraw his plea of guilty rests squarely in the trial court's discretion (CPL § 220.60[3]; and see, *People v. Alexander*, 97 NY2d 482 [2002]; *People v. Elmendorf*, 45 AD3d 858, 859 [2d Dept. 2007]).

It is well settled that a plea of guilty that has been made knowingly, voluntarily

and intelligently should be upheld (see, *Elmendorf*, 45 AD3d at 859; and see, *Fiumefreddo*, 82 NY2d 536). The plea minutes amply demonstrate that Defendant admitted his guilt subsequent to a comprehensive plea allocution during which, under oath, he categorically acknowledged his complete satisfaction with attorney Kevin McLoone (see, Plea Minutes, p. 4, lines 14-25 and p. 5, lines 1-10). Further, Defendant was advised of, and unequivocally expressed that he understood, every right he was relinquishing by admitting his guilt and the consequences of his pleas of guilty (*Id.*, pp. 5-6).

Significantly, despite Defendant's present claim that he was promised a meeting with the District Attorney's Office and a concomitant opportunity to receive mitigation beyond the negotiated plea deal, while under oath during this Court's extensive plea *voir dire*, Defendant denied that anyone other than the Court's sentence promise, no one had made any promise to him in order to get him to enter a plea of guilty (*Id.*, p. 7, lines 13-15). It bears noting that the within application is based solely and completely upon Defendant's self-serving statements and is not supported by an Affirmation from prior counsel acknowledging that any off-the-record promise was made to him. Defendant's bold conclusory claims and do not give rise to a basis for him to be permitted to withdraw his plea (see generally, *People v. Jones*, 44 NY2d 76, 81 [1978]).

This Court would be remiss if it failed to comment that Defendant herein does not claim innocence. Moreover, the plea deal of which Defendant availed himself was better than any which had been offered to him on dates before to April 12, 2018. On all prior occasions the People had recommended a prison sentence of ten (10) years.

Indeed, at the start of the plea *voir dire*, this Court commented “[y]ou have a very good lawyer and he's convinced me and, actually the Assistant District Attorney to, despite the fact that you're a predicate violent, to offer you on this one court date eight years in state prison, five years post-release supervision, . . .” (Plea Minutes, p. 2, lines 13-20).

In considering Defendant's plea of guilty, it bears stating that Defendant received a very favorable plea disposition. The minimum prison sentence Defendant could have received, as a predicate felony, is seven (7) years. Moreover, had Defendant gone to trial and been convicted, in addition to facing a maximum prison sentence of fifteen years on the charge of criminal possession of a weapon in the second degree, the Court could have imposed a consecutive sentence in relation to the charge of bail jumping in the second degree (see, Penal Law § 70.25[1]; and see, *People v. Larino*, 205 AD2d 556 [2d Dept. 1994]).

In considering a defendant's application to withdraw a previously entered plea of guilty, a court is "entitled to rely on the record to ascertain whether any promises, representations, implications and the like were made to the defendant" and induced his plea of guilty" (*People v. Ramos*, 65 NY2d 640, 642 [1984](internal citations omitted)). Nothing in the record of Defendant's plea suggests his plea was improvident. Moreover, the transcript of his plea of guilty conclusively demonstrates that Defendant's admission was made knowingly and voluntarily after the Court made a proper and searching inquiry into his understanding of the proceedings and the rights he was forfeiting by entering the pleas of guilty. Further, the transcript establishes that, under oath, Defendant unequivocally represented he had been given sufficient time to consider the plea, was satisfied with counsel's representation and that his plea was not

induced by a promise made by anyone other than this Court. In this instance, where there is a lack of evidence of innocence or that fraud or mistake played a role in inducing the plea, it is appropriate to deny Defendant's application to withdraw his plea of guilty (see, *People v. Smith*, 54 AD3d 879 [2d Dept. 2008]; and see, *People v Pillich*, 48 AD3d 1061 [2008]).

Consequently, it is an appropriate exercise of this Court's discretion to deny Defendant's application and to do so without a hearing (see, *People v. Hansen*, 269 AD2d [2d Dept. 2000] citing *People v Rosa*, 239 AD2d 364 [2d Dept. 1997]); *People v. Avery*, 18 AD3d 244 [1st Dept. 2005]; *People v. Sain*, 261 AD2d 488, 489 [2d Dept. 1999] citing CPL § 220.60[3]).

The foregoing constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York
December 19, 2018



Honorable Barry E. Warhit
Westchester County Court

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