2023 Annual Conference

Syracuse, New York

Navigating Post-Judgment Motion Practice: CPL Article 440 & Writs of Error Coram Nobis

Date: Tuesday, October 3, 2023
Instructors:
Brian Rudner, Esq.
Hon. Barbara Seelbach
MCLE: 1.0 Professional Practice

This program has been approved for credit in New York State for all attorneys including those who are Newly Admitted (less than 24 months) and administered by the Onondaga County Bar Association

PRESENTERS

BRIAN RUDNER is a Town Justice in the Town of East Fishkill, in Dutchess County. Mr. Rudner is also the principal court attorney to the Honorable Edward T. McLoughlin, Dutchess County Court Judge. Prior to his employment with Judge McLoughlin, Mr. Rudner served as the principal court attorney to the Honorable Peter M. Forman, Dutchess County Court Judge (Retired).

Mr. Rudner graduated St. John's University School of Law in 2001. He began his career as a prosecutor in the Office of the District Attorney, Bronx County. After leaving the DA's Office in 2008, Mr. Rudner worked in private practice, primarily in civil and criminal litigation, until being hired by Judge Forman in 2019. Mr. Rudner is admitted to practice law in New York.

BARBARA SEELBACH took the bench in 2006 and is currently employed as the Confidential Secretary to Dutchess County Supreme Court Justice Christi J. Acker. She has spent the majority of her career in personal injury claims as an adjuster and supervisor for property and casualty insurance companies. She was also employed as a senior claims negotiator for a major law firm where she successfully settled personal injury cases and represented the firm at mediation and arbitration proceedings. A graduate of the University of Arizona, she completed an internship in the House of Commons in London, England. She has also served as Secretary, Vice President and President of the Dutchess County Magistrates Association where she tackled major issues such as the prohibition of plea bargaining by the State Police. In September of 2015, she joined the ranks of the NYSMA and was elected as a Director for the Association where she has been an active member of the Training and Education Committee.

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title M. Proceedings After Judgment (Refs & Annos)
Article 440. Post-Judgment Motions (Refs & Annos)

McKinney's CPL § 440.10

§ 440.10 Motion to vacate judgment

Effective: January 15, 2022
Currentness

1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

(a) The court did not have jurisdiction of the action or of the person of the defendant; or

(b) The judgment was procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for or in behalf of a court or a prosecutor; or

(c) Material evidence adduced at a trial resulting in the judgment was false and was, prior to the entry of the judgment, known by the prosecutor or by the court to be false; or

(d) Material evidence adduced by the people at a trial resulting in the judgment was procured in violation of the defendant's rights under the constitution of this state or of the United States; or

(e) During the proceedings resulting in the judgment, the defendant, by reason of mental disease or defect, was incapable of understanding or participating in such proceedings; or

(f) Improper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgment which conduct, if it had appeared in the record, would have required a reversal of the judgment upon an appeal therefrom; or

(g) New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence; or

(g-1) Forensic DNA testing of evidence performed since the entry of a judgment, (1) in the case of a defendant convicted after a guilty plea, the court has determined that the defendant has demonstrated a substantial probability that the defendant was actually innocent of the offense of which he or she was convicted, or (2) in the case of a defendant convicted after a trial, the court has determined that there exists a reasonable probability that the verdict would have been more favorable to the defendant.

(h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States; or

(i) The judgment is a conviction where the defendant's participation in the offense was a result of having been a victim of sex trafficking under section 230.34 of the penal law, sex trafficking of a child under section 230.34-a of the penal law, labor trafficking under section 135.35 of the penal law, aggravated labor trafficking under section 135.37 of the penal law, compelling prostitution under section 230.33 of the penal law, or trafficking in persons under the Trafficking Victims Protection Act (United States Code, title 22, chapter 78); provided that

(i) official documentation of the defendant's status as a victim of sex trafficking, labor trafficking, aggravated labor trafficking, compelling prostitution, or trafficking in persons at the time of the offense from a federal, state or local government agency shall create a presumption that the defendant's participation in the offense was a result of having been a victim of sex trafficking, labor trafficking, aggravated labor trafficking, compelling prostitution or trafficking in persons, but shall not be required for granting a motion under this paragraph;

(ii) a motion under this paragraph, and all pertinent papers and documents, shall be confidential and may not be made available to any person or public or private entity except where specifically authorized by the court; and

(iii) when a motion is filed under this paragraph, the court may, upon the consent of the petitioner and all of the state and local prosecutorial agencies that prosecuted each matter, consolidate into one proceeding a motion to vacate judgments imposed by distinct or multiple criminal courts; or

(j) The judgment is a conviction for a class A or unclassified misdemeanor entered prior to the effective date of this paragraph and satisfies the ground prescribed in paragraph (h) of this subdivision. There shall be a rebuttable presumption that a conviction by plea to such an offense was not knowing, voluntary and intelligent, based on ongoing collateral consequences, including potential or actual immigration consequences, and there shall be a rebuttable presumption that a conviction by verdict constitutes cruel and unusual punishment under section five of article one of the state constitution based on such consequences; or

(k) The judgment occurred prior to the effective date of the laws of two thousand twenty-one that amended this paragraph and is a conviction for an offense as defined in subparagraphs (i), (ii), (iii) or (iv) of paragraph (k) of subdivision three of section 160.50 of this part, in which case the court shall presume that a conviction by plea for the aforementioned offenses was not knowing, voluntary and intelligent if it has severe or ongoing consequences, including but not limited to potential or actual immigration consequences, and shall presume that a conviction by verdict for the aforementioned offenses constitutes cruel and unusual punishment under section five of article one of the state constitution, based on those consequences. The people may rebut these presumptions.

2. Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment when:

(a) The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue; or

(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 unless the issue raised upon such motion is ineffective assistance of counsel. This paragraph shall not apply to a motion under paragraph (i) of subdivision one of this section; or

(c) Although sufficient facts appear on the record of the proceedings 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 take or perfect an appeal during the prescribed period or to his or her unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him or her unless the issue raised upon such motion is ineffective assistance of counsel; or

(d) The ground or issue raised relates solely to the validity of the sentence and not to the validity of the conviction.

3. Notwithstanding the provisions of subdivision one, the court may deny a motion to vacate a judgment when:

(a) Although facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the ground or issue in question was not subsequently determined upon appeal. This paragraph does not apply to a motion based upon deprivation of the right to counsel at the trial or upon failure of the trial court to advise the defendant of such right, or to a motion under paragraph (i) of subdivision one of this section; or

(b) The ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state, other than an appeal from the judgment, or upon a motion or proceeding in a federal court; unless since the time of such determination there has been a retroactively effective change in the law controlling such issue; or

(c) Upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.

Although the court may deny the motion under any of the circumstances specified in this subdivision, in the interest of justice and for good cause shown it may in its discretion grant the motion if it is otherwise meritorious and vacate the judgment.

4. If the court grants the motion, it must, except as provided in subdivision five or six of this section, vacate the judgment, and must dismiss the accusatory instrument, or order a new trial, or take such other action as is appropriate in the circumstances.

5. Upon granting the motion upon the ground, as prescribed in paragraph (g) of subdivision one, that newly discovered evidence creates a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant in that the conviction would have been for a lesser offense than the one contained in the verdict, the court may either:

(a) Vacate the judgment and order a new trial; or

(b) With the consent of the people, modify the judgment by reducing it to one of conviction for such lesser offense. In such case, the court must re-sentence the defendant accordingly.

6. If the court grants a motion under paragraph (i) or paragraph (k) of subdivision one of this section, it must vacate the judgment and dismiss the accusatory instrument, and may take such additional action as is appropriate in the circumstances. In the case of a motion granted under paragraph (i) of subdivision one of this section, the court must vacate the judgment on the merits because the defendant's participation in the offense was a result of having been a victim of trafficking.

7. Upon a new trial resulting from an order vacating a judgment pursuant to this section, the indictment is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time the previous trial was commenced, regardless of whether any count was dismissed by the court in the course of such trial, except (a) those upon or of which the defendant was acquitted or deemed to have been acquitted, and (b) those dismissed by the order vacating the judgment, and (c) those previously dismissed by an appellate court upon an appeal from the judgment, or by any court upon a previous post-judgment motion.

8. Upon an order which vacates a judgment based upon a plea of guilty to an accusatory instrument or a part thereof, but which does not dismiss the entire accusatory instrument, the criminal action is, in the absence of an express direction to the contrary, restored to its prepleading status and the accusatory instrument is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time of the entry of the plea, except those subsequently dismissed under circumstances specified in paragraphs (b) and (c) of subdivision six. Where the plea of guilty was entered and accepted, pursuant to subdivision three of section 220.30, upon the condition that it constituted a complete disposition not only of the accusatory instrument underlying the judgment vacated but also of one or more other accusatory instruments against the defendant then pending in the same court, the order of vacation completely restores such other accusatory instruments; and such is the case even though such order dismisses the main accusatory instrument underlying the judgment.

9. Upon granting of a motion pursuant to paragraph (j) of subdivision one of this section, the court may either:

(a) With the consent of the people, vacate the judgment or modify the judgment by reducing it to one of conviction for a lesser offense; or

(b) Vacate the judgment and order a new trial wherein the defendant enters a plea to the same offense in order to permit the court to resentence the defendant in accordance with the amendatory provisions of subdivision one-a of section 70.15 of the penal law.

Credits

(L.1970, c. 996, § 1. Amended L.2010, c. 332, §§ 1 to 5, eff. Aug. 13, 2010; L.2012, c. 19, § 4; L.2015, c. 368, § 29, eff. Jan. 19, 2016; L.2018, c. 189, § 9, eff. Nov. 13, 2018; L.2019, c. 55, pt. OO, §§ 3, 4, eff. April 12, 2019; L.2019, c. 59, pt. MMM, § 2, eff. April 12, 2019; L.2019, c. 131, § 3, eff. Aug. 28, 2019, repealed L. 2019, c. 132, § 1, eff. Aug. 28, 2019; L.2019, c. 131, § 4, eff. Aug. 28, 2019; L.2019, c. 132, § 1, eff. Aug. 28, 2019; L.2021, c. 92, § 18, eff. March 31, 2021; L.2021, c. 501, § 1, eff. Oct. 25, 2021; L.2021, c. 629, § 2; L.2021, c. 629, § 3, eff. Nov. 16, 2021.)

McKinney's CPL § 440.10, NY CRIM PRO § 440.10
Current through L.2023, chapters 1 to 191. Some statute sections may be more current, see credits for details.

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Article 440. Post-Judgment Motions (Refs & Annos)

McKinney's CPL § 440.20

§ 440.20 Motion to set aside sentence; by defendant

Currentness

1. At any time after the entry of a judgment, the court in which the judgment was entered may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law. Where the judgment includes a sentence of death, the court may also set aside the sentence upon any of the grounds set forth in paragraph (b), (c), (f), (g) or (h) of subdivision one of section 440.10 as applied to a separate sentencing proceeding under section 400.27, provided, however, that to the extent the ground or grounds asserted include one or more of the aforesaid paragraphs of subdivision one of section 440.10, the court must also apply subdivisions two and three of section 440.10, other than paragraph (d) of subdivision two of such section, in determining the motion. In the event the court enters an order granting a motion to set aside a sentence of death under this section, the court must either direct a new sentencing proceeding in accordance with section 400.27 or, to the extent that the defendant cannot be resentenced to death consistent with the laws of this state or the constitution of this state or of the United States, resentence the defendant to life imprisonment without parole or to a sentence of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole. Upon granting the motion upon any of the grounds set forth in the aforesaid paragraphs of subdivision one of section 440.10 and setting aside the sentence, the court must afford the people a reasonable period of time, which shall not be less than ten days, to determine whether to take an appeal from the order setting aside the sentence of death. The taking of an appeal by the people stays the effectiveness of that portion of the court's order that directs a new sentencing proceeding.

2. Notwithstanding the provisions of subdivision one, the court must deny such a motion when the ground or issue raised thereupon was previously determined on the merits upon an appeal from the judgment or sentence, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue.

3. Notwithstanding the provisions of subdivision one, the court may deny such a motion when the ground or issue raised thereupon was previously determined on the merits upon a prior motion or proceeding in a court of this state, other than an appeal from the judgment, or upon a prior motion or proceeding in a federal court, unless since the time of such determination there has been a retroactively effective change in the law controlling such issue. Despite such determination, however, the court in the interest of justice and for good cause shown, may in its discretion grant the motion if it is otherwise meritorious.

4. An order setting aside a sentence pursuant to this section does not affect the validity or status of the underlying conviction, and after entering such an order the court must resentence the defendant in accordance with the law.

Credits
(L.1970, c. 996, § 1. Amended L.1995, c. 1, § 21.)

McKinney's CPL § 440.20, NY CRIM PRO § 440.20
Current through L.2023, chapters 1 to 191. Some statute sections may be more current, see credits for details.

End of Document

McKinney's CPL § 440.30

§ 440.30 Motion to vacate judgment and to set aside sentence; procedure

Effective: January 1, 2020
Currentness

1. (a) A motion to vacate a judgment pursuant to section 440.10 of this article and a motion to set aside a sentence pursuant to section 440.20 of this article must be made in writing and upon reasonable notice to the people. Upon the motion, a defendant who is in a position adequately to raise more than one ground should raise every such ground upon which he or she intends to challenge the judgment or sentence. If the motion is based upon the existence or occurrence of facts, the motion papers must contain sworn allegations thereof, whether by the defendant or by another person or persons. Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief. The defendant may further submit documentary evidence or information supporting or tending to support the allegations of the moving papers. The people may file with the court, and in such case must serve a copy thereof upon the defendant or his or her counsel, if any, an answer denying or admitting any or all of the allegations of the motion papers, and may further submit documentary evidence or information refuting or tending to refute such allegations. After all papers of both parties have been filed, and after all documentary evidence or information, if any, has been submitted, the court must consider the same for the purpose of ascertaining whether the motion is determinable without a hearing to resolve questions of fact.

(b) In conjunction with the filing or consideration of a motion to vacate a judgment pursuant to section 440.10 of this article by a defendant convicted after a trial, in cases where the court has ordered an evidentiary hearing upon such motion, the court may order that the people produce or make available for inspection property in its possession, custody, or control that was secured in connection with the investigation or prosecution of the defendant upon credible allegations by the defendant and a finding by the court that such property, if obtained, would be probative to the determination of defendant's actual innocence, and that the request is reasonable. The court shall deny or limit such a request upon a finding that such a request, if granted, would threaten the integrity or chain of custody of property or the integrity of the processes or functions of a laboratory conducting DNA testing, pose a risk of harm, intimidation, embarrassment, reprisal, or other substantially negative consequences to any person, undermine the proper functions of law enforcement including the confidentiality of informants, or on the basis of any other factor identified by the court in the interests of justice or public safety. The court shall further ensure that any property produced pursuant to this paragraph is subject to a protective order, where appropriate. The court shall deny any request made pursuant to this paragraph where:

(i) (1) the defendant's motion pursuant to section 440.10 of this article does not seek to demonstrate his or her actual innocence of the offense or offenses of which he or she was convicted that are the subject of the motion, or (2) the defendant has not presented credible allegations and the court has not found that such property, if obtained, would be probative to the determination of the defendant's actual innocence and that the request is reasonable;

(ii) the defendant has made his or her motion after five years from the date of the judgment of conviction; provided, however, that this limitation period shall be tolled for five years if the defendant is in custody in connection with the conviction that is the subject of his or her motion, and provided further that, notwithstanding such limitation periods, the court may consider the motion if the defendant has shown: (A) that he or she has been pursuing his or her rights diligently and that some extraordinary circumstance prevented the timely filing of the motion; (B) that the facts upon which the motion is predicated were unknown to the defendant or his or her attorney and could not have been ascertained by the exercise of due diligence prior to the expiration of the statute of limitations; or (C) considering all circumstances of the case including but not limited to evidence of the defendant's guilt, the impact of granting or denying such motion upon public confidence in the criminal justice system, or upon the safety or welfare of the community, and the defendant's diligence in seeking to obtain the requested property or related relief, the interests of justice would be served by considering the motion;

(iii) the defendant is challenging a judgment convicting him or her of an offense that is not a felony defined in section 10.00 of the penal law; or

(iv) upon a finding by the court that the property requested in this motion would be available through other means through reasonable efforts by the defendant to obtain such property.

1-a. (a)(1) Where the defendant's motion requests the performance of a forensic DNA test on specified evidence, and upon the court's determination that any evidence containing deoxyribonucleic acid (“DNA”) was secured in connection with the trial resulting in the judgment, the court shall grant the application for forensic DNA testing of such evidence upon its determination that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant.

(2) Where the defendant's motion for forensic DNA testing of specified evidence is made following a plea of guilty and entry of judgment thereon convicting him or her of: (A) a homicide offense defined in article one hundred twenty-five of the penal law, any felony sex offense defined in article one hundred thirty of the penal law, a violent felony offense as defined in paragraph (a) of subdivision one of section 70.02 of the penal law, or (B) any other felony offense to which he or she pled guilty after being charged in an indictment or information in superior court with one or more of the offenses listed in clause (A) of this subparagraph, then the court shall grant such a motion upon its determination that evidence containing DNA was secured in connection with the investigation or prosecution of the defendant, and if a DNA test had been conducted on such evidence and the results had been known to the parties prior to the entry of the defendant's plea and judgment thereon, there exists a substantial probability that the evidence would have established the defendant's actual innocence of the offense or offenses that are the subject of the defendant's motion; provided, however, that:

(i) the court shall consider whether the defendant had the opportunity to request such testing prior to entering a guilty plea, and, where it finds that the defendant had such opportunity and unjustifiably failed to do so, the court may deny such motion; and

(ii) a court shall deny the defendant's motion for forensic DNA testing where the defendant has made his or her motion more than five years after entry of the judgment of conviction; except that the limitation period may be tolled if the defendant has shown: (A) that he or she has been pursuing his or her rights diligently and that some extraordinary circumstance prevented the timely filing of the motion for forensic DNA testing; (B) that the facts upon which the motion is predicated were unknown to the defendant or his or her attorney and could not have been ascertained by the exercise of due diligence prior to the expiration of this statute of limitations; or (C) considering all circumstances of the case including but not limited to evidence of the defendant's guilt, the impact of granting or denying such motion upon public confidence in the criminal justice system, or upon the safety

or welfare of the community, and the defendant's diligence in seeking to obtain the requested property or related relief, the interests of justice would be served by tolling such limitation period.

(b) In conjunction with the filing of a motion under this subdivision, the court may direct the people to provide the defendant with information in the possession of the people concerning the current physical location of the specified evidence and if the specified evidence no longer exists or the physical location of the specified evidence is unknown, a representation to that effect and information and documentary evidence in the possession of the people concerning the last known physical location of such specified evidence. If there is a finding by the court that the specified evidence no longer exists or the physical location of such specified evidence is unknown, such information in and of itself shall not be a factor from which any inference unfavorable to the people may be drawn by the court in deciding a motion under this section. The court, on motion of the defendant, may also issue a subpoena duces tecum directing a public or private hospital, laboratory or other entity to produce such specified evidence in its possession and/or information and documentary evidence in its possession concerning the location and status of such specified evidence.

(c) In response to a motion under this paragraph, upon notice to the parties and to the entity required to perform the search the court may order an entity that has access to the combined DNA index system ("CODIS") or its successor system to compare a DNA profile obtained from probative biological material gathered in connection with the investigation or prosecution of the defendant against DNA databanks by keyboard searches, or a similar method that does not involve uploading, upon a court's determination that (1) such profile complies with federal bureau of investigation or state requirements, whichever are applicable and as such requirements are applied to law enforcement agencies seeking such a comparison, and that the data meet state DNA index system and/or national DNA index system criteria as such criteria are applied to law enforcement agencies seeking such a comparison and (2) if such comparison had been conducted, and if the results had been admitted in the trial resulting in the judgment, a reasonable probability exists that the verdict would have been more favorable to the defendant, or in a case involving a plea of guilty, if the results had been available to the defendant prior to the plea, a reasonable probability exists that the conviction would not have resulted. For purposes of this subdivision, a "keyboard search" shall mean a search of a DNA profile against the databank in which the profile that is searched is not uploaded to or maintained in the databank.

2. If it appears by conceded or uncontradicted allegations of the moving papers or of the answer, or by unquestionable documentary proof, that there are circumstances which require denial thereof pursuant to subdivision two of section 440.10 or subdivision two of section 440.20, the court must summarily deny the motion. If it appears that there are circumstances authorizing, though not requiring, denial thereof pursuant to subdivision three of section 440.10 or subdivision three of section 440.20, the court may in its discretion either (a) summarily deny the motion, or (b) proceed to consider the merits thereof.

3. Upon considering the merits of the motion, the court must grant it without conducting a hearing and vacate the judgment or set aside the sentence, as the case may be, if:

(a) The moving papers allege a ground constituting legal basis for the motion; and

(b) Such ground, if based upon the existence or occurrence of facts, is supported by sworn allegations thereof; and

(c) The sworn allegations of fact essential to support the motion are either conceded by the people to be true or are conclusively substantiated by unquestionable documentary proof.

4. Upon considering the merits of the motion, the court may deny it without conducting a hearing if:

(a) The moving papers do not allege any ground constituting legal basis for the motion; or

(b) The motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts, as required by subdivision one; or

(c) An allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof; or

(d) An allegation of fact essential to support the motion (i) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true.

5. If the court does not determine the motion pursuant to subdivisions two, three or four, it must conduct a hearing and make findings of fact essential to the determination thereof. The defendant has a right to be present at such hearing but may waive such right in writing. If he does not so waive it and if he is confined in a prison or other institution of this state, the court must cause him to be produced at such hearing.

6. At such a hearing, the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion.

7. Regardless of whether a hearing was conducted, the court, upon determining the motion, must set forth on the record its findings of fact, its conclusions of law and the reasons for its determination.

Credits

(L.1970, c. 996, § 1. Amended L.1994, c. 737, § 2; L.2004, c. 138, § 2, eff. July 6, 2004; L.2012, c. 19, §§ 1, 2; L.2019, c. 59, pt. LLL, § 10, eff. Jan. 1, 2020.)

McKinney's CPL § 440.30, NY CRIM PRO § 440.30
Current through L.2023, chapters 1 to 191. Some statute sections may be more current, see credits for details.

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New York Official Reports

64 Misc.3d 483, 103 N.Y.S.3d 812, 2019 N.Y. Slip Op. 29165

**1 The People of the State of New York, Plaintiff,

v

John-Paul Avital, Defendant.

Justice Court of the Town of East Fishkill, Dutchess County
2K6701DXSP
June 6, 2019

CITE TITLE AS: People v Avital

HEADNOTE

Crimes
Vacatur of Judgment of Conviction
Lifetime Revocation of Driver's License under After-Enacted Regulations

Defendant's convictions for traffic infractions were not vacated, notwithstanding that regulations promulgated after he entered the underlying guilty pleas (*see generally* 15 NYCRR part 136) effectively imposed a lifetime revocation of his driver's license as a result of his driving history (*see* 15 NYCRR 136.5 [b] [2]). The loss of a driver's license is a collateral consequence of a judgment of conviction. Thus, the loss of defendant's driver's license here was not a valid basis to disturb his convictions. In any event, it was not the challenged convictions that led to the lifetime suspension of defendant's license, but rather his complete driving history, including three driving while intoxicated offenses, that brought him within the purview of the regulations.

RESEARCH REFERENCES

Am Jur 2d Automobiles and Highway Traffic §§ 117–120, 139, 147, 149, 150, 155.

15 NYCRR part 136; 136.5 (b) (2).

NY Jur 2d Automobiles and Other Vehicles §§ 526, 609–611, 627, 628, 643–645.

ANNOTATION REFERENCE

See ALR Index under Driver's Licenses.

FIND SIMILAR CASES ON THOMSON REUTERS WESTLAW

Path: Home > Cases > New York State & Federal Cases > New York Official Reports

Query: driver /2 license /6 loss /s collateral & guilty /4 plea!

APPEARANCES OF COUNSEL

Alexander Sherwood Keenan, Hopewell Junction, for defendant.
Robert Noe, *Town Prosecutor*, Poughkeepsie, for plaintiff.

OPINION OF THE COURT

Brian M. Rudner, J.

The defendant has moved, by notice of motion dated December *484 19, 2018, for a writ of coram nobis vacating the judgments of conviction on the following matters:

Speed in Zone (66 in 55)

Violation Date: 6/11/2004

Conviction Date: 10/14/2004

Ticket No.: 2K6701DXSP

Lane Change Hazard

Violation Date: 6/10/2007

Conviction Date: 7/23/2007

Ticket No.: 2K63042WSP

The defendant argues that the above-referenced guilty pleas should be vacated because, at the time they were entered, he could not have known that regulations enacted after the guilty pleas would impose a lifetime license revocation. The People oppose the relief requested. For the reasons set forth herein, the defendant's motion is denied.

In 2012, the Commissioner of the Department of Motor Vehicles promulgated new rules and regulations relating to the relicensure of applicants with multiple drug- or alcohol-

related driving convictions. (*See generally* 15 NYCRR part 136 [hereinafter the Regulations].) The purpose of the Regulations was, in part, "to take disciplinary action in order to force a change in the attitude and driving habits of problem drivers, where the Department's review indicates that such action is necessary for the protection of the applicant and the public alike." (15 NYCRR 136.1 [a].) As relevant here, section 136.5 (b) (2) provides that

> "[u]pon receipt of a person's application for relicensing, the Commissioner shall conduct a lifetime review of such person's driving record. If the record review shows that . . .
>
> "(2) the person has three or four alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period and, in addition, has one or more serious driving offenses within the 25 year look back period, then the Commissioner shall deny the application."

"Serious driving offense," as defined in 15 NYCRR 136.5 (a) (2) (iv), includes "20 or more points from any violations."

The defendant has an extensive history of driving offenses, including alcohol-related convictions in 2007, 2008, and 2013, as well as more than 21 points from violations (including the two convictions he seeks to vacate in the instant motion). The defendant contends that as a result of the Regulations, New York State has denied his application to renew his driver's license for the last five years.

***485** It is well-settled that the loss of a driver's license is a collateral consequence of a judgment of conviction. (*See People v Ford*, 86 NY2d 397, 403 [1995]; *People v Williams*, 150 AD3d 1549 [3d Dept 2017]; *People v Garraway*, 144 AD3d 703 [2d Dept 2016]; *People v Hill*, 57 Misc 3d 154[A], 2017 NY Slip Op 51605[U] [App Term, 2d Dept, 9th &10th Jud Dists 2017] [the possibility that the reinstatement of defendant's driver's license might be administratively denied was a collateral consequence]; *People v Olecski*, 57 Misc 3d 698 [Crim Ct, NY County 2017] [relicensing ramifications under 15 NYCRR 136.5 (b) (3) (ii) were a collateral, and not direct, consequence of plea].) Thus, the defendant's loss of his driver's license is a collateral consequence of his guilty pleas and not a valid basis to disturb the instant convictions.

In moving to vacate these convictions, defendant argues that at the time of his guilty ****3** pleas, he did not know, and *could not have* known, that his pleas would result in a lifetime suspension of his license to drive. This argument is unavailing. First, it is belied by the fact that his 2013 conviction for driving while intoxicated occurred *after* the Regulations had gone into effect. Whether defendant (or his then attorney) knew of the Regulations at the time of the 2013 guilty plea, he certainly *could* have known. Defendant's ability to avoid the effect of the Regulations back in 2013 undercuts his present argument that it would be unfair and unjust to hold him to his guilty pleas in light of then-unknown consequences. Second, the defendant's insistence that the instant guilty pleas led to a lifetime suspension of his license is inaccurate and, in the view of this court, an attempt to focus attention on the instant guilty pleas rather than the entirety of the defendant's driving history. It is not the defendant's 2004 conviction for speeding that caused the lifetime suspension of his license. It is not the defendant's 2007 conviction for hazardous lane change that led to the lifetime suspension of his license. It is the defendant's complete driving history, including three driving while intoxicated offenses, that has brought him within the purview of the Regulations.

Moreover, even before the Regulations in their present form went into effect, re-issuance of a new license to an offender whose license had been revoked was (and remains) subject to the discretion of the Department of Motor Vehicles Commissioner. (*See* Vehicle and Traffic Law §§ 510 [6] [a]; 1193 [2] [c]; *Matter of Acevedo v New York State Dept. of Motor Vehs.*, 29 NY3d 202, 214 [2017].)

***486** The defendant relies heavily on the case of *People v Velte* (61 Misc 3d 331 [Poughkeepsie City Ct 2018]). For the reasons set forth herein, this court finds the rationale of *Velte* unpersuasive and declines to follow it. The court finds the holding of *People v Wheaton* (49 Misc 3d 378 [Seneca County Ct 2015]) more compelling. In *Wheaton*, the defendant moved pursuant to CPL article 440 to vacate a 2004 conviction for driving while intoxicated because his driver's license was subsequently revoked in 2013 under 15 NYCRR part 136. The court in *Wheaton* denied the motion to vacate, finding the loss of the driver's license was a collateral consequence and that the "defendant's grievance lies with the enactment and enforcement of the new regulation, not the manner of his conviction." (*Id.* at 379; *see also People v Capraro*, 51 Misc 3d 1212[A], 2016 NY Slip Op 50633[U] [Mount Vernon City Ct 2016] [CPL article 440 motion to

vacate speeding conviction denied despite extreme financial hardship suffered by defendant resulting from permanent ineligibility for relicensing due to 15 NYCRR 136.5 (b) (2)].)

Finally, were the court to grant the defendant's motion, it would, in effect, be invalidating the Regulations as applied to the defendant. In light of his driving history, the defendant appears to be exactly the type of problem driver the Regulations were promulgated to address. The court will not intrude upon the province of the Commissioner of the Department of Motor Vehicles by vacating guilty pleas that, on the record before the court, were knowingly and voluntarily entered. Based upon the foregoing, it is hereby ordered that the defendant's motion is denied in all respects.

STATE OF NEW YORK: COUNTY OF DUTCHESS
JUSTICE COURT: TOWN OF EAST FISHKILL

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION AND ORDER
Ticket No.: 2K6702T1SP
Case No.: 06080532

STEVEN PRICE,

Defendant.

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RUDNER, J., Town Justice

The following papers were read and considered by the Court in deciding the defendant's petition for a writ of error coram nobis:

	Papers Numbered
Verified Petition for Writ of Error Coram Nobis ……..	1
Exhibit ……..……..	2
Affirmation of Robert Noe, Esq., in Opposition ……...	3
Defense Counsel's January 11, 2021 Supplemental Submission …..	4

The defendant has petitioned this Court for a writ of error coram nobis vacating his judgment of conviction for Speeding [VTL 1180(B) – 60 mph in a 55 mph zone – a 3-point traffic infraction] entered in this Court on or about April 17, 2007. It appears from the Court's file that the defendant was initially charged by simplified traffic information with driving 78 mph in a 55 mph zone [a 6-point traffic infraction] but was allowed to plea to the reduced speeding charge after initially entering a not-guilty plea and participating in a pre-trial conference. The defendant argues that his judgment of conviction should be vacated because: (1) he was not advised, prior to entering his guilty plea, of his right to counsel or an adjournment to obtain counsel; and (2) as a result of this conviction, the Department of Motor Vehicles has permanently denied him relicensing. The People oppose the requested relief. For the reasons set forth herein, the petition is denied.

In 2012, the Commissioner of the Department of Motor Vehicles promulgated new rules and regulations relating to the re-licensure of applicants with multiple drug or alcohol-related driving convictions [*see generally*, 15 NYCRR Part 136 (hereinafter "the Regulations")]. The purpose of the Regulations was, in part, "to take disciplinary action in order to force a change in the attitude and driving habits of problem drivers, where the Department's review indicates that such action is necessary for the protection of the applicant and the public alike" [15 NYCRR 136.1(a)]. As relevant here, Section 136.5(b)(2) provides that "[u]pon receipt of a person's application for relicensing, the Commissioner shall conduct a lifetime review of such person's driving record. If the record review shows that … (2) the person has three or four alcohol- or drug-related driving convictions or incidents in any combination with the 25 year look back period and, in addition, has one or more serious driving offenses within the 25 year

look back period, then the Commissioner shall deny the application." "Serious driving offense", as defined in 15 NYCRR §136.5(a)(2)(iv), includes "20 or more points from any violations."

The defendant has an extensive history of driving offenses, including three alcohol-related convictions in the past 25 years, as well as 28 points from violations (including the conviction he seeks to vacate in the instant motion).

Assuming that coram nobis relief remains available[1] under the circumstances at bar, the defendant's petition must nevertheless be denied. A motion to vacate a judgment of conviction, whether brought pursuant to CPL §440.10 or the common law writ of error coram nobis, cannot be used as a substitute for a direct appeal [CPL §440.10(2)(c); *People v. Cooks*, 67 NY2d 100 (1986); *People v. Howard*, 12 NY2d 65 (1962), *cert denied* 374 US 840 (1963); *People v. Schwartz*, 12 NY2d 753 (1962)]. There is no evidence in the record that the defendant appealed the judgment of conviction that he now seeks to vacate. Accordingly, the defendant is barred from now raising the claim that he was not advised of his right to seek counsel, as sufficient facts appear on the record to have permitted adequate review of this claim upon direct appeal from the underlying judgment, but the defendant unjustifiably failed to perfect his appeal from that judgment [*see People v. McCrory*, 114 AD3d 810, 810 (2d Dept. 2014), *lv app denied* 23 NY3d 1065 (2014)].

Even if the Court were to consider the merits of the defendant's petition, it would be denied. The defendant's primary claim is that he was not advised, prior to entering his guilty plea, of his right to counsel or an adjournment to obtain counsel. There is no constitutional or statutory requirement that a person charged with a traffic infraction be apprised of his right to counsel unless a conviction of the infraction subjected the person to the possibility of incarceration [*People v. Letterio*, 16 NY2d 307, 310 (1965); *People v. Dibello*, 46 Misc3d 143(A) (App Term, 9th & 10th Jud Dists, 2015); *People v. Schonfeld*, 26 Misc3d 74, 76 (App Term, 9th & 10th Jud Dists, 2009)]. Here, after initially entering a not guilty plea and then participating in a pre-trial conference, the defendant was offered a reduced speeding charge of 60 mph in a 55 mph zone. This reduced speeding charge offered to the defendant did not subject him to the possibility of incarceration [*see* VTL §1180(h)(1)(i)]. Thus, the defendant was not entitled to be advised of his right to counsel before entering his guilty plea and his petition must therefore be denied.

The restrictions imposed upon the defendant by the Regulations are also not a sufficient basis to vacate the judgment of conviction. It is well-settled that the loss of a driver's license is a collateral consequence of a judgment of conviction [*see People v. Ford*, 86 NY2d 397, 403 (1995); *People v. Williams*, 150 AD3d 1549 (3d Dept. 2017); *People v. Garraway*, 144 AD3d 703 (2d Dept. 2016); *People v. Hill*, 57 Misc3d 154(A) (App. Term 2d Dept. 2017) (the possibility that the reinstatement of defendant's driver's license might be administratively denied was a collateral consequence); *People v. Olecski*, 57 Misc3d 698 (City Ct., City of New York, 2017) (relicensing ramifications under 15 NYCRR 136.5(b)(3)(ii) were a collateral, and not direct, consequence of plea)]. Thus, the defendant's loss of his

[1] "Most of the common-law, coram nobis types of relief were abrogated when the Criminal Procedure Law was enacted" [*People v. Grimes*, 32 NY3d 302, 307 (2018) (citations omitted)]. Rather, [coram nobis] "is extraordinary relief only to be provided in rare cases when a right to appeal was extinguished due solely to the unconstitutionally deficient performance of counsel" [*People v. Rosario*, 26 NY3d 597, 603 (2015) (internal quotation marks and citations omitted); *cf People v. Velte*, 61 Misc3d 331 (City Ct., City of Poughkeepsie, 2018)].

driver's license is a collateral consequence of his guilty plea and not a valid basis to disturb the instant conviction.

Moreover, even before the Regulations in their present form went into effect, re-issuance of a new license to an offender whose license had been revoked was (and remains) subject to the discretion of the DMV Commissioner [*see* Vehicle and Traffic Law §§510(6)(a) & 1193(2)(c); *Acevedo v. New York State Dept. of Motor Vehicles*, 29 NY3d 202, 214 (2017)].

The defendant, in a supplemental submission from counsel dated January 11, 2021, asked the Court to consider the following cases when rendering its decision on the petition: *People v. Lynch* (Patchogue Village Justice Court, Patricia Romeo, J., November 30, 2020) and *People v. Velte*, 61 Misc.3d 331 (City Ct., City of Poughkeepsie, 2018). The Court finds the rationale of these cases unpersuasive and declines to follow them. The Court finds the holding of *People v. Wheaton*, 49 Misc.3d 378 (Cty. Ct., Seneca Cty., 2015) more instructive. In *Wheaton*, the defendant moved pursuant to CPL §440 to vacate a 2004 conviction for driving while intoxicated because his driver's license was subsequently revoked in 2013 under 15 NYCRR Part 136. The Court in *Wheaton* denied the motion to vacate, finding the loss of the driver's license was a collateral consequence and that the "defendant's grievance lies with the enactment and enforcement of the new regulation, not the manner of his conviction" [*id*. at 379; *see also People v. Gallagher,* 70 Misc3d 1210(A) (City Court, City of Rye, December 16, 2020); *People v. Avital*, 64 Misc3d 483 (Just Ct, Town of East Fishkill, 2019); *People v. Capraro*, 51 Misc.3d 1212(A) (City Ct., City of Mt. Vernon, 2016) (CPL §440 motion to vacate speeding conviction denied despite extreme financial hardship suffered by defendant resulting from permanent ineligibility for relicensing due to 15 NYCRR §136.5[b][2])].

Finally, it is not the defendant's 2007 conviction in this Court for speeding that led to the lifetime suspension of his license. It is the defendant's complete driving history, including three driving while intoxicated offenses, that has brought him within the purview of the Regulations. Were the Court to grant the defendant's motion, it would, in effect, be invalidating the Regulations as applied to the defendant. In light of his driving history, the defendant appears to be exactly the type of problem driver the Regulations were promulgated to address. The Court will not intrude upon the province of the Commissioner of the Department of Motor Vehicles by vacating a guilty plea that, on the record before the Court, was knowingly and voluntarily entered. Based upon the foregoing, it is

ORDERED that the defendant's petition for a writ of error coram nobis vacating his judgment of conviction is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: February 17, 2021
Hopewell Junction, New York

_____
Hon. Brian M. Rudner, *Town Justice*

STATE OF NEW YORK: COUNTY OF DUTCHESS
JUSTICE COURT: TOWN OF EAST FISHKILL

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PEOPLE OF THE STATE OF NEW YORK

vs. DECISION AND ORDER

CHRISTOPHER CHILLO,
Defendant.

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HON. BRIAN M. RUDNER, Town Justice

The Defendant has moved, by notice of motion dated May 10, 2018, for an Order vacating his guilty plea entered December 22, 2016 and the judgment of conviction entered February 23, 2017. In support of the motion, the Defendant submitted an affidavit, an affirmation of his present attorney, Robert Leader, a certified stenographic transcript of the December 22, 2016 proceedings, and a copy of the misdemeanor complaint charging the Defendant with one count of Criminal Mischief in the Fourth Degree [Penal Law §145.00]. The Office of the District Attorney, Dutchess County, submitted an affirmation in opposition to the motion dated June 19, 2018. On or about July 3, 2018, the Defendant submitted reply papers, to wit: a supplemental affirmation from Mr. Leader, affidavit of Tina Marie Chillo (the Defendant's mother), and an additional affidavit from the Defendant. In addition to the aforementioned moving papers and supporting exhibits, the Court took judicial notice of the contents of its file in the matter, including a copy of the Pre-Sentence Report prepared by the Dutchess County Department of Probation, and a certified stenographic transcript of the Defendant's sentencing on February 23, 2017.

After due and careful consideration of the facts and argument set forth in the aforementioned moving papers, the Defendant's motion to vacate his guilty plea and judgment of conviction is DENIED.

The Defendant's motion sets forth two bases on which he seeks to vacate his conviction. First, he asserts that there was a fatal defect in his guilty plea allocution on December 22, 2016. While the Defendant was charged with and ultimately pled guilty to Criminal Mischief in the Fourth Degree in violation of Penal Law §145.00 (*subdivision 4*), he avers that the factual component of his guilty plea allocution was fatally deficient because the Assistant District Attorney questioned him on the elements of Penal Law §145.00 (*subdivision 1),* rather than subdivision 4. Second, the Defendant claims ineffective assistance of counsel on the date that he entered his plea of guilty. Each of the Defendant's arguments will be addressed in turn.

Defective Allocution

Although not specifically styled as such by the Defendant, a motion to vacate a conviction after entry of a judgment is governed by Article 440 of the Criminal Procedure Law. Section 440.10(2)(c) states, in pertinent part: "[T]he Court must deny a motion to vacate a judgment when: …

> (c) Although sufficient facts appear on the record of the proceedings 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 take or perfect an appeal during the prescribed period …

The purpose of this statutory provision, per the Court of Appeals, "is to prevent CPL 440.10 from being used as a substitute for direct appeal when defendant was in a position to raise an issue on appeal or could readily have raised it on appeal but failed to do so. *People v. Cooks*, 67 N.Y.2d 100 (1986) (internal citations omitted). Further, the Defendant's characterization of the purportedly incorrect allocution as a "fatal jurisdictional defect" does not alter the analysis. In *People v. Cuadrado*, the Court of Appeals stated:

> Whether or not a defect is properly described by the adjectives "fundamental" and "jurisdictional," it is within the power of the Legislature to make reasonable rules governing when those defects may be complained of. As long as those rules give a defendant a fair opportunity to vindicate his rights, they should be enforced. CPL 440.10(2)(c) is such a rule. 9 N.Y.3d 362, 365 (2007).

The issue raised in this first prong of the Defendant's motion could have been raised and resolved by a review of the record on direct appeal. There is no indication in the record that the Defendant appealed his conviction. Accordingly, the Defendant's motion to vacate his conviction on the ground of the allegedly defective allocution is DENIED.

Ineffective Assistance of Counsel

The Defendant's second basis for seeking to vacate his conviction is the allegedly ineffective assistance of his counsel. To overcome the presumed validity of a judgment of conviction and entitle a defendant to a hearing on a motion pursuant to C.P.L. 440.10, a defendant "has the burden of coming forward with allegations sufficient to create an issue of fact as to matters not appearing on the record of the underlying conviction." *People v. Crippen*, 196 A.D.2d 548, 549 (2d Dep't 1993); *see also People v. Brown*, 56 N.Y.2d 242, 246-247 (1982); *People v. Session*, 34 N.Y.2d 254, 256 (1974). Mere conclusory allegations or bare assertions of ultimate facts are insufficient to warrant a hearing. *Session*, 34 N.Y.2d at 256.

The Criminal Procedure Law provides for several specific instances when a trial court can, after considering the merits, deny a motion to vacate without a hearing. *People v. Satterfield*, 66 N.Y.2d 796 (1985) (under section 440.30 "a court will in the first instance determine on written submission whether the motion can be decided without a hearing."). A motion to vacate can be denied without a hearing when the facts supporting the claim are "contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and … under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true." C.P.L. §440.30(4)(d); *People v. Taylor*, 211 A.D.2d 603 (1st Dep't 1995), *lv. denied*, 85 N.Y.2d 981 (1995) (where "defendant merely submitted

his own affidavit and that of his appellate attorney, who had no personal knowledge of the facts" and "was unsupported by any other affidavits or evidence," the trial court properly denied a motion to vacate judgment pursuant to C.P.L. §440.10); *People v. Sanchez*, 212 A.D.2d 487 (1st Dep't 1995) (defendant's motion based solely on his own affidavit denied).

The only evidence offered by the Defendant in support of his claim of ineffective assistance of counsel are his two affidavits. The affidavit of the Defendant's mother, submitted for the first time in the Defendant's reply papers, sheds no light on the alleged deficiencies of the Defendant's attorney but, rather, addresses the alleged deficiency in the plea allocution. The affirmations submitted by Mr. Leader, without any direct, personal knowledge of the matter in question, provide no factual support for the Defendant's claims of ineffective assistance. The Defendant has not provided any affirmation from his former attorney, nor has he provided any explanation for why any such affirmation was not attempted to be procured.

The record before this Court contradicts the Defendant's claims. The Defendant claims that he was unable to speak with his attorney prior to the Court appearance during which he entered his plea of guilty. This is belied by the certified transcript of the guilty plea, submitted by the Defendant in support of his motion. When asked by Judge Romig if he was satisfied with his attorney's services, the Defendant responded "yes" (*see* Transcript, page 6). The Defendant makes reference in his affidavit to a "rushed discussion" with counsel before entry of the guilty plea. However, there is no support for this contention in the record, other than the Defendant's conclusory allegation. When asked by Judge Romig if he needed further time to discuss the matter with his attorney, the Defendant replied "no" (*see* Transcript, page 6). There is no indication in the record that after entering his guilty plea, but prior to sentencing on February 23, 2017, the Defendant moved pursuant to C.P.L. §220.60(3) to withdraw his guilty plea. The Pre-Sentence Report prepared by the Department of Probation, which is a part of the Court file and of which the Court takes judicial notice, is devoid of claims by the Defendant that his plea was involuntary or that his attorney had been ineffective. Finally, the certified stenographic transcript of the Defendant's sentencing on February 23, 2017 contains no mention by the Defendant of any of the claims asserted in the instant motion.

Based upon all of the circumstances attending the case, the Court finds that there is no reasonable possibility that the unsupported and conclusory allegations put forth by the Defendant are true. Accordingly, the Defendant's motion to vacate his conviction on the ground of ineffective assistance of counsel is DENIED.

The foregoing constitutes the Decision and Order of this Court.

Dated: Hopewell Junction, New York
September 19, 2018

_____
Hon. Brian M. Rudner, *Town Justice*

To: Office of the District Attorney, Dutchess County
Assistant District Attorney Michael Viviano

Robert Leader, Esq.
Counsel for the Defendant

STATE OF NEW YORK: COUNTY OF DUTCHESS
COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK	DECISION AND ORDER SCI No: 316/2013
- against –	William V. Grady, District Attorney By: Bridget Rahilly Steller,
VICTOR EDUARDO TERRERO,	Esq.
Defendant.	Walter Rieman, Esq. Carter E. Greenbaum, Esq. Wenwa Eva Gao, Esq. Attorneys for Defendant

FORMAN, J., County Court Judge

The following papers were read and considered in deciding the defendant's motion to vacate his judgment of conviction:

	Papers Numbered
Notice of Motion ……..…...	**1**
Affirmation of Carter E. Greenbaum …...…….	**2**
Exhibits (A-Z) ……	**3-28**
Affirmation of Wenwa Gao ……..	**29**
Exhibits (AA – II) ……..	**30-38**
Affidavit of Victor Eduardo Terrero ……..	**39**
Affidavit of Victor Terrero, Sr. ……	**40**
Affidavit of Johanna Terrero ……...	**41**
Affidavit of Alanna De Leon ……	**42**
Affidavit of Anna J. Capellan ……..	**43**
Affidavit of Helen Rojas Capellan ……..	**44**
Affidavit of Luis Martinez-Nicolas ……	**45**
Affidavit of Nicauly Andujar ……...	**46**
Affirmation of Steven Patterson ……..	**47**
Memorandum of Law ……...	**48**
Affirmation of Bridget Rahilly Steller in Opposition ……..	**49**
Exhibits (1-28) ……	**50-77**
Affirmation of Aviv Segal ……	**78**
Memorandum of Law ……...	**79**
Reply Memorandum of Law ……	**80**
Letter from Luke Phillips, Esq., dated 6/22/20	**81**
Exhibit ……	**82**

Letter from Kirsten Rappleyea, Esq., dated 6/25/20 …… 83

The defendant pled guilty to one count of Criminal Possession of a Controlled Substance in the Third Degree [Penal Law §220.16(12)] and was subsequently sentenced to a determinate prison term of three years, with two years of post-release supervision. The defendant now moves, pursuant to Criminal Procedure Law §440.10(h), to vacate his judgment of conviction on the grounds that he received ineffective assistance of counsel and that this Court did not advise him about the immigration consequences of his guilty plea. For the reasons set forth herein, the motion is denied.

FACTUAL BACKGROUND

On November 11, 2012, the defendant and co-defendants Allyn Martinez and Hans Suncar were arrested by the Town of Poughkeepsie Police Department and charged with Criminal Possession of a Controlled Substance in the Second Degree, a Class A-II felony in violation of Penal Law §220.18(1). According to the felony complaint filed against the defendants in the Town of Poughkeepsie Justice Court, the defendants were observed in a motor vehicle with two bags containing heroin with an aggregate weight in excess of four (4) ounces. The two bags containing heroin were found on the rear driver-side seat, next to the defendant.

The Town of Poughkeepsie Justice Court, pursuant to Article 18-b of the County Law, assigned Steven Patterson to represent the defendant and Richard Berube to represent co-defendant Suncar. The Office of the Public Defender was assigned to represent co-defendant Martinez.

By letter dated January 13, 2014, the District Attorney extended an offer to all three defendants of three years in prison, two years of post-release supervision, and forfeiture of United States currency and cellular phones, in exchange for a plea of guilty to Criminal Possession of a

Controlled Substance in the Third Degree, a Class B Felony. Each defendant agreed to this proposed disposition.

On April 10, 2014, the defendant appeared before this Court with attorney Glen Bruno in place of Mr. Patterson[1]. After the defendant consented to proceed to the plea with Mr. Bruno, the defendant waived prosecution by indictment and was arraigned on the superior court information charging him with the Class B Felony of Criminal Possession of a Controlled Substance in the Third Degree. As relevant to the instant motion, the following colloquy took place during the plea allocution:

> THE COURT: Now, Mr. Terrero, I understand that you are here in this country pursuant to a green card?
>
> THE DEFENDANT: Yes
>
> THE COURT: Which means that upon this guilty plea you are probably going to face deportation proceedings.

After an off-the-record conversation between the defendant and Mr. Bruno, the discussion of immigration consequences continued as follows:

> MR. BRUNO: Judge, I have been advised by Mr. Patterson and that if Mr. Terrero pleads guilty today that he will be deported. Not probably deported. The deportation time will depend upon the completion of his sentence in the State prison.
>
> THE COURT: Right.
>
> MR. BRUNO: And I have asked him if he understands that by pleading guilty today that he must accept that collateral consequence as a given, and he advises me that he does understand that, and he still wishes to proceed with the plea today, but I do ask that the Court confirm that directly with my client.
>
> THE COURT: Is that true, Mr. Terrero?

[1] The transcript of the proceedings indicate that Mr. Patterson was unable to appear and arranged for Mr. Bruno to assist the defendant with the plea. The Court, with the assistance of a Spanish interpreter, advised the defendant why Mr. Bruno was present in place of Mr. Patterson, asked if the defendant had any questions, and asked if the defendant consented to proceed that day with Mr. Bruno. The defendant agreed to move ahead with the plea with Mr. Bruno [*see* Plea Transcript, Rappleyea Affirmation, Exhibit 13, pp 4-6].

THE DEFENDANT: Yes.

THE COURT: You recognize that you are looking at deportation proceedings because of your guilty plea here today that you are going to enter?

THE DEFENDANT: Yes.

THE COURT: Okay. Are there any questions that you have for me before we go to the next step, sir?

THE DEFENDANT: No, sir.

THE COURT: … Have you had enough time to talk to either Mr. Patterson or Mr. Bruno about your legal options in this case?

THE DEFENDANT: Yes.

THE COURT: Have they answered all of your questions?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied with their advice?

THE DEFENDANT: Yes.

[Plea Transcript, Rappleyea Affirmation, Exhibit 13, pp 15-18]

Thereafter, the defendant admitted his guilt, allocuted to facts establishing the elements of the charged offense, and advised this Court that his plea was entered knowingly, intelligently, and voluntarily. The Court accepted the guilty plea and adjourned the matter for sentencing.

On May 22, 2014, the defendant appeared before this Court with Mr. Patterson for sentencing. The defendant had not moved to vacate his guilty plea. Despite the negotiated disposition, Mr. Patterson urged the Court to consider a lesser sentence. He pointed out that the defendant had no prior arrests since entering the country in 2008; that the defendant's parents had been very involved and that his father was present in court; that the defendant had been gainfully employed; and that he had made a terrible mistake due to his addiction to heroin. When the

defendant was given an opportunity to speak, he referenced a letter that he had written to the Court a few days after his guilty plea, in which he had expressed a desire to remain in the country. The defendant also told the Court that he had written a second letter for the Court to review. The Court advised the defendant that it had read his first letter and permitted the Spanish interpreter to read the second letter into the record. In this second letter, the defendant expressed shame and remorse and repeated his desire to remain in the country.

The Court imposed the bargained-for determinate three-year prison sentence, followed by two years of post-release supervision[2]. After sentence was imposed, the court clerk orally advised the defendant of his appellate rights and provided him with a printed copy of the oral instructions. The defendant acknowledged on the record that he was aware of his appellate rights.

The defendant failed to timely file a notice of appeal. On or about May 18, 2015, the Office of the Public Defender filed a motion in the Appellate Division, Second Department, seeking permission to file a late notice of appeal. The People opposed the motion. By Decision and Order dated June 19, 2015, the Appellate Division denied the motion. On or about August 18, 2015, the defendant filed a pro se motion to reargue the denial of his motion to file a late notice of appeal. The People opposed the motion. By Decision and Order dated December 3, 2015, the Appellate Division denied the defendant's motion to reargue.

DISCUSSION

The defendant now moves to vacate his judgment of conviction pursuant to CPL 440.10(1)(h). In support of his motion, the defendant argued that Mr. Patterson provided ineffective assistance of counsel in that: (1) he failed to advise the defendant that his plea and sentence carried a risk of permanent exclusion from the United States; and (2) he failed to negotiate

[2] Each of the co-defendants pled guilty and received the same sentence as the defendant.

a more favorable plea that would have avoided negative immigration consequences. The defendant also claimed that the Court failed to properly advise him, prior to the entry of his plea, about the possibility of permanent exclusion, as required by CPL §220.50(7). For the reasons set forth herein, each of these arguments is without merit.

(i) *Failure to Advise of Risk of Permanent Exclusion*

As to the defendant's claims that Mr. Patterson and the Court failed to advise him of the risk of permanent exclusion, sufficient facts appear on the record to have permitted, upon direct appeal, adequate review of these issues [*see* CPL §440.10(2)(c)]. The transcript of the plea proceedings – which contains a detailed discussion of the immigration consequences of the plea – clearly establishes that neither defense counsel nor the Court advised the defendant of the risk of permanent exclusion. The salient issue is not *whether* the defendant was advised of the risk, but whether defense counsel and/or the Court were *required* to advise him of the risk. The record would have permitted the Appellate Division to answer that question, had the defendant timely appealed. A CPL §440.10 motion to vacate a judgment of conviction "cannot be made as a substitute for a direct appeal from the judgment when the defendant could have raised his claims on appeal, but failed to do so." [*People v. Williams*, 5 AD3d 407, 407 (2d Dept. 2004); *see also People v. Cooks*, 67 NY2d 100, 103 (1986); *People v. McCrory*, 114 AD3d 810 (2d Dept. 2014); *People v. Gutierrez*, 57 AD3d 1006, 1007 (2d Dept. 2008)]. Because the defendant unjustifiably failed to timely appeal his judgment of conviction, CPL §440.10(2)(c) mandates that the motion be denied insofar as it asserts that Mr. Patterson and the Court failed to advise him of the risk of permanent exclusion from the country [*People v. Malik*, 166 AD3d 650, 653 (2d Dept. 2018); *People v. Young*, 150 AD3d 429, 429 (1st Dept. 2017), *lv app denied* 29 NY3d 1136 (2017)].

In his reply papers, the defendant argued that *People v. Peque* [22 NY3d 168, 202 (2013)] provides explicit authority for a defendant to raise a claim of ineffective assistance of counsel on a motion pursuant to CPL §440 [*see* Defendant's Reply Memorandum of Law, p 2]. Contrary to the defendant's assertion, *Peque* does not stand for that unqualified proposition. The Court in *Peque* stated, as relevant to this issue: "Where a defendant's complaint about counsel is predicated on factors such as counsel's strategy, advice or preparation *that do not appear on the face of the record*, the defendant must raise his or her claim via a CPL 440.10 motion" [*id.* at 202 (emphasis added)]. Here, as discussed *supra,* the issues raised by the defendant regarding the failure to advise of the risk of permanent exclusion do appear on the face of the record such that they could have been resolved on direct appeal.

The defendant cited *People v. Grubstein* [24 NY3d 500 (2014)] to support his argument that the failure to raise these issues on direct appeal should not bar the instant CPL §440 motion. The Court finds *Grubstein* to be factually dissimilar from the case at bar. In *Grubstein*, the defendant was not represented by counsel when he entered a guilty plea to a misdemeanor charge of driving while intoxicated. The trial court did not advise the defendant of his right to appeal and the defendant took no appeal. In reversing Appellate Term's reversal of a trial court order granting the defendant's motion to vacate, the Court of Appeals held "that a defendant who asserts that he was deprived of his right to counsel when he pleaded guilty pro se is not barred from raising that claim in a motion under CPL 440.10 by his failure to raise it on direct appeal" [*id*. at 501-502]. The facts here are strikingly different. The record in this matter clearly establishes that the defendant, in the presence of counsel and with the aid of a Spanish interpreter, was advised of his

appellate rights orally and in writing. The defendant, without justification[3], failed to file a notice of appeal. Based upon the foregoing, the Court finds that the limited exception to the procedural barrier of CPL §440.10(2) enunciated in *Grubstein* is inapplicable to the instant matter.

Even if the Court were to consider the merits of the defendant's motion as to these claims, the motion would be denied. The record clearly shows that the Court and counsel complied with the requirements of *Peque*, *supra*, and *Padilla v. Kentucky* [559 US 356 (2010)] by advising the defendant that he would be deported as a consequence of his guilty plea [*see also People v. Diaz-Paz*, 175 AD3d 1552, 1552 (2d Dept. 2019), *lv app denied* 34 NY3d 1077 (2019); *People v. Ramsood*, 161 AD3d 1198, 1199 (2d Dept. 2018) ("… a trial court must alert a noncitizen defendant that he or she may be deported as a consequence of the plea of guilty"), *lv app denied* 32 NY3d 940 (2018); *People v. Martial*, 125 AD3d 688, 689 (2d Dept. 2015) ("… County Court clearly apprised the defendant that he might be deported as result of his plea of guilty. Thus, the court satisfied the requirements set forth by the Court of Appeals in *People v. Peque*")].

By letter dated June 22, 2020, after this motion had been fully submitted, the defendant alerted the Court to the Court of Appeals' decision in *People v. Delorbe* [35 NY3d 112 (March 31, 2020)] and claimed that the holding of that case would have a material impact on the Court's determination of this motion. The People submitted written opposition on June 25, 2020. The defendant's reliance on *Delorbe* is misplaced.

In *Delorbe*, the Court of Appeals reaffirmed the narrow exception to the preservation requirement that was set forth in *Peque* [*Delorbe*, 35 NY3d at 118-121]. The defendant in *Delorbe* – who had failed to move to withdraw his guilty plea – argued on appeal that he was not required

[3] The Appellate Division considered and rejected the defendant's argument that the reason he failed to timely file a notice of appeal was because Mr. Patterson failed to advise him he had such a right when it denied the defendant's motion for permission to file a late notice of appeal and the defendant's pro se motion to reargue.

to preserve his due process claim that the trial court failed to inform him of potential adverse immigration consequences. The Court held that the defendant did not fit within this narrow exception to the preservation requirement because he was fully advised of the potential immigration consequences of his guilty plea and thus had a "reasonable opportunity to object to the plea court's failure to advise him of the potential deportation consequences of his plea" [*id.* at 115].

Here, like the defendant in *Delorbe*, Mr. Terrero was fully advised of the potential deportation consequences of his guilty plea. As discussed *supra*, the Court and defense counsel fully complied with the requirements of *Peque* and *Padilla* by advising the defendant that he would be deported as a consequence of his plea. Mr. Terrero thereafter failed to raise his claims on a direct appeal although the record of the proceedings would have allowed him to do so. Furthermore, had he timely appealed, Mr. Terrero could have litigated whether he could benefit from the narrow exception to the preservation requirement that was acknowledged in *Peque* and reaffirmed in *Delorbe*. Thus, *Delorbe* does not alter the Court's analysis; the defendant's unjustifiable failure to raise his claims that the Court and defense counsel failed to advise him of the risk of permanent exclusion on direct appeal bar this Court's consideration of those claims on this motion [CPL §440.10(2)(c)].

(ii) *Failure of Counsel to Negotiate a More Favorable Plea*

The defendant also claimed that Mr. Patterson was ineffective in that he failed to negotiate a more favorable plea that would have avoided negative immigration consequences. Specifically, the defendant argued that, given the lack of evidence against him and his lack of a criminal record, Mr. Patterson was ineffective for failing to secure a plea to Criminal Possession of a Controlled Substance in the Seventh Degree, a misdemeanor. The Court finds that this claim is not

procedurally barred by CPL §440.10(2)(c) as the resolution of the claim depends, in part, upon materials outside the record of the plea proceedings. The Court can, however, decide this claim without a hearing based upon court transcripts, other official documents and unquestionable documentary proof and the defendant's submissions [*see People v. Satterfield*, 66 NY2d 796, 799 (1985)].

It is well-settled that the "right to the effective assistance of counsel is guaranteed by both the Federal and State Constitutions." [*People v. Baldi*, 54 NY2d 137, 146 (1981)]. "What constitutes effective assistance is not and cannot be fixed with yardstick precision, but varies according to the unique circumstances of each representation." [*id*. at 146; *see also People v. Berroa*, 99 NY2d 134, 138-39 (2002)]. Under the federal standard for ineffective assistance of counsel, a defendant must show that his or her attorney's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial [*see Strickland v. Washington*, 466 US 668, 687 (1984)]. In New York, the standard for effective assistance of counsel "has long been whether the defendant was afforded meaningful representation" [*People v. Henry*, 95 NY2d 563, 565 (2000) (citations omitted)]. "So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met" [*Baldi*, 54 NY2d at 147; *see also People v. Oliveras*, 21 NY3d 339 (2013); *People v. Koki*, 74 AD3d 987, 987-88 (2d Dept. 2010)]. "The phrase 'meaningful representation' does not mean 'perfect representation.'" [*People v. Benevento*, 91 NY2d 708, 712 (1998) (citations omitted); *see also People v. Cummings*, 16 NY3d 784, 785 (2011); *People v. Modica*, 64 NY2d 828, 829 (1985)].

"In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel." [*People v. Taylor*, 144 AD3d 1317, 1319 (3d Dept. 2016), *lv app denied*, 28 NY3d 1151 (2017); *see also People v. Ingram*, 80 AD3d 713 (2d Dept. 2011), *lv app denied* 16 NY3d 831 (2011); *People v. Carr*, 89 AD3d 1033, 1034 (2d Dept. 2011)].

The submissions on the motion establish that Mr. Patterson provided competent, meaningful and effective representation in his negotiation of a favorable plea. The defendant was initially charged with the A-II felony offense of Criminal Possession of a Controlled Substance in the Second Degree [PL §220.18(1)]. If convicted, the defendant faced a minimum determinate sentence of three years with a maximum exposure of ten years [*see* PL §§60.04 & 70.71]. Mr. Patterson was able to negotiate a plea to the reduced charge of Criminal Possession of a Controlled Substance in the Third Degree [PL §220.16(12)], a Class B felony, with a sentence of three years (equivalent to the minimum on the A-II offense with which the defendant was originally charged). Given the evidence against the defendant - notably the fact that he was the sole back-seat passenger in a vehicle in which more than four ounces of a substance containing heroin were found on the seat adjacent to him – Mr. Patterson provided meaningful and effective representation in securing a plea to the reduced charge. Moreover, notwithstanding the negotiated disposition, Mr. Patterson urged the Court at sentencing to consider a more lenient sentence given the certainty of deportation and the defendant's lack of criminal history.

The defendant's claims are also belied by his sworn statements during the plea allocution. The defendant advised this Court that he was satisfied with the services provided by Mr. Patterson, that he did not need more time to speak with counsel before moving forward with the plea, and

that Mr. Patterson had answered all of his questions [*see* Plea Transcript, Rappleyea Affirmation, Exhibit 13, pp 15-18].

Finally, the "submissions on the motion fail to establish any reasonable probability that the People would have made [] an offer" to a misdemeanor, as suggested by the defendant [*Young*, 150 AD3d at 429]. As such, the defendant's motion can be denied without a hearing [*id.*; *People v. Olivero*, 130 AD3d 479, 480 (1st Dept. 2015), *lv app denied* 26 NY3d 1042 (2015)].

Based upon the foregoing, the defendant's motion is denied because it relies on allegations that are contradicted by court records or other official documents and there is no reasonable possibility that the defendant's allegations are true [CPL §440.30(4)(d); *People v. Hargrove,* 138 AD2d 741, 741 (2d Dept. 1988)]. Contrary to the defendant's assertions, the record demonstrates that the defendant received competent, meaningful, and effective representation [*People v. McDaniel*, 13 NY3d 751 (2009); *Henry*, 95 NY2d at 566]. "Because our state standard … offers greater protection than the federal test, [this Court] necessarily reject[s] defendant's federal constitutional challenge by determining that he was not denied meaningful representation under the State Constitution" [*People v. Caban*, 5 NY3d 143, 156 (2005)].

Based upon the foregoing, and because the defendant's remaining contentions are without merit, it is hereby

ORDERED, that the defendant's motion to vacate his judgment of conviction pursuant to CPL §440.10 is denied.

The foregoing constitutes the Decision and Order of the Court.

Date: July 16, 2020
Poughkeepsie, New York

_____
HON. PETER M. FORMAN
COUNTY COURT JUDGE

To: William V. Grady, Esq.
Dutchess County District Attorney
By: Kirsten Rappleyea, Esq.,
236 Main Street
Poughkeepsie, New York 12601

Paul, Weiss, Rifkind, Wharton & Garrison LLP
Attorneys for Defendant
1285 Avenue of the Americas
New York, New York 10019-6064

The Bronx Defenders
Attorneys for Defendant
360 East 161st Street
Bronx, New York 10451

STATE OF NEW YORK: COUNTY OF DUTCHESS
COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK	DECISION AND ORDER Ind. No.: 121/2013
- against –	
	William V. Grady, District Attorney
CRAIG E. GABBIDON,	By: Kirsten Rappleyea, Esq.
Defendant.	Defendant, *pro se*

MCLOUGHLIN, J.,

The following papers were read and considered in deciding the defendant's motion to vacate his judgment of conviction:

	Papers Numbered
Notice of Motion ……...	1
Affidavit of Defendant ……..…….	2
Memorandum of Law ……..	3
Exhibits (A – O) …….	4-18
Affirmation in Opposition ……	19
Exhibits (1-25) ……	20-44
Reply Affidavit …….	45

This motion is the latest iteration of the defendant's challenge to his 2014 conviction for criminal sexual act in the first degree (Penal Law §130.50[2]). For the reasons set forth herein, the motion is denied.

BACKGROUND

By superseding indictment number 121/2013, the defendant was charged with criminal sexual act in the first degree, a class B violent felony (Penal Law §130.50[2]); rape in the first degree, a class B violent felony (Penal Law §130.35[2]); two counts of criminal sexual act in the third degree, a class E felony (Penal Law §130.40[2]); and endangering the welfare of a child, a

class A misdemeanor (Penal Law §260.10[1]). On June 11, 2014, the defendant appeared before this Court (Greller, J.) and entered a plea of guilty to criminal sexual act in the first degree under the first count of the indictment. On December 23, 2014, the Court, having previously denied a motion by the defendant to withdraw his guilty plea, sentenced the defendant to a determinate prison term of 15 years, to be followed by 10 years of post-release supervision.

The defendant filed a timely notice of appeal. The defendant's assigned appellate counsel, Del Atwell, Esq., filed an appellant's brief in the Appellate Division, Second Department, on or about May 29, 2015, raising the following issues: (1) the Court erred in denying the defendant's motion to withdraw his guilty plea; (2) the defendant received ineffective assistance of counsel on his guilty plea; and (3) the sentence was harsh and excessive. By Decision and Order dated December 2, 2015, the Second Department affirmed the judgment of conviction (*People v. Gabbidon*, 134 AD3d 736 [2d Dept. 2015]). In rejecting the defendant's claim of ineffective assistance of counsel, the Appellate Division found that "the record demonstrates that the defendant received an advantageous plea, and nothing in the record casts doubt on the apparent effectiveness of counsel" (*id.* at 737). By Order dated March 31, 2016, the Court of Appeals denied the defendant's application for leave to appeal (*People v. Gabbidon*, 27 NY3d 964 [2016]).

On or about September 16, 2016, the defendant filed his first CPL §440 motion in this Court seeking to vacate his judgment of conviction. In that motion, the defendant argued that his guilty plea was involuntary because the post-release term imposed exceeded the period mentioned by the Court during the plea colloquy and that his attorney was ineffective for failing to object to the proposed incorrect term of post-release supervision. By Decision and Order dated January 21, 2017, this Court denied the defendant's motion. The defendant's application for leave to appeal

that denial to the Appellate Division, Second Department, was denied by Associate Justice Reinaldo E. Rivera on April 11, 2017.

On August 15, 2017, the defendant filed a motion for a writ of error coram nobis in the Appellate Division, claiming he was denied the effective assistance of counsel on his direct appeal. By Decision and Order dated January 31, 2018, the Appellate Division denied that application (*People v. Gabbidon*, 157 AD3d 964 [2d Dept. 2018]). On September 24, 2018, the Court of Appeals denied the defendant's application for leave to appeal (*People v. Gabbidon*, 32 NY3d 1003 [2018]).

On or about May 23, 2018, the defendant returned to this Court with his second CPL §440 motion. In that motion, the defendant argued that he was denied effective assistance of counsel because his attorney coerced him into pleading guilty and failed to explain possible defenses. The defendant also asserted a claim of actual innocence. By Decision and Order dated August 20, 2018, the Court denied the motion. The defendant's application for leave to appeal that denial to the Appellate Division, Second Department, was denied by Associate Justice Reinaldo E. Rivera on February 26, 2019.

Undaunted, the defendant now returns with his third motion pursuant to CPL §440.10. The defendant asserts that his conviction should be vacated on the following grounds: (1) actual innocence; (2) he was denied the right to counsel at his arraignment on the felony complaint; (3) the prosecutor presented false and insufficient evidence to the grand jury; (4) his attorneys were ineffective in that they failed to: (i) conduct an investigation and communicate with him; (ii) facilitate his testimony before the grand jury; (iii) request a *Frye* hearing; and (iv) identify and develop a defense to the charges. The People oppose the requested relief.

DISCUSSION

The motion can be determined on the basis of court transcripts, other official documents and unquestionable documentary proof, as well as the defendant's submissions on the motion. Therefore, no hearing is required (*People v. Satterfield*, 66 NY2d 796 [1985]).

The defendant's claims that he was arraigned without counsel and that the prosecutor presented false and insufficient evidence to the grand jury are procedurally barred by CPL §440.10[2][c]. As these claims are entirely record-based, the defendant's unjustified failure to raise them on his direct appeal precludes their review on this motion and requires summary denial (CPL §440.10[2][c]; *People v. Cuadrado*, 9 NY3d 362 [2007]; *People v. McKenzie*, 151 AD3d 1080 [2d Dept. 2017], *lv app denied* 30 NY3d 981 [2017]; *People v. Williams*, 5 AD3d 407, 407 [2d Dept. 2004], *lv app denied*, 3 NY3d 650 [2004]). Furthermore, as each of these claims could have been raised, but were not, on the defendant's first two CPL §440 motions, they are also procedurally barred by CPL §440.10[3][c] (*see People v. Graves*, 62 AD3d 900 [2d Dept. 2009], *lv app denied* 13 NY3d 939 [2010]; *People v. Cochrane*, 27 AD3d 659 [2d Dept. 2006], *lv app denied* 7 NY3d 787 [2006], *cert denied Cochrane v. New York*, 549 US 976 [2006]).

The defendant's claim of ineffective assistance of counsel is without merit. That issue was raised by the defendant and decided by the Appellate Division on his direct appeal. In affirming the judgment of conviction and rejecting the claim of ineffective assistance of counsel, the Appellate Division found that:

> "[T]he record demonstrates that the defendant received an advantageous plea, and nothing in the record casts doubt on the apparent effectiveness of counsel … There is nothing in the record to support the defendant's claim that counsel's performance was deficient" (*Gabbidon*, 134 AD3d at 737 [citations omitted]).

As such, the defendant's present claims of ineffective assistance of counsel must be denied (CPL §440.10(2)(a); *People v. Thomas*, 131 AD3d 551 [2d Dept. 2015], *lv app denied*, 26 NY3d 1112 [2016]). To the extent the defendant's present claims of ineffective assistance were not specifically addressed by the Appellate Division, they are nevertheless procedurally barred by CPL §440.10[3][c]. The defendant was in a position to raise these specific claims in his first two CPL §440 motions but unjustifiably failed to do (*Graves*, 62 AD3d at 900; *Cochrane*, 27 AD3d at 659).

Even if the Court were to consider the merits of the motion insofar as it asserts a claim of ineffective assistance, it would be denied because it relies on conclusory allegations contained solely in the defendant's affidavit and is not supported by any other affidavit or credible evidence; is contradicted by court records or other official documents; and there is no reasonable possibility that the defendant's allegations are true (CPL §440.30[4][d]; *People v. Allen*, 174 AD3d 815 [2d Dept. 2019]; *People v. Khalapov*, 133 AD3d 618 [2d Dept. 2015]; *People v. Leftenant*, 121 AD3d 1019 [2d Dept. 2014], *lv app denied* 24 NY3d 1121 [2015]). The defendant's claims of ineffective assistance are belied by his sworn statements during the plea allocution. The defendant advised the Court that: he had enough time to speak with his attorneys about his legal options; his attorneys had answered all his questions; he was satisfied with the advice and representation provided by counsel; and that no one had forced, coerced, or threatened him to plead guilty (*see* Rappleyea Aff., Ex. 5, pp 8-10).

The record establishes that the defendant's attorneys provided competent, meaningful and effective representation. Ms. Mungavin filed appropriate motions seeking various forms of relief, including dismissal of the indictment and suppression of statements. Although parts of these motions were denied, some parts were granted, including an order directing that *Huntley* and *Sandoval* hearings take place prior to trial. Ms. Mungavin successfully negotiated a plea bargain

that allowed the defendant to enter a guilty plea in return for a sentence (15 years) that was less than the sentence that could have been imposed if the defendant had been convicted after trial (25 years). Moreover, if there had been a conviction after trial, consecutive sentences would have been permitted for the first two counts of the indictment, "since each count as charged involved a separate sexual act constituting a distinct offense" (*Gabbidon*, 134 AD3d at 736, citing *People v. Colon*, 61 AD3d 772 [2d Dept. 2009], *People v. Dallas*, 31 AD3d 573 [2d Dept. 2006], *People v. Gersten*, 280 AD2d 487 [2d Dept. 2001]).

The defendant's assertion that his attorneys were ineffective for failing to facilitate his testimony in the grand jury is meritless (*see People v. Hogan*, 26 NY3d 779, 787 [2016] ("…whether to have a defendant testify before a grand jury is a strategic decision within counsel's authority to make … while the better practice may be for counsel to confer with his or her client, defendant cannot establish ineffective assistance of counsel based on counsel's decision that defendant would not testify before the grand jury"); *see also People v. Wiggins*, 89 NY2d 872 [1996]). In order to succeed on an ineffective assistance claim in this regard, "a defendant must show prejudice – for example, that if he or she had … testified in the grand jury, the outcome would have been different" (*id*. [internal quotation marks and citation omitted]). Here, the defendant's self-serving, conclusory affidavit fails to make this showing.

The defendant's claim that his attorneys should have moved for a *Frye* hearing on STR DNA testing is similarly without merit. "A defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*People v. Stultz*, 2 NY3d 277, 287 [2004]). STR DNA testing, which was used to analyze the evidence in this case, has gained general acceptance in the field of DNA testing and identification (*see In re M.R.*, 63 Misc3d 916, 920-921 [Sup Ct, Orange Cty, 2019] [denying

request for *Frye* hearing as there was "a general acceptance of Y-STR DNA analysis in the scientific community"]; *see also Curran v. Keyser,* 19-CV-4196, Smith, U.S.M.J., 2020 WL 3318128, at *4 [SDNY, June 18, 2020] ["[E]xpert testimony based on [STR DNA analysis] did not require a separate *Frye* hearing to determine its reliability because its reliability had already been established]; *People v. Owens,* 187 Misc2d 838 [Sup Ct, Monroe Cty, 2011]).

Based upon the foregoing, the defendant's motion to vacate his conviction on the ground of ineffective assistance of counsel is summarily denied because the defendant received competent, meaningful and effective representation (*People v. McDaniel*, 13 NY3d 751 [2009]; *People v. Henry*, 95 NY2d 563 2000]. "[T]he record demonstrates that the defendant received an advantageous plea, and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v. Brown*, 170 AD3d 878, 879 [2d Dept. 2019] [citations omitted]; *Gabbidon*, 134 AD3d at 737).

To the extent the defendant's motion asserts a claim of actual innocence as a basis for vacating the judgment of conviction, it must also be summarily denied. "Where a defendant has been convicted by guilty plea, there is no actual innocence claim cognizable under CPL 440.10(1)(h)" (*People v. Tiger*, 32 NY3d 91, 103 [2018]). Moreover, because the defendant's claim of innocence is directly refuted by the transcribed minutes of his guilty plea, the motion to vacate the judgment of conviction based upon actual innocence is summarily denied pursuant to CPL §440.30[4][d].

Finally, the defendant's motion for assignment of counsel is also denied (*see People v. Richardson,* 159 Misc2d 167 [Sup. Ct., Kings Cty, 1993] [holding no right to appointed counsel under state or federal law for Article 440 motion where no hearing ordered]; *see also People v. Ayrhart*, 8 Misc3d 1014(A) [Cty Ct, Niagara Cty, 2005]; County Law §722[4]).

Based upon the foregoing, and because the defendant's remaining contentions are without merit, it is hereby

ORDERED that the defendant's motion to vacate his judgment of conviction pursuant to CPL §440.10 is denied; and it is further

ORDERED, that the defendant's motion for assignment of counsel is denied.

The foregoing constitutes the Decision and Order of the Court.

Date: January 28, 2022
Poughkeepsie, New York

_____
HON. EDWARD T. MCLOUGHLIN
COUNTY COURT JUDGE

To: William V. Grady, Esq.
Dutchess County District Attorney
By: Kirsten Rappleyea, Esq.,
236 Main Street
Poughkeepsie, New York 12601

Craig E. Gabbidon, DIN #15-A-0150
Wallkill Correctional Facility
50 McKendrick Road, P.O. Box G
Wallkill, New York 12589

NAVIGATING POST-JUDGMENT MOTION PRACTICE:

CPL ARTICLE 440 AND WRITS OF ERROR CORAM NOBIS

PRESENTED BY THE HON. BRIAN M. RUDNER, TOWN JUSTICE, TOWN OF EAST FISHKILL, AND LAW CLERK TO THE HON. EDWARD T. MCLOUGHLIN, DUTCHESS COUNTY COURT, AND BARBARA SEELBACH, TOWN JUSTICE, TOWN OF CLINTON, DIRECTOR, NYSMA

1

WHAT WE ARE GOING TO DISCUSS TODAY:

- Substantive grounds for post-judgment relief:
  - CPL Article 440:
    - 440.10 – motion to vacate judgment of conviction
    - 440.20 – motion to set aside sentence
  - Writs of error coram nobis
- How to determine the motion

2

WHAT WE ARE NOT GOING TO DISCUSS:

- CPL 440.46 or 440.47
- Post-judgment DNA provisions
- 440.46-a – motion for resentence; persons convicted of certain marijuana offenses

3

FOUNDATIONAL PRINCIPLES & RECURRING THEMES:

New York courts have long recognized society's "formidable" interest in the finality of judgments (People v. Jackson, 78 NY2d 638, 647 [1991]).

A judgment of conviction is presumed to be valid (People v. Session, 34 NY2d 254, 255 [1974]).

In order to overcome that presumption, a defendant has the burden of coming forward with allegations sufficient to create an issue of fact as to matters not appearing on the record of the underlying conviction (id.).

A motion to vacate a judgment of conviction cannot be used as a substitute for a direct appeal (People v. Cooks, 67 NY2d 100 [1986]).

"[C]oram nobis relief is not just another stop on a continuum of opportunities for a defendant to seek appellate relief" (People v. Grimes, 32 NY3d 302, 316 [2018]).

4

A BRIEF HISTORY

Prior to the enactment of the Criminal Procedure Law, New York had no statute for collateral attack on a judgment of conviction.

In Lyons v. Goldstein, 290 NY 19 [1943]), the Court of Appeals resurrected the ancient common law writ of error coram nobis. By this writ a person convicted of an offense could petition the court to exercise its inherent power to set aside the judgment on the basis of facts not disclosed prior to entry of judgment due to duress or fraud which, had they been disclosed to the court, would have prevented entry of the judgment.

Passage of the CPL, specifically Article 440, was meant to cover all extant non-appellate post-judgment remedies, thus largely replacing the writ of error coram nobis.

5

A BRIEF HISTORY: (CONTINUED)

But … enactment of the CPL "did not expressly abolish the common-law writ of coram nobis or necessarily embrace all of its prior or unanticipated functions" (People v. Bachert, 69 NY2d 593, 599 [1987]). As a result, coram nobis remains a viable mechanism for relief in limited circumstances surrounding ineffective assistance of counsel on appeal.

But … we still see motions filed in Justice Courts seeking to vacate judgments of conviction which seek "coram nobis" relief.

Takeaway: Do not reject application if brought as "coram nobis," simply consider it under the CPL Article 440 rubric we will be discussing today

6

CPL 440.10 – MOTION TO VACATE JUDGMENT

CPL 440.30[1][a]:

After entry of the judgment

Must be filed in the court that entered the judgment

No time limitation for making the motion

> But see People v. Dennis, 141 AD3d 730 [2d Dept. 2016] [reversing Supreme Court's vacatur of defendant's 1992 conviction because defendant's conflict of interest claim, which was based on the fact that his initial defense attorney accepted a position with the District Attorney's Office, could have been raised "significantly sooner, and his extraordinary delay in bringing his claims would greatly prejudice the People's ability to retry the case"]).

7

CPL 440.10 – MOTION TO VACATE JUDGMENT (CONTINUED)

Must be in writing

On reasonable notice to the People

Must raise all grounds upon which defendant intends to challenge the sentence

8

COURT MAY GRANT THE MOTION ON ANY OF THE FOLLOWING 12 GROUNDS:

(A) "The court did not have jurisdiction of the action or of the person of the defendant"

Geographic error (filed in wrong municipality)

Subject matter jurisdiction

Personal jurisdiction (charged the wrong defendant)

9

GROUNDS (CONTINUED)

(B) "THE JUDGMENT WAS PROCURED BY DURESS, MISREPRESENTATION OR FRAUD ON THE PART OF THE COURT OR A PROSECUTOR OR A PERSON ACTING FOR OR IN BEHALF OF A COURT OR PROSECUTOR"

Plea offer premised on a knowing misstatement by the prosecutor / prosecutorial misconduct

People v. Miller, 206 AD3d 1296 [3d Dept. 2022], lv app denied 39 NY3d 1156 [2023]

People v. Wagstaffe, 120 AD3d 1361 [2d Dept. 2014]

10

GROUNDS – CPL 440.10[1][B] (CONTINUED)

"Person acting for or on behalf of a prosecutor"

State Police forensic scientist's misconduct, even though unknown to People at time of trial, warranted vacatur of murder conviction (People v. Seeber, 94 AD3d 1335 [3d Dept. 2012]).

Plea offer premised on a threat (e.g., if defendant doesn't take plea, any conviction after trial will lead to maximum sentence)

But: the Court advising a defendant of the maximum sentence permitted by statute or that a plea offer would no longer be available if the defendant proceeded with the suppression hearing does not, without more, constitute coercion sufficient to vacate a judgment of conviction

People v. Walton, 168 AD3d 1001, 1001 (2d Dept. 2019), lv app denied 33 NY3d 982 (2019)
People v. Bravo, 72 AD3d 697, 698 (2d Dept. 2010)

11

GROUNDS (CONTINUED)

(C) MATERIAL EVIDENCE ADDUCED AT TRIAL RESULTING IN THE JUDGMENT WAS FALSE AND WAS, PRIOR TO THE ENTRY OF THE JUDGMENT, KNOWN BY THE PROSECUTOR OR BY THE COURT TO BE FALSE"

Prosecutor knowingly used false evidence or knowingly allowed false testimony

(D) "Material evidence adduced by the people at a trial resulting in the judgment was procured in violation of the defendant's rights under the constitution of this state or of the United States"

Defense counsel fails to move to suppress unlawfully-obtained evidence
(these claims are usually coupled with a claim of ineffective assistance of counsel under §440.10[1][h])

(E) "During the proceedings resulting in the judgment, the defendant, by reason of mental disease or defect, was incapable of understanding or participating in such proceedings"

No CPL 730 exam conducted and defendant later determined to lack capacity to proceed

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(F) "IMPROPER AND PREJUDICIAL CONDUCT NOT APPEARING IN THE RECORD OCCURRED DURING A TRIAL RESULTING IN THE JUDGMENT WHICH CONDUCT, IF IT HAD APPEARED ON THE RECORD, WOULD HAVE REQUIRED A REVERSAL OF THE JUDGMENT UPON AN APPEAL THEREFROM"

Defendant must not only show that conduct was improper but that it was also prejudicial (People v. Jackson, 78 NY2d 638, 647 [1991]).

Only applies to conduct "during a trial"

Examples:

Brady or Rosario violation

Juror misconduct:

People v. McGregor, 179 AD3d 26 [st Dept. 2019] [First Department vacated judgment of conviction when trial juror, who was admittedly attracted to a prosecution witness, sought to develop a relationship with that witness during jury deliberations]

People v. Southall, 156 AD3d 111 [1st Dept. 2017] [First Department vacated judgment of conviction for trial juror's failure to disclose that she applied for position in the Office of the District Attorney that was prosecuting the defendant two days before being sworn as a trial juror]

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(G) NEW EVIDENCE DISCOVERED AFTER ENTRY OF JUDGMENT WHICH COULD NOT HAVE BEEN PRODUCED BY THE DEFENDANT AT THE TRIAL EVEN WITH DUE DILIGENCE.

Evidence must be of such a character as to create a probability that had it been received at trial the verdict would have been more favorable to defendant

The new evidence must not be merely impeaching or contradicting the former evidence
People v. Hargrove, 162 AD3d 25 [2d Dept. 2018]

A motion pursuant to this ground must be made with due diligence after the discovery of the new evidence
People v. Stuart, 123 AD2d 46 [2d Dept. 1986] [motion made more than one year after discovery of purported new evidence did not constitute due diligence]

(G-1) Forensic DNA testing of evidence since entry of judgment (we will not see this often in Justice Court)

If guilty plea, defendant must demonstrate a "substantial probability" that he/she is "actually innocent"

If convicted after trial, court must determine that there is "reasonable probability" that verdict would have been more favorable to defendant

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(H) "THE JUDGMENT WAS OBTAINED IN VIOLATION OF A RIGHT OF THE DEFENDANT UNDER THE CONSTITUTION OF THIS STATE OR OF THE UNITED STATES"

Ineffective assistance of counsel

Absence of defendant at material stage of proceedings

"Actual Innocence"

All four departments of the Appellate Division have held that a defendant may challenge a conviction after trial on the ground that he/she is actually innocent.

People v. Mosley, 155 AD3d 1124 [3d Dept. 2017]
People v. Hamilton, 115 AD3d 12 [2d Dept. 2014]
People v. Pottinger, 156 AD3d 1379 [4th Dept. 2017]
People v. Jimenez, 142 AD3d 149 [1st Dept. 2016]

Defendant must demonstrate factual innocence, not mere legal insufficiency of evidence of guilt

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"THE JUDGMENT WAS OBTAINED IN VIOLATION OF A RIGHT OF THE DEFENDANT UNDER THE CONSTITUTION OF THIS STATE OR OF THE UNITED STATES" – CPL 440.10[1][H] (CONTINUED)

Actual innocence claims are not cognizable in case in which the defendant has pleaded guilty

People v. Tiger, 32 NY3d 91 [2018]

16

(I) THE JUDGMENT IS A CONVICTION WHERE DEFENDANT'S PARTICIPATION IN THE OFFENSE WAS A RESULT OF HAVING BEEN A VICTIM OF SEX TRAFFICKING

17

(J) "ONE DAY TO PROTECT NEW YORKERS ACT"

Effective April 12, 2019

- intended to ameliorate immigration consequences of misdemeanor convictions, the Act reduced maximum definite sentence to 364 days
- A defendant must show:

  Judgment is a conviction for a misdemeanor entered prior to April 12, 2019

  Conviction obtained in violation of rights under state or federal constitution

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"ONE DAY TO PROTECT NEW YORKERS ACT" – 440.10[1][J] (CONTINUED)

To make that showing, statute creates two rebuttable presumptions:

If judgment of conviction was by plea of guilty, there is a rebuttable presumption that plea was not knowing, voluntary and intelligent, based on "ongoing collateral consequences, including potential or actual immigration consequences"

If judgment of conviction was by verdict, there is a rebuttable presumption that the judgment constitutes "cruel and unusual punishment" under the state constitution.

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"ONE DAY TO PROTECT NEW YORKERS ACT" – 440.10[1][J] (CONTINUED)

Special remedy in 440.10[9]:

With People's consent, court may vacate the judgment or modify it by reducing it to one of a conviction for a lesser offense; or

Regardless of whether People consent, court may vacate the judgment, order a new trial, allow defendant to enter a plea to the same offense, and impose sentence of 364 days or less.

See People v. Boodoosingh, 75 Misc3d 4 [App Term, 2d Dept, 2022] [Toussaint, J., in dissent]

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(K) MARIJUANA REGULATION & TAX ACT OF 2021

Convictions prior to March 31, 2021

For certain marijuana misdemeanor offenses (and for the since repealed crime of Loitering for the Purpose of Engaging in a Prostitution Offense)

Same mechanism and presumptions as a motion under subparagraph (j)

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PROCEDURAL BARS – CPL 440.10[2]

Court **must** deny a motion to vacate when:

(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 appeal

440 motions are not a substitute for direct appeal (People v. Cooks, 67 NY2d 100 [1986]).

2021 Amendment: This procedural bar does not apply to:

Motions which raise the issue of ineffective assistance of counsel
Motions to vacate because victim of sex trafficking

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PROCEDURAL BARS – CPL 440.10[2] (CONTINUED)

(c) Defendant "unjustifiably" failed to appeal the judgment or did appeal but "unjustifiably" failed to raise the issue on the appeal

> Sufficient facts must appear on the record of the proceedings underlying the judgment to have permitted adequate review of the issue on appeal

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COURT OF APPEALS, IN APPLYING THIS SUBDIVISION, HAS HELD THAT:

Whether or not a defect is properly described by the adjectives "fundamental" and "jurisdictional," it is within the power of the Legislature to make reasonable rules governing when those defects may be complained of. As long as those rules give a defendant a fair opportunity to vindicate his rights, they should be enforced. CPL 440.10(2)(c) is such a rule. People v. Cuadrado, 9 NY3d 362 [2007].

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PROCEDURAL BARS – CPL 440.10[2] (CONTINUED)

2021 Amendment: The procedural bar in CPL 440.10[2][c] does not apply to claims of ineffective assistance of counsel

"Unjustifiably" - see People v. Grubstein, 24 NY3d 500 [2014]

(d) The ground or issue raised relates solely to the validity of the sentence and not the validity of the conviction

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PROCEDURAL BARS – CPL 440.10[3]

Court **may** deny a motion to vacate if:

(a) Facts in support of the ground or issue could have, with due diligence, been made to appear in the record in a manner providing an adequate basis for review on appeal, and defendant unjustifiably failed to adduce such matter prior to sentence and the ground or issue was not determined on appeal

People v. Miller, 206 AD3d 1296 [3d Dept. 2022], lv app denied 39 NY3d 1156 [2023]

This subdivision does not apply to:

A motion based upon deprivation of right to counsel at trial or upon failure of trial court to advise defendant of such right

A motion to vacate because victim of sex trafficking

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PROCEDURAL BARS – CPL 440.10[3] (CONTINUED)

(b) The ground or issue was decided on the merits in a court of this state other than on an appeal of the judgment or sentence, or in a federal court.

People v. Bellamy, 187 AD3d 1421 [3d Dept. 2020], lv app denied 36 NY3d 1049 [2021]

People v. McBride, 40 AD3d 780 [2d Dept. 2007] [issue decided on merits in prior 440 motion]

Despite the prior determination, the court "in the interest of justice and for good cause shown" may grant the motion if it is otherwise meritorious

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PROCEDURAL BARS – CPL 440.10[3] (CONTINUED)

(c) Upon a previous CPL 440 motion, defendant was in a position adequately to raise the ground or issue underlying the present motion but failed to do so

People v. Graves, 62 AD3d 900 [2d Dept. 2009], lv app denied 13 NY3d 939 [2010]

People v. Bellamy, 187 AD3d 1421 [3d Dept. 2020], lv app denied 36 NY3d 1049 [2021]

But compare People v. Wagstaffe, 120 AD3d 1361 [2d Dept. 2014]

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EFFECT OF GRANTING CPL §440.10 MOTION

CPL §440.10[4]:

If court grants the motion, it must vacate the judgment and

Dismiss the accusatory instrument or

Order a new trial

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CPL 440.20 – MOTION TO SET ASIDE SENTENCE

CPL 440.30[1][a]:

After entry of the judgment

Must be filed in the court that entered the judgment

No time limitation for making the motion

Must be in writing

On reasonable notice to the People

Must raise all grounds upon which defendant intends to challenge the sentence

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CPL 440.20 – MOTION TO SET ASIDE SENTENCE (CONTINUED)

Court may grant the motion to set aside the sentence if movant establishes the sentence is:

Unauthorized; or

Illegally imposed; or

Otherwise invalid as a matter of law

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CPL 440.20 – MOTION TO SET ASIDE SENTENCE (CONTINUED)

The statute does not vest a trial court with the authority to reduce a sentence:

Because it was unduly harsh or excessive (People v. Chacko, 119 AD3d 955, 956 [2d Dept. 2014]); or

In the interest of justice (People v. Jogie, 118 AD3d 1025 [2d Dept. 2014])

CPL §430.10: "when the court has imposed a sentence of imprisonment and such sentence is in accordance with law, such sentence may not be changed, suspended or interrupted once the term or period of the sentence has commenced."

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PROCEDURAL BARS – CPL 440.20([2]

Court **must** deny a motion to set aside a sentence if the ground or issue was decided on the merits on an appeal from the judgment or sentence.

Procedural Bars – CPL 440.20[3]

Court **may** deny a motion to set aside a sentence if the ground or issue was decided on the merits in a court of this state other than on an appeal of the judgment or sentence, or in a federal court.

Despite the prior determination, the court "in the interest of justice and for good cause shown" may grant the motion if it is otherwise meritorious

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EFFECT OF GRANTING CPL §440.20 MOTION:

Vacates the sentence, not the conviction

Does not affect the validity of the underlying conviction

After entering an order vacating the sentence, court must resentence the defendant

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ONCE THE MOTION IS FULLY SUBMITTED, HOW DO YOU DECIDE IT?

1. CPL 440.30[1][a] contemplates that a court will in the first instance determine on written submissions whether the motion can be decided without a hearing (People v. Satterfield, 66 NY2d 796 [1985]).

It is not enough for a defendant to make conclusory allegations of ultimate facts; supporting evidentiary facts must be provided (People v. Session, 34 NY2d 254 [1974]).

2. Do any of the aforementioned procedural bars apply?

If so, court must (may) summarily deny the motion (CPL §440.30[2])

If not, court should proceed to consider the motion on the merits

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DECIDING THE MOTION (CONTINUED)

3. CPL §440.30[3]: Upon considering the merits, the court *must* grant it without conducting a hearing and vacate the judgment or set aside the sentence if:

(a) The moving papers allege a ground constituting a legal basis for the motion; *and*

(b) Such ground, if based upon the existence or occurrence of facts, is supported by sworn allegations thereof; *and*

(c) The sworn allegations of fact essential to support the motion are either conceded by the People to be true or are conclusively substantiated by unquestionable documentary proof.

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DECIDING THE MOTION (CONTINUED)

4. CPL §440.30[4]: Upon considering the merits of the motion, the court *may* deny it without conducting a hearing if:

(a) The moving papers do not allege any ground constituting a legal basis for the motion; or

(b) The motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts; or

(c) An allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof; or

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DECIDING THE MOTION (CONTINUED)

(d) An allegation of fact essential to support the motion:

(i) Is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit of evidence and

(ii) Under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true

Certified transcript of plea and/or sentencing proceedings = commonly used to determine claims on 440 motions.

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OTHER EXAMPLES

People v. Chu-Joi, 26 NY3d 1105 [2015] [unquestionable documentary proof from Peruvian government refuted defendant's claim that he was 15 years old at time of crime and therefore should have been sentenced as juvenile offender]

People v. Nowlin, 145 AD3d 1447 [4th Dept. 2016] [defendant's claim on 440 motion was contradicted by terms of drug court contract]

Courts denying 440 motions where allegations in defendant's affidavit not supported by other evidence:

People v. Ferguson, 193 AD3d 1253 [3d Dept. 2021], lv app denied 37 NY3d 964 [2021]
People v. Allen, 174 AD3d 815 [2d Dept. 2019], lv app denied 34 NY3d 978 [2019]
People v. Vasquez, 134 AD3d 742 [2d Dept. 2015], lv app denied 27 NY3d 1008 [2016]
People v. Leftenant, 121 AD3d 1019 [2d Dept. 2014], lv app denied 24 NY3d 1121 [2015]

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CPL §440.30[5]:

If the motion cannot be determined based upon §440.30[2], [3], or [4] (i.e., on the papers), then the Court *must* conduct a hearing.

Defendant has the right to be present at the hearing but can waive such right in writing.

Defendant has the burden of proving, by a preponderance of the evidence, every fact essential to support the motion (CPL §440.30[6]).

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DECISION – CPL §440.30[7]

Regardless of whether a hearing is conducted, the court, upon determining the motion, must set forth on the record:

Findings of fact

Conclusions of law

Reasons for its determination

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ASSIGNMENT OF COUNSEL?

There is no right to appointed counsel under state or federal law for Article 440 motion where no hearing ordered

People v. Richardson, 159 Misc2d 167 [Sup. Ct., Kings County, 1993]

People v. Ayrhart, 8 Misc3d 1014[A] [County. Ct., Niagara County, 2005])

In 2019, County Law §722 was amended so that, when counsel is assigned on an appeal of a criminal action, such an assignment includes authorization for representation with respect to any proceeding concerning a motion filed pursuant to CPL Article 440 (see County Law §722[5]).

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APPEAL

No appeal as of right from denial of a CPL §440 motion.

Defendant must move for leave to appeal [CPL §§ 450.15, 460.15].

The denial of a CPL §440 motion is reviewed under an abuse of discretion standard.

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MOTIONS TO VACATE IN JUSTICE COURTS – COMMON SCENARIOS

1. Attempt to vacate DWI or traffic convictions to avoid DMV regulations [15 NYCRR Part 136]

Filing of these motions is increasing as more people fall within the purview of the DMV regulations

Cases that have dealt with this issue and have denied the requested relief:

- People v. Avital, 64 Misc3d 483 [Just. Ct, Town of East Fishkill, 2019] [copy in course materials]
- People v. Wheaton, 49 Misc3d 378 [County Ct, Seneca County, 2015]
- People v. Gallagher, 70 Misc3d 1210(A) [City Court, City of Rye, 2020]
- People v. Capraro, 51 Misc3d 1212(A) [City Court, City of Mt. Vernon, 2016]
- People v. Beltran, 77 Misc3d 1901 [Just. Court, Town of Deerpark, 2022]
- People v. Newell, 76 Misc3d 1062 [Just. Court, Town of New Scotland, 2022]
- People v. Pazmino, 78 Misc3d 831 [Crim Ct, Queens County, 2023]
- People v. Maggio, 210 AD3d 798 [2d Dept. 2022] [citing Avital]
- People v. DiTore, 209 AD3d 665 [2d Dept. 2022] [citing Avital]

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MORE COMMON SCENARIOS

Cases that have dealt with this issue and granted the motion to vacate the judgment:

People v. Velte, 61 Misc3d 331 [City Court, City of Poughkeepsie, 2018]
People v. Luther, 48 Misc3d 699 [County Court, Monroe County, 2014]
People v. Lynch, 2020 NY Misc LEXIS 10270 [Justice Ct, Village of Patchogue, 2020]

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MOTIONS TO VACATE IN JUSTICE COURTS – COMMON SCENARIOS (CONTINUED)

2. Guilty pleas on traffic matters without counsel

Claim: I was not advised prior to entering guilty plea of right to counsel or of right to an adjournment to seek counsel.

There is no constitutional or statutory requirement that a person charge with a traffic infraction be apprised of his right to counsel or be given an adjournment to obtain counsel (People v. Letterio, 16 NY2d 307 [1965]) ...

UNLESS ... a conviction for the offense subjects the motorist to the possibility of incarceration (People v. Schonfeld, 26 Misc3d 74 [App Term, 9th & 10th Jud. Dists., 2009].

See sample decision on People v. Price in course materials.

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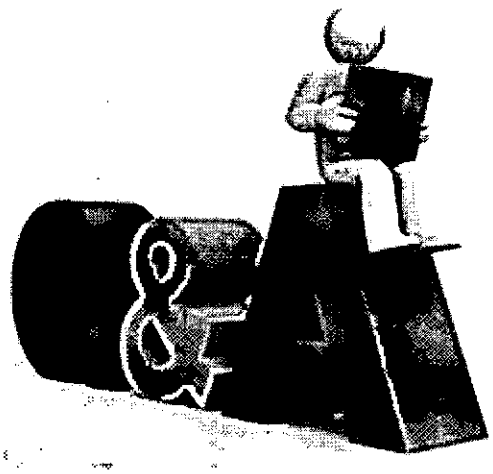
QUESTIONS?



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