

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD DEPARTMENT

People v. Thaxton

2021 NY Slip Op 01159 (Appellate Division of the Supreme Court of the State of New York Third Department 2021) · No. 110513 · Decided February 25, 2021

SUMMARY

The New York Appellate Division, Third Department affirmed a judgment convicting Karim Thaxton, upon his guilty plea, of criminal sale of a controlled substance in the third degree. The court held that Thaxton knowingly and voluntarily waived his right to appeal, foreclosing his sentence challenge, and that defense counsel's statement regarding the motion to withdraw the plea did not create an actual conflict requiring assignment of new counsel.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Third Department
WRITING FOR THE COURT	Reynolds Fitzgerald, J.; Garry, P.J.; Egan Jr., J.; Lynch, J.; Clark, J.
JURISDICTION	New York
DECIDED	February 25, 2021
DOCKET	110513
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendant appealed from a judgment of County Court convicting him upon his guilty plea to criminal sale of a controlled substance in the third degree. He challenged the validity of his appeal waiver, the severity of his agreed-upon sentence, and the denial of his pro se motion to withdraw his guilty plea without assignment of new counsel.
STANDARD OF REVIEW	The court reviewed the validity of the appeal waiver and County Court's handling of the motion to withdraw the guilty plea for legal error, while considering whether counsel's conduct affirmatively undermined the motion and created an actual conflict of interest.
PRECEDENTIAL VALUE	published
PARTIES	Karim Thaxton v. The People of the State of New York

TOPICS

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PRACTICE AREAS

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QUESTIONS PRESENTED

1. Whether defendant's waiver of the right to appeal was knowing, voluntary, and intelligent.
2. Whether the valid appeal waiver foreclosed defendant's challenge to the harshness of the agreed-upon sentence.
3. Whether defense counsel's statement that he did not necessarily agree with the affidavit supporting defendant's motion to withdraw his guilty plea created an actual conflict requiring assignment of new counsel.

HOLDINGS

1. The waiver of defendant's right to appeal was valid because the court explained that the waiver was separate and distinct from the rights automatically forfeited by the guilty plea, and defendant also executed a comprehensive written waiver after reviewing it with counsel.
2. County Court did not err by failing to assign new counsel because counsel's statement that he did not necessarily agree with the affidavit did not affirmatively undermine defendant's assertions or amount to an adverse position creating an actual conflict of interest.

KEY QUOTATIONS

*“It is well settled that a defendant has a right to the effective assistance of counsel on his or her motion to withdraw a guilty plea” (*2)*

*“While defense counsel need not support a pro se motion to withdraw a plea, counsel may not become a witness against his or her client, make remarks that affirmatively undermine a defendant's arguments, or otherwise take a position that is adverse to the defendant” (*2)*

*“counsel takes a position adverse to his [or her] client when stating that the defendant's motion lacks merit, or that the defendant, who is challenging the voluntariness of his or her guilty plea, made a knowing plea that was in his or her best interest” (*2)*

FACTUAL BACKGROUND

Thaxton pleaded guilty under a negotiated agreement to criminal sale of a controlled substance in the third degree and agreed to waive his right to appeal. Before sentencing, he moved pro se to withdraw his plea, asserting that it was not knowingly, voluntarily, and intelligently entered because of alleged deficiencies involving an omnibus motion, hearings, and discovery. Defense counsel stated that he had notarized the supporting affidavit but did not necessarily agree with its language. County Court denied the motion and imposed the agreed sentence.

PROCEDURAL HISTORY

Pursuant to a negotiated plea agreement, Thaxton pleaded guilty and agreed to waive his right to appeal. County Court denied his pro se motion to withdraw the plea and sentenced him as a second felony offender to 10 years in prison followed by three years of postrelease supervision. The Appellate Division affirmed.

DISPOSITION

affirmed

CASES CITED

- People v. Lopez, 6 NY3d 248, 256 [2006]
- People v. Purnell, 186 AD3d 1834, 1834-1835 [2020], lv denied 36 NY3d 975 [2020]
- People v. Burnett, 186 AD3d 1837, 1838 [2020], lvs denied 36 NY3d 969, 970 [2020]
- People v. Thomas, 34 NY3d 545, 558-563 [2019]
- People v. Williams, 185 AD3d 1359, 1360 [2020]
- People v. Mitchell, 21 NY3d 964, 966 [2013]
- People v. Faulkner, 168 AD3d 1317, 1318-1319 [2019]
- People v. Oliver, 158 AD3d 990, 991 [2018]
- People v. Maldonado, 183 AD3d 1129, 1129-1130 [2020]
- People v. Washington, 25 NY3d 1091, 1095 [2015]
- People v. McCray, 106 AD3d 1374, 1374-1375 [2013]
- People v. Tyler, 130 AD3d 1383, 1385 [2015]
- People v. Leeper, 298 AD2d 190, 190 [2002], lv denied 99 NY2d 560 [2002]

OPINION

PER CURIAM.

People v Thaxton (2021 NY Slip Op 01159) People v Thaxton 2021 NY Slip Op 01159 Decided on February 25, 2021 Appellate Division, Third Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided and Entered: February 25, 2021 110513 [*1]The People of the State of New York, Respondent, vKarim Thaxton, Appellant.

Calendar Date: January 7, 2021 Before: Garry, P.J., Egan Jr., Lynch, Clark and Reynolds Fitzgerald, JJ. Stephen J. Carney, Schenectady, for appellant. J. Anthony Jordan, District Attorney, Fort Edward (Taylor Fitzsimmons of counsel), for respondent. Reynolds Fitzgerald, J. Appeal from a judgment of the County Court of Washington County (McKeighan, J.), rendered June 8, 2018, convicting defendant upon his plea of guilty of the crime of criminal sale of a controlled substance in the third degree.

Pursuant to a negotiated plea agreement, defendant pleaded guilty to criminal sale of a controlled substance in the third degree and agreed to waive his right to appeal. At sentencing, defendant moved pro se to withdraw his guilty plea, alleging, among other things, that his plea was not knowingly, voluntarily and intelligently entered allegedly because an omnibus motion was filed without his input, he was not present for any hearings and he was informed that, in the event that he wanted to view certain discovery, the plea offer would be withdrawn.

Defense counsel, in response to County Court's inquiry, stated that, although he notarized the affidavit in the motion to withdraw the plea, he did "not prescribe to any of the language contained within the affidavit [and did] not necessarily even agree with the affidavit."

The court, after providing defendant and the People an opportunity to be heard, reviewed the plea colloquy and denied the pro se motion. The court then sentenced defendant, as a second felony offender, in accordance with the terms of the plea agreement, to 10 years in prison followed by three years of postrelease supervision. Defendant appeals. Initially, we are unpersuaded by defendant's contention that the waiver of the right to appeal is invalid.

Prior to accepting the plea offer, defendant was informed that a waiver of the right to appeal was a condition of the plea agreement. The record reflects that, during the plea colloquy, County Court advised defendant that the right to appeal was separate and distinct from the rights automatically forfeited by his guilty plea, which defendant indicated he understood (see *People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Purnell*, 186 AD3d 1834, 1834 [2020], lv denied 36 NY3d 975 [2020]).

Defendant also executed a comprehensive written waiver of appeal after reviewing it with counsel and assuring the court that he understood it and had no questions (see *People v Burnett*, 186 AD3d 1837, 1838 [2020], lvs denied 36 NY3d 969, 970 [2020]). Notwithstanding the fact that defendant gave brief responses to the court's inquiries, we are satisfied that the record reflects that he understood the nature and consequences of the appeal waiver and knowingly, voluntarily and intelligently waived the right to appeal (see *People v Thomas*, 34 NY3d 545, 558-563 [2019]; *People v Lopez*, 6 NY3d at 256; *People v Williams*, 185 AD3d 1359, 1360 [2020]).

Given the valid appeal waiver, defendant's challenge to the harshness of the agreed-upon sentence is foreclosed (see *People v Purnell*, 186 AD3d at 1835). We also find without merit defendant's contention that his motion to withdraw his plea was undermined when defense counsel expressed a position adverse to defendant's interest and, [*2]as such, County Court erred by not assigning him new counsel to represent him on the motion.

"It is well settled that a defendant has a right to the effective assistance of counsel on his or her motion to withdraw a guilty plea" (*People v Mitchell*, 21 NY3d 964, 966 [2013] [citations omitted]; accord *People v Faulkner*, 168 AD3d 1317, 1318 [2019]). "While defense counsel need not support a pro se motion to withdraw a plea, counsel may not become a witness against his or

her client, make remarks that affirmatively undermine a defendant's arguments, or otherwise take a position that is adverse to the defendant" (People v Oliver, 158 AD3d 990, 991 [2018] [internal quotation marks and citations omitted]; see People v Maldonado, 183 AD3d 1129, 1129-1130 [2020]). "[C]ounsel takes a position adverse to his [or her] client when stating that the defendant's motion lacks merit, or that the defendant, who is challenging the voluntariness of his [or her] guilty plea, made a knowing plea that was in his [or her] best interest" (People v Washington, 25 NY3d 1091, 1095 [2015] [internal quotation marks, ellipsis, brackets and citations omitted]), at which point a conflict of interest arises and new counsel must be assigned on the motion (see People v Mitchell, 21 NY3d at 966; People v Maldonado, 183 AD3d at 1130).

Here, defense counsel, in response to an inquiry by County Court as to whether the motion was being made solely by defendant, stated that he had notarized the affidavit but that he did "not necessarily even agree with the affidavit."

We are unpersuaded that counsel's statement, which made no further elaboration as to the legal basis or merits of the motion, affirmatively undermined defendant's assertions or amounted to an adverse position against defendant so as to create an actual conflict (see People v Washington, 25 NY3d at 1095; compare People v McCray, 106 AD3d 1374, 1375 [2013]).

As such, we find no error in County Court failing to assign new counsel on the motion (see People v Washington, 25 NY3d at 1095; People v Leeper, 298 AD2d 190, 190 [2002], lv denied 99 NY2d 560 [2002]; compare People v Maldonado, 183 AD3d at 1129-1130; People v Faulkner, 168 AD3d at 1318-1319; People v Tyler, 130 AD3d 1383, 1385 [2015]; People v McCray, 106 AD3d at 1374-1375).

Garry, P.J., Egan Jr., Lynch and Clark, JJ., concur. ORDERED that the judgment is affirmed.