

Short Form Order

SUPREME COURT - STATE OF NEW YORK
CRIMINAL TERM - PART K-23 - 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- :

ARTHUR WOLTERS, :

_____ :
Defendant. :

Ind. No. 1923/04

Motion: Vacate Judgment

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

ARTHUR WOLTERS, PRO SE
For The Motion

HON. RICHARD A. BROWN, D. A.
BY: MICHELLE CORT, ADA
Opposed

Papers
Numbered

Notice of Motion/Affidavits/Exhibits _____ 1
Answering & Reply Affidavits/Exhibits _____ 2 - 3
Hearing Minutes _____

Upon the foregoing papers, defendant's motion to vacate judgment is denied in accordance with the accompanying memorandum decision.

GLORIA D'AMICO
Clerk

Date: March 17, 2005 _____

ROBERT CHARLES KOHM, J. S. C.

M E M O R A N D U M

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: JHO-H

THE PEOPLE OF THE STATE OF NEW YORK	:	
	:	
- against -	:	BY: ROBERT CHARLES KOHM, J.
	:	
ARTHUR WOLTERS,	:	DATE: MARCH 17, 2005
	:	
Defendant.	:	INDICT NO: 1923/04
	:	

The defendant moves, pro se, to vacate the judgment rendered November 1, 2004, convicting him of aggravated unlicensed operation of a motor vehicle in the first degree, upon a jury verdict, and imposing sentence.

The defendant alleges prosecutorial misconduct in that the prosecutor (i) failed to notify him of a second grand jury proceeding; (ii) knowingly used false evidence, the defendant's Department of Motor Vehicles driving abstract; and (iii) committed a Rosario violation. The defendant also alleges that trial counsel was ineffective for failing to (i) effectuate his right to testify at the second grand jury proceeding and seek dismissal of the indictment based on such lack of testimony; (ii) move to dismiss the indictment as defective for failing to charge all material elements of the crime and on double jeopardy grounds; (iii) subpoena the police officers who issued the summonses which led to the suspensions of his license; (iv) move to suppress the

suspensions as having been based on default convictions; (v) raise a statute of limitations defense; (vi) obtain the minutes of his 2001 trial in Sullivan County; and (vii) object to admission of certain Department of Motor Vehicle documents. Finally, the defendant alleges that the court lacked jurisdiction because the evidence at trial was legally insufficient.

A motion made pursuant to CPL 440.10 may not be used as a substitute for a direct appeal of a judgment (see, People v Mower, 97 NY2d 239; People v Cooks, 67 NY2d 100; People v Kandekore, 300 AD2d 318, lv denied 99 NY2d 616, cert denied 540 US 896). Thus, claims based upon facts which sufficiently appear on the record of the proceedings or which, with due diligence, could have been made to so appear prior to sentencing are subject to a procedural bar (id; see, CPL 440.10[2], [3][a]). Here, the defendant filed a notice of appeal, but has yet to perfect the appeal. Thus, the only one of his claims which might be said to survive the procedural bar is that alleging the prosecutor's knowing use of false evidence; although the claim could have been made to appear on the record prior to sentencing, the defendant's allegations of ineffective assistance of counsel may bypass the procedural bar by excusing the due diligence requirement. In any event, the defendant has based his claim only upon his own conclusory, unsubstantiated allegation that an unnamed Department of Motor Vehicles ("DMV")

employee testified at the abovementioned 2001 trial that the defendant's DMV abstract was "a mistake" and "a canard." Accordingly, the defendant has failed to raise an issue of fact with respect to either the validity of the abstract or the prosecutor's knowledge concerning it (see, CPL 440.30 [4][b], [d]; People v Brown, 56 NY2d 242; People v Ford, 46 NY2d 1021; People v Session, 34 NY2d 254).

While the record of these proceedings may be inadequate for the Appellate Division to determine whether the defendant's specific allegations with respect to defense counsel's failures to subpoena the police officers and summonses and obtain the minutes of his 2001 trial are true, the record is sufficient to determine whether, in the context of this case, the defendant received meaningful representation, even assuming the allegations to be true.

The defendant's allegations concerning defense counsel's "failures" appear to be based, in large part, upon the defendant's misunderstanding of the nature of the offense of which he was found guilty, including the knowledge component thereof. The defendant was not punished herein for his earlier license suspensions, but, rather, for the repetitive or recidivist nature of his conduct (see, People v Cleveland, 238 AD2d 897; People v Guszak, 237 AD2d 715; People v Cintron, 163 Misc2d 881). Moreover, the knowledge sufficient to support his conviction is a

"reason to know" standard satisfied by the defendant's failure to pay the statutory fee necessary to reinstate his license (see, People v Cleveland, supra; People v Guszack, supra; People v Pabon, 167 Misc2d 214).

Accordingly, the defendant's motion to vacate judgment is denied.

Order entered accordingly.

The Clerk of the Court shall distribute a copy of this memorandum and accompanying order to the defendant at his place of incarceration and to the District Attorney.

ROBERT CHARLES KOHM, J.S.C.