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MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART K-4

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THE PEOPLE OF THE STATE OF NEW YORK : BY: WILLIAM M. ERLBAUM, J.
: :
-against- : DATE: December 6, 2001
: :
ROBERT ADELMAN, : INDICT. NO. 940/00
DEFENDANT. :
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The defendant, Robert Adelman, has submitted a pro se motion, dated September 18, 2001, seeking to vacate his conviction and sentence under indictment number 940/00. Though the defendant does not state under what section of the CPL he seeks to have the requested relief granted, his applications are clearly covered by CPL Article 440. The defendant raises numerous claims to support his motion. He alleges that throughout the pendency of his case, he was denied the effective assistance of counsel, that he was denied a speedy trial, that he was denied bail, and that when he pled guilty under the instant indictment, he did so while under duress. The People have submitted an affirmation, dated October 26, 2001, in opposition to the entire motion.

PROCEDURAL BACKGROUND

The defendant was indicted in April, 2000, for Attempted

Murder in the Second Degree, Attempted Assault in the First Degree, Assault in the Second Degree, Assault in the Third Degree, and Criminal Possession of a Weapon in the Fourth Degree. The People alleged that the defendant committed these offenses on December 24, 1999, against his estranged wife. At that time, the defendant was a practicing attorney, admitted to the bar in New York State.

On February 22, 2000, a CPL 730 hearing was ordered by the Criminal Court. A CPL 730 hearing was conducted in this part of the Supreme Court on May 5, 2000. On May 17, 2000, this Court found the defendant fit to proceed. When reviewing the entire record of this case, it is clear that the defendant understood the content and significance of the proceedings.

On January 24, 2001, the defendant pled guilty to Assault in the Second Degree and Assault in the Third Degree, and waived his right to appeal. During plea negotiations, an attempt was made to find a resolution to this matter that would not preclude the defendant from practicing law again, sometime in the future, for reasons that include the fact that no part of the defendant's criminality was alleged to have involved his practice of law. Though he would be disbarred as a result of the felony plea, the parties wanted to leave open that possibility that the defendant, apparently a very accomplished and successful attorney, might

practice law again someday. The agreed upon sentence in this case was a split sentence of time served and concurrent probationary sentences, and a five year full order of protection to be issued in favor of the complaining witness. Upon completion of five years probation, if the defendant strictly adhered to all conditions of his probation, the People would not oppose the vacating of the felony plea, leaving the defendant with only a misdemeanor conviction, and therefore the possibility, though not the guarantee, of his reapplication and readmission to the bar. Great care was taken during the plea allocution to protect the defendant from further diminishing his chances for readmission. The defendant entered into an Alford/Serrano plea, (see, North Carolina v. Alford, 400 US 25 [1970], and People v. Serrano (15 NY2d 304 [1965])), where he agreed to the entry of the conviction, and conceded the ability of the People to prove his guilt beyond a reasonable doubt, yet the defendant was spared the need to articulate the facts that supported his guilt ¹. On June 21, 2001, the defendant was

¹ Though references were made at the plea and sentence that the defendant did not wish any specificity regarding the underlying facts in this case to come from his own mouth, (see, plea minutes, dated January 24, 2001, page 10, line 6 and sentencing minutes, dated June 21, 2001, page 9, line 7,) it is clear from the entire record that the defendant was fully aware of the underlying facts supporting this indictment. Defense counsel at the time of the plea acknowledged that the defendant

sentenced as promised. He submits that in June of 2001, he was disbarred as a result of this guilty plea. The Court notes that by the time this matter concluded, the defendant had utilized the services of four different attorneys, two retained, and two court appointed. The Court does find it unnecessary to discuss the reasons behind the changes of counsel, but only notes this fact to clarify the discussion that follows.

In a motion dated July 20, 2001, the defendant sought to vacate his plea and sentence. However, the defendant withdrew that motion on September 5, 2001. The defendant subsequently filed the instant motion. The defendant explicitly conditions this motion on a request that he remain at liberty. The defendant submits that should this Court grant his motion, but set bail conditions, his application is respectfully withdrawn.

was aware of the contents of the indictment, (see, plea minutes, page 11, line 3), and at the sentencing of this matter, the Court reminded all parties that reference should be made to each and every time the matter appeared on the Court's calendar (see, sentencing minutes, page 7, line 1). When minutes of prior calendar calls are reviewed, the defendant's knowledge of the facts of the case is evident. For example, on May 17, 2000, the People made a lengthy distillation of the facts herein (see, minutes of May 17, 2000, page 21); on that same day, the defendant saw photos of the injuries suffered by the complainant (see, page 24, line 11); and while the defendant addressed the Court regarding his bail status, (see, page 39, line 11) he categorized this matter as a "patently bogus case" (see, page 42, line 1). Also, the defendant's frequent questions to the Court, posed throughout the pendency of these proceedings, demonstrate his awareness of his situation.

The Court will not make any promises to the defendant regarding his bail status. Should the issue of bail arise, due to an application by the People, or on the Court's own motion, the Court will address that issue in an appropriate manner, depending upon the circumstances and facts that develop. Since this is the second motion filed by this defendant, on the very same issue, the Court believes that finality needs to be achieved in this matter.

The defendant moves to vacate his conviction on four separate grounds. The Court decides the defendant's motion to vacate his judgement and sentence as follows.

MOTION TO VACATE JUDGEMENT
ON THE GROUND OF INEFFECTIVE ASSISTANCE OF COUNSEL

The defendant's first argument in support of his motion is that during the pendency of this matter he never received the effective assistance of counsel. The defendant makes numerous statements describing alleged misbehavior committed by his attorneys. However, other than specifically mentioning by name the attorney who represented him at the time of the plea, the defendant fails to allege precisely which of his four prior attorneys committed which of the many acts that he asserts caused him to suffer the alleged ineffective assistance of counsel.

Instead, he treats the group of attorneys who represented him "en masse", alleging, presumably, that all of them committed all of the acts complained of.

CPL 440.30 [4][d] states that a court may deny a 440.10 motion, without a hearing, when an "allegation of fact essential to support the motion 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 under these and all the other circumstances attending the case, there is no reasonable possibility that the allegation is true".

The defendant's allegation in this case that he did not enjoy the effective assistance of counsel is made solely by him. The defendant fails to provide the Court with any evidence at all supporting his allegation. He does not include any affidavits from any of the four attorneys who represented him, he provides no documentation regarding his allegations, and he does not refer to specific conversations with any of his attorneys. Finally, the defendant fails to make specific, detailed factual allegations. Though the defendant claims, for example, that his time with his attorneys was limited, he fails to state to which of the four attorneys who represented him he is referring, and how any of their actions truly affected him.

Furthermore, the record established at the plea proceedings

directly contradicts the allegation by the defendant that he received ineffective assistance of counsel. Upon review of the plea minutes in this case, dated January 24, 2001, it is evident that the defendant was satisfied with the representation he received at the time of the plea, by his retained counsel, and he so stated. Also, there was no indication provided by the defendant that he felt he had received ineffective assistance of counsel from his prior attorneys, which in turn either affected him when he entered the plea, or caused him to reconsider even entering the plea. The minutes reflect that the defendant was not shy when it came to voicing any concerns he may have had to the Court. In fact, the defendant asked questions of the Court regarding the conditions of probation, (see, page 15, line 13-14, and page 15, line 23- page 16, line 3) and regarding the order of protection (see, page 16, line 19, and page 17, line 23- page 18, line 1). Yet, though he was asked directly about it by the Court, on page 13, line 14, the defendant never mentioned that at any point in the proceedings he had ineffective counsel. Additionally, when reviewing these minutes in their entirety, it is clear that the defendant, an extremely intelligent man and talented attorney, knowingly and voluntarily pled guilty. The plea defendant was entering into was an Alford/Serrano plea, in order to limit his vulnerability in any disciplinary proceedings

that would follow, and defendant noted at page 12, line 10, "Yes, your honor, with that understanding I so plead".

When reviewing the sentencing minutes in this case, dated June 21, 2000, it is clear that this record contradicts the defendant's allegations in his motion. For example, the defendant in his motion complains that an associate of his attorney represented him at sentence. The defendant alleges this attorney was someone "purporting to be his associate" (see, defendant's affirmation, paragraph 21, no pagination). However, the minutes reflect that the defendant asked this attorney to appear (see, page 2, line 9). Also, in paragraphs 18 and 21 of the defendant's motion, he alleges that he had no access to the probation report prepared for his sentence. However, it is clear from the sentencing minutes that the defendant did in fact read the report (see, pages 2-3). In fact, he sought to refute some of the statements made by the probation department (see, page 10, line 16). Though the defendant perhaps would have liked a copy of the report, or more time with it, clearly the situation at sentencing regarding the probation report was not as alleged by the defendant in his moving papers.

Additionally, on page 12 of the sentencing minutes, the defendant made a statement to the Court essentially complaining about his experiences on Rikers Island, and about his experiences

with his attorneys. However, the minutes reflect on page 15, line 3, that the defendant conceded that the attorney who represented him at his plea, and another attorney who had earlier represented him, were "cuts above average". The Court on line 17 agreed. Most importantly, despite the defendant's statements about his attorneys, he never sought to not be sentenced, and he never asked, prior to sentence, to withdraw his plea. Instead, on page 17, line 6, the defendant clearly indicated that he was ready for sentence.

Furthermore, in reviewing the facts and circumstances of this case, it is clear that the defendant did in fact benefit from the effective assistance of counsel. When evaluating such a claim, the "core of the inquiry is whether defendant received meaningful representation" (see, People v. Benevento, 91 NY2d 708, 712 [1998]). That determination is made by reviewing "the evidence, the law, and the circumstances of a case, viewed in totality and as of the time of the representation" (see, People v. Baldi, 54 NY2d 137, 147 [1981]). The New York State Court of Appeals, in People v. Ford, 86 NY2d 397, 404 [1995], has also held that "meaningful representation does not mean perfect representation", and that, "in the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing else in the record

casts doubt on the apparent effectiveness of counsel". In the defendant's case, he clearly received an advantageous plea bargain. The top count of this indictment was Attempted Murder in the Second Degree, a class "B" violent felony. The defendant, had he been convicted after trial, was facing a mandatory prison term ranging anywhere from 5-25 years. (See, PL 70.02). Instead, the last attorney to represent the defendant secured a plea for him to Assault in the Second Degree, a class "D" violent felony, and to Assault in the Third Degree, a class "A" misdemeanor. Not only was the defendant sentenced to the jail time he had already served (approximately 9 months) plus a probationary sentence, but, if the defendant successfully completed his probation, the People agreed not to oppose a motion by the defendant to vacate the felony conviction, and at that point, only a misdemeanor conviction would remain on his record. Considering the defendant's past criminal record, the nature of the instant case, and the injuries sustained by the complaining witness, the defense counsel clearly secured for defendant a beneficial plea. Furthermore, the defendant has not pointed to anything in this record that would cast doubt on counsel's effectiveness. The allegations by the defendant do not demonstrate that he received ineffective assistance of counsel at any stage in these proceedings. (See also, People v. Tomaselli, 7

NY2d 350 [1960], counsel spent approximately ten minutes with a client before advising him to plead guilty; People v. Nicholls, 157 AD2d 1004, 1005 [3rd Dept 1990], the "mere fact that counsel did not engage in some pretrial procedures available to defendant does not, of itself, indicate ineffective assistance of counsel"; see also, People v. Peters, 90 AD2d 618 [3rd Dept. 1982]; People v. Batsford, 165 AD2d 957 [3rd Dept 1990] attorney's failure to more thoroughly investigate matter did not deny defendant of effective assistance of counsel; People v. Noble, 231 AD2d 800 [3rd Dept 1996], appeal denied, 89 NY2d 866 [1996], defendant alleged lack of contact with attorney; People v. Ford, 86 NY2d 397 [1995], discussing ineffective assistance of counsel claims and collateral proceedings).

Based upon the totality of the facts and circumstances surrounding this case, there is no "reasonable possibility" (see, CPL 440.30[4][d]) that the allegation raised by the defendant that he did not receive the effective assistance of counsel is true. This conclusion is supported by the extremely favorable plea bargain received by the defendant, the unsupported, nonspecific allegations of the defendant, and the fact that defendant was represented by four different attorneys during the pendency of this case, all of them capable and reputable members of the bar. It strains credulity for defendant to allege that

all of these attorneys are ineffective. The Court had the opportunity to observe the performance and skill of each of these attorneys. Motions were filed, a hearing was held, and defendant never alleged which attorneys' behavior he found unacceptable. Accordingly, the Court finds that there is no "reasonable possibility" (see, CPL 440.3[4][d]) that the defendant was denied the effective assistance of counsel.

Therefore, pursuant to CPL 440.3[4][d], the defendant's motion to vacate his judgement on the ground of ineffective assistance of counsel is denied.

MOTION TO VACATE JUDGEMENT
ON THE GROUNDS OF THE DENIAL OF THE CONSTITUTIONAL
RIGHTS TO BAIL AND A SPEEDY TRIAL

The defendant moves to vacate his conviction on the grounds that he was denied his Constitutional rights to bail and to a speedy trial. The defendant makes these claims in paragraph 14 of his affirmation (no pagination). However, he fails to allege any facts to sustain these claims. In fact, bail and speedy trial are mentioned nowhere else in the defendant's affirmation. These allegations are entirely conclusory and unsupported.

CPL 440.30 [4][b] states that a court may deny a 440.10 motion, without a hearing, when "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 [...]". (See also, People v. Lake, 213 AD2d 494 [2nd Dept 1995], appeal denied, 86 NY2d 737 [1995]; People v. Lawson, 191 AD2d 514 [2nd Dept 1993], appeal denied, 81 NY2d 1075 [1993]; People v Gonzalez, 158 AD2d 615 [2nd Dept 1990], appeal denied, 76 NY2d 735 [1990]).

Conclusory allegations do not constitute sworn allegations of fact. (People v. Hickey, 277 AD2d 511 [3rd Dept 2000], appeal denied, 95 NY2d 964 [2000]; People v. Smith, 251 AD2d 226, [1st Dept 1998], appeal denied, 92 NY2d 930 [1998]; People v. Folks, 246 AD2d 433 [1st Dept 1998], appeal denied, 91 NY2d 972 [1998]; People v. Brown, 227 AD2d 691 [3rd Dept 1996], appeal denied, 88 NY2d 980 [1996]). In this case, the defendant's moving papers contain only conclusory allegations without discussion, or even mention, of any specific facts. His conclusory allegations lack any showing that his rights were violated. Accordingly, it is not necessary for the Court to address the defendant's claims that he was denied his Constitutional rights to bail and a speedy trial on the merits. However, the Court notes that the defendant's bail status was determined only after the Court heard extensive argument, by both the People and the defendant, on that issue (see, minutes of May

17, 2000). The Court further notes that the pendency of this indictment, charging a "B" violent felony, was thirteen months, from incident to plea of guilty. (Defendant was sentenced five months later, however, during the interval from plea to sentence he was at liberty). While the case was pending, the litigation included a CPL 730 hearing, motion practice, the appearance of new attorneys at the request of the defendant, and numerous conferences held with the hopes of settling the matter. Accordingly, the defendant's motion to vacate his conviction on the grounds that he was denied his Constitutional rights to bail and a speedy trial is denied.

MOTION TO VACATE JUDGEMENT
ON THE GROUND OF DURESS

The defendant also moves to vacate his conviction on the grounds that he was under duress when he entered his guilty plea. He alleges the duress he suffered was due to illness, jail conditions, and the ineffective assistance of counsel.

In reviewing this claim, the Court again looks to CPL 440.30 [4][d]. As discussed above, a motion to vacate a judgement may be denied, without a hearing, if the allegations to support the motion are made solely by the defendant, and are unsupported by any other evidence, and if there is no reasonable possibility

that they are true.

The defendant's allegations in this case are based solely on his own claims and are unsupported by any evidence. The Court finds that there is no reasonable possibility that the defendant pled guilty solely because he was under duress. Although the Court does sympathize with the defendant if he experienced the traumas and indecencies he claims, it does not find that any of those incidents render his plea involuntary.

The defendant's claims are based solely on his own allegations. He does not provide the Court with any supporting evidence. He does not submit medical records establishing how any illness he suffered, or how any problem with his medications, affected his ability to freely plead guilty and understand the different aspects of the plea bargain. He does not attach to his motion affidavits from doctors, Riker's Island medical personnel, family, or friends, attesting to how his medical situation caused him duress, made him feel that he had no choice but to plead guilty, or affected his abilities during the disposition of this case. Furthermore, when the plea minutes in this case, dated January 24, 2001, are reviewed, it is clear that the defendant knowingly and voluntarily pled guilty. It is clear from the record of this case that the defendant understood all of the proceedings that were conducted, was an integral part of his own

defense, freely inquired of the Court when he had questions, and readily sought and accepted the disposition in this case.

The defendant also fails to provide the Court with any supporting evidence as to his claim that the jail conditions caused him duress. Though he alleges that the jail he was housed in was an "inhumane environment" (see, defendant's affirmation, dated September 18, 2001, paragraph 23, no pagination), and submits that he was assaulted and threatened, the defendant fails to provide the Court with any documentary evidence supporting his allegations. More importantly, however, the defendant fails to allege how any distinct incident caused him duress and specifically affected his entering the guilty plea. It is clear when the Court reviews the record in this case, that the defendant knowingly and voluntarily entered his guilty plea. Though the defendant did make an extensive record at his sentencing regarding his time on Rikers Island and his thoughts on the performance of the lawyers he dealt with during the pendency of this case (see, sentencing minutes, dated June 21, 2001), he never asked at that time that he not be sentenced, or that his plea be withdrawn. Furthermore, the defendant never made any reference to any of these concerns when he actually took the plea on January 24, 2001. Instead, the Court is left to review only the conclusory allegations in the defendant's motion

papers that he was under duress when he pled guilty, which is directly contradicted by the plea and sentencing minutes.

As to the defendant's final claim that he was under duress due to the ineffective assistance of counsel, the Court will refer to its prior discussion above on this subject. The Court will simply add that no supporting evidence was provided establishing that this claim was a cause of duress suffered by the defendant, and no mention was made on June 21, 2001 that the sentence should not be imposed.

Additionally, case law demonstrates that the allegations raised by the defendant regarding his medical condition, the jail conditions, and the quality of the representation that he received from his attorneys, do not demonstrate that he suffered from duress, which in turn induced him to plead guilty. (See, People v. Gonzales, 231 AD2d 939 [4th Dept 1996], appeal denied, 89 NY2d 923 [1996], defendant's unsubstantiated claim that he pled guilty because he did not take his medication insufficient to support motion to withdraw plea; People v. Greeman, 194 AD2d 397 [1st Dept 1993], leave denied, 82 NY2d 719 [1993], claim that defendant took a plea because he needed medical treatment insufficient to support motion to withdraw plea; People v. Ayers, 192 AD2d 1134 [4th Dept 1993], leave denied, 81 NY2d 1069 [1993], claim that back condition caused duress insufficient to support

motion to withdraw plea;² People v. Williams, 237 AD2d 644 [3rd Dept 1997], appeal denied, 90 NY2d 866 [1997], defendant's claim of duress due to medication insufficient to support CPL 440 motion; People v. Hanley, 249 AD2d 680 [3rd Dept 1998], leave denied, 92 NY2d 898 [1998], claim of beating and denial of privileges insufficient to support CPL 440 motion; see also, People v. Hanley, 255 AD2d 837 [3rd Dept 1998], leave denied, 92 NY2d 1050 [1999]; People v. Graves, 251 AD2d 746 [3rd Dept 1998]; see also, the previous discussion of case law demonstrating that the defendant did in fact receive competent representation).

The Court also finds that there is no reasonable possibility that the defendant pled guilty because he was under various forms of duress. (See, CPL 440.30 [4][b]). In addition to considering the issues discussed above, the Court has again reviewed the plea minutes in this case, dated January 24, 2001, and the sentencing minutes, dated June 21, 2001, in this case. The defendant was represented by counsel at these proceedings. The defendant made no mention that he was suffering hardships and that those hardships, rather than his own desire to do so, caused him to

²The fact that these cases relate to motions to withdraw pleas instead of motions to vacate judgements is inconsequential. The holdings are what is relevant. Unsubstantiated medical claims did not establish grounds to support the motions.

plead guilty. As discussed earlier, the defendant was obviously comfortable asking questions of the Court, and made no claim that he was unsatisfied with the agreed upon plea bargain. To the contrary, he readily accepted the disposition, and clearly knew what he was doing. The Court, therefore, finds no reasonable possibility that the defendant's allegation that duress caused him to plead guilty in this matter is true.

Accordingly, the defendant's motion to vacate his judgement on the ground of duress is denied.

MOTION TO VACATE SENTENCE

The defendant also moves to vacate his sentence. However, he does not allege any facts to support his motion. He simply makes this general request at the beginning (paragraph 2, no pagination) and at the end (paragraph 26, no pagination) of his affirmation.

CPL 440.20[1] states that at "any time after the entry of a judgement, the court in which the judgement 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".

The Court agrees with the People's position that the defendant's application must be denied. The defendant's moving

papers fail to allege any legal ground upon which the request may be granted. The defendant does not allege that his sentence was unauthorized, illegally imposed, or otherwise invalid as a matter of law.

Accordingly, the defendant's motion to set aside his sentence is denied.

CONCLUSION

Based upon the above discussion, the defendant's motion to vacate his judgement and sentence is hereby denied in all respects.

This constitutes the decision and order of the Court.

The Clerk of the Court is directed to distribute copies of this decision and order to the defendant and the District Attorney.

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WILLIAM M. ERLBAUM, A.J.S.C.