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Short Form Order

SUPREME COURT - STATE OF NEW YORK
CRIMINAL TERM - PART K-8 - QUEENS COUNTY
125-01 QUEENS BLVD. KEW GARDENS, NY 11415

P R E S E N T:

HON. ROBERT CHARLES KOHM
Justice

THE PEOPLE OF THE STATE OF NEW YORK

-against-

ENRIQUE GOZMIN,
Defendant.

Ind. No. 1954/93

Motion VACATE JUDGMENT OF CONVICTION AND SET ASIDE SENTENCE

The following papers numbered
1 to 3 submitted in this motion.

PAUL S. BRENNER, ESQ.
For The Motion

HON. RICHARD A. BROWN, D.A.
BY: ANASTASIA SPANAKOS, ADA
Opposed

	Papers Numbered
Notice of Motion/Affirmation	1 - 2
Affirmation in Opposition	3

Upon the foregoing papers, and in the opinion of the court herein, defendant's motion to vacate the judgment of conviction and to set aside the sentence is denied. See the accompanying memorandum.

GLORIA D'AMICO
Clerk

Date: JUNE 20, 2001

ROBERT CHARLES KOHM, J.S.C.

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS : CRIMINAL TERM : PART K-8

THE PEOPLE OF THE STATE OF NEW YORK -against- ENRIQUE GOZMIN, Defendant.	BY: ROBERT CHARLES KOHM, J. DATE: 20, 2001 INDICT. NO. 1954/93

Defense counsel makes this motion for an order vacating the judgment of conviction and to set aside the sentence.

Defendant was indicted for robbery in the first degree, robbery in the second degree, unauthorized use of a vehicle in the first degree, and criminal possession of stolen property in the fourth degree (two counts). On July 12, 1993, defendant's attorney negotiated a plea for defendant. Defendant pled guilty to all charges in the indictment and he was released on his own recognizance while awaiting sentence. As a condition to his plea, defendant had to complete the program at the Center for Alternative Sentencing and Employment Services (CASES) with the goal of receiving a sentence of probation. He was taken into the program on July 12, 1993, and

scheduled to appear on July 14, 1993, but failed to do so. As a result of his failure to participate in the program, defendant was discharged from the program on July 21, 1993.

A bench warrant was issued on September 14, 1993, after defendant did not appear for sentencing. Defendant was sentenced on October 15, 1993, in absentia. He was sentenced to concurrent prison terms of from seven to twenty-one years for the first degree robbery conviction, from five to fifteen years for the second degree robbery conviction, from one to three years for the first degree unauthorized use of a vehicle conviction, and from one to three years for each count of fourth degree possession of stolen property conviction. Defendant remained a fugitive until his arrest on May 3, 2000, and on September 6, 2000, the warrant was vacated and the sentence was executed.

Defense counsel now makes this motion to vacate the judgment of conviction and to set aside the sentence. In support of the motion he argues that the judgment of conviction should be vacated since defendant's plea was not knowingly and intelligently made due to a conflict of interest by his attorney. The attorney who represented him also represented a co-defendant. Also, the defense argues that the sentence

should be set aside since the sentence was harsh and excessive. Defendant has led a law biding life and has not been arrested in the past seven years.

There is no merit to defense counsel's arguments.

A motion to vacate a judgment of conviction must be denied if there are sufficient facts on the record to have allowed adequate review of the issue on direct appeal but no such appellate determination occurred because defendant unjustifiably failed to raise the issue on appeal (CPL 440.10[2][c]). A motion to vacate a judgment of conviction should not be "employed as a substitute for direct appeal" when defendant was in a position to raise the issue on appeal, but failed to do so (People v Cooks, 67 NY2d 100, 103).

A judgment of conviction is presumed to be valid. This presumption of regularity exists until contrary substantiating evidence appears. The party challenging the validity has the burden of coming forward with sufficient allegations to create an issue of fact (People v Richetti, 302 NY 290). Sufficient evidentiary facts must be alleged in order to raise a triable issue of fact sufficient to challenge the presumed validity of a judgment of conviction. Bare allegations are insufficient to carry this evidentiary burden.

It is not enough to make conclusory allegations. Supporting facts must be provided (see, CPL 440.30(4)(d); People v Brown, 56 NY2d 242; People v Session, 34 NY2d 254).

In this case, defendant has failed to set forth any legal basis to warrant granting the relief requested on the ground of a conflict of interest by former defense counsel (see, People v Gomberg, 38 NY2d 307).

Section 440.20(1) of the Criminal Procedure Law provides that upon motion of the defendant the court may set aside the sentence if it was unauthorized, illegally imposed or otherwise invalid as a matter of law. However, in this case, defendant was properly sentenced and the sentence was valid as a matter of law. Defendant did not file a Notice of Appeal regarding his conviction nor is an appeal pending.

When a sentence of imprisonment is imposed, and that sentence is in accordance with law, the sentence may not be changed, suspended or interrupted once the term or period of the sentence has commenced (CPL 430.10).

Based on the foregoing, the motion to vacate the judgment of conviction and to set aside the sentence is denied.

Order entered accordingly.

The clerk of the court is directed to mail copies of this decision and order to the attorney for defendant and to the District Attorney.

ROBERT CHARLES KOHM, J.S.C.