

People v Williams

2019 NY Slip Op 33144(U)

January 24, 2019

County Court, Westchester County

Docket Number: 17-0833

Judge: Barry E. Warhit

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This opinion is uncorrected and not selected for official publication.

COUNTY COURT STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
THE PEOPLE OF THE STATE OF NEW YORK

FILED and ENTERED
1/24/19
**WESTCHESTER
COUNTY CLERK**

-against-

DECISION AND ORDER

IND No. 17-0833

AKIEL WILLIAMS,

Defendant.

-----X
WARHIT, J.

The following papers were considered in connection with this application by Defendant for an Order pursuant to CPL § 420.40, granting him deferral of his obligation to pay the mandatory surcharge and fees imposed upon him at sentence, due to indigency:

FILED
JAN 24 2019

<u>PAPERS</u>		<u>NUMBERED</u>
MOTION/AFFIDAVIT/EXHIBIT	TIMOTHY C. IDONI	1
AFFIRMATION IN OPPOSITION	COUNTY CLERK COUNTY OF WESTCHESTER	2

On July 12, 2018, in Westchester County Court (Warhit, J.), defendant pled guilty to Attempted Criminal Possession of a weapon in the Second Degree (Penal Law §110/265.03[3]) under IND # 17-0833. On September 13, 2018, he was sentenced as a Second Felony Offender to a determinate term of six years, to be followed by five years post-release supervision, and to a mandatory surcharge of \$300.00, a Crime Victim's Assistance Fee of \$25.00, and a DNA Databank fee of \$50.00, for total fees and surcharges of \$375.00. Defendant now moves this court, pursuant to CPL § 420.40, to permit him to defer his obligation to pay the \$375.00 in mandatory surcharges and fees imposed upon him at sentence and as a part of his plea bargain, due to his indigency.

In support of the instant application, the defendant alleges only that he is unable to pay the fees and surcharges because he is indigent and incarcerated. Nowhere does defendant, as the People properly point out, provide proof of his lack of means to pay the challenged fees, such as an accounting of his funds on deposit in the correctional facility in which he is housed, or that his situation is different from other incarcerated defendants.

Defendant has also failed to demonstrate the applicability of CPL § 420.40 to the instant matter. As numerous trial courts have held, the statutory scheme under CPL § 420.40 (5) which permits deferral of mandatory surcharges and fees imposed under Penal Law § 60.35, does not contemplate deferral of such fees for inmates incarcerated for longer than 60 days. As noted in *People v. Morrison*, 36 Misc.3d 868 (Supreme Court, New York County, 2012),

Under CPL §420.40, a defendant upon whom surcharges are imposed pursuant to PL §60.35 is accorded an opportunity to seek deferral (but not waiver) of the collection of such surcharges on the grounds of "unreasonable hardship" at a hearing "on an appearance date set forth in a summons issued pursuant to subdivision three of Section 60.35 of the penal law." However, PL §60.35(8) also expressly provides: "The court shall not issue a summons under this subdivision to a person who is not being sentenced to a term of confinement in excess of sixty days in jail or in the department of correctional services."

(36 Misc.3d, 883, the court noting in a footnote that the reference in § 420.40 [5] to a hearing under § 65.35 [3], was likely a reference to § 65.35 [8].) Defendants such as the instant defendant, for whom a deferral hearing is simply not available due to their incarceration for in excess of 60 days, apparently have no other mechanism, under CPL § 420.40 or elsewhere, to seek deferral of their imposed surcharges and fees. See also *People v. Allen*, 13 Misc.3d 1208(A) (Supreme Court, New York County, 2006); *People v. Hopkins*, 185 Misc.2d 312 (Supreme Court, Kings County, 2000); but see contra *People v. Pierce*, 16 Misc.3d 1126 (A) (Supreme Court, New York County, 2009.)

In any event, whether the mechanism under CPL § 420.40 (5) and Penal Law § 60.35 is available to a defendant incarcerated for over 60 days such as the instant one, the People are correct that the defendant has failed in his burden to demonstrate that there should be a deferral of the surcharge and fees. CPL § 420.40 provides

2. On an appearance date set forth in a summons issued pursuant to subdivision three of section 60.35 of the penal law, section eighteen hundred nine of the vehicle and traffic law or section 27.12 of the parks, recreation and historic preservation law, a person upon whom a mandatory surcharge, sex offender registration

fee or DNA databank fee was levied shall have an opportunity to present on the record credible and verifiable information establishing that the mandatory surcharge, sex offender registration fee or DNA databank fee should be deferred, in whole or in part....

Here, the defendant has merely stated that he is unable to pay the surcharge and fee at this time because he is indigent and incarcerated. Clearly, this fails to rise to the level of "...credible and verifiable information establishing that the mandatory surcharge...[and] DNA databank fee should be deferred, in whole or in part...due to the indigence of such person"; defendant has not only submitted a conclusory allegation of his indigence, but also there is no way to test the credibility of the allegation, nor is his alleged indigence verifiable, since he provided no financial information at all in support of his application. Consequently, even if the Court were empowered under CPL § 420.40 (5) and Penal Law § 60.35 to defer the surcharge and fee, defendant has failed to support his application for such deferral with credible and verifiable evidence of his indigence.

Based upon the foregoing, it is hereby

ORDERED, that the defendant's application to defer his obligation to pay the mandatory surcharge and fees imposed upon him at sentence, due to indigency, is denied.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York

January 24, 2019



HON. BARRY E. WARHIT, J.S.C.

TO:

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