Court of Appeals
State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

CHARLES HICKS,

Defendant-Respondent.

Brief of the
New York State Defenders Association

Amicus Curiae

Jonathan E. Gradess
New York State Defenders Association
194 Washington Avenue, Suite 500
Albany, New York 12210
(518) 465-3524

Of Counsel:
Alfred O'Connor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Interest of Amicus

The New York State Defenders Association (NYSDA) is a not-for-profit membership association of more than 1200 public defenders, legal aid attorneys, 18-B counsel and private practitioners throughout the state. With funds provided by the state of New York, NYSDA operates the Public Defense Backup Center, which offers legal consultation, research, and training to more than 5,000 lawyers who serve as public defense counsel in criminal cases in New York. The Backup Center also provides technical assistance to counties that are considering changes and improvements in their public defense systems.

New York State contractually obligates NYSDA, through its Public Defense Backup Center, "to review, assess and analyze the public defense system in the state, identify problem areas and propose solutions in the form of specific recommendations to the Governor, the Legislature, the Judiciary and other appropriate instrumentalities." In this capacity, the Association has issued numerous reports identifying problems in the state's public defense system.

The Court of Appeals has granted NYSDA *amicus curiae* status in a number of important cases dealing with the rights of criminal defendants. Some of the cases in which this Court has granted NYSDA *amicus* status include: People v. Robinson, et al. ___ N.Y.2d ___ (Slip Op. # 141, 142, 143 - December 18, 2001); People v. Young, 94 N.Y.2d 171 (1999); People v. Romero, 91 N.Y.2d 750 (1998); People v. Grant, 91 N.Y.2d 989 (1998); People v. Burdo, 91 N.Y.2d 146 (1997); People v. Knowles, 88 N.Y.2d 763 (1996); People v. Ford, 86 N.Y.2d 397 (1995); People v. McKiernan, 84 N.Y.2d 397 (1994);

Matter of King v. N.Y.S. Div. of Parole, 83 N.Y.2d 788 (1994); People v. Van Pelt, 76 N.Y.2d 156 (1990); People v. Seaberg, 74 N.Y.2d 1 (1989); People v. Pollenz, 67 N.Y.2d 264 (1986) and People v. Bigelow, 66 N.Y.2d 417 (1985).

This case raises an important issue about the legality of a trial court's reservation of a right to increase a defendant's bargained-for sentence, without affording him an opportunity to withdraw the plea, for violating a condition of the court's sentence commitment requiring "truthful" answers during a presentence interview. Here, the lower court more than tripled Respondent's bargained-for sentence of 6 – 12 years and imposed a term of 20 – 40 years when it determined that he falsely denied guilt during the presentence interview. As the Appellate Division below recognized in vacating the increased sentence in this case and other cases involving the same sentencing judge, the lower court's sentence condition undermines the "reasonable assurance of certainty" that motivates most defendants to seek a negotiated resolution to criminal charges. People v. Parker, 271 A.D.2d 63, 71 (4th Dept. 2000).

This Court's endorsement of the lower court's sentence condition would have a profound effect on plea bargaining in New York, and thereby on the criminal justice system as a whole. Widespread adoption of the lower court's sentence condition by criminal court judges in this State would work a seismic shift in the cost-benefit analysis that forms the basis of most plea bargains, and propel more and more cases, which might otherwise have been settled, to trial. In light of the systemic nature of the issues under review, NYSDA and its members have a substantial interest in the instant appeal.

Point One

A court's reservation of the right to unilaterally increase a bargained-for sentence for a defendant's "lies" concerning culpability during a pre-sentence interview is fundamentally incompatible with its obligation to supervise the plea bargaining process, since the threat will inhibit defendants from making even well-founded post-plea claims of coercion or innocence. Imposition of such a condition violates public policy because it compromises the court's critical role in ensuring that a guilty plea is knowingly, voluntarily and intelligently entered.

The sentencing court below more than tripled Respondent's bargained-for sentence of 6 – 12 years when it found that he violated a condition of his plea agreement by lying to the author of the pre-sentence report during a jailhouse interview in which he denied guilt of the underlying crimes of conviction. Attempting to justify the court's drastic response to this out-of-court assertion of innocence, the People frame the legal issue on this appeal in a deceptively simple way: "What is so wrong," the People essentially ask, "about punishing a liar who refuses to accept responsibility for his crimes?" The facts and circumstances in the four cases reviewed in People v. Parker, 271 A.D.2d 63 (4th Dept. 2000), offer a compelling practical answer to this question in the context of a sentence condition identical to the one imposed below. As detailed in Respondent's brief, these cases dramatically illustrate just how unworkable and easily abused the former Judge Bristol's "no lying" condition has proven to be in actual practice. By trifling with and upsetting the legitimate expectations of criminal defendants, like Respondent, who waived their constitutional rights and entered guilty pleas in exchange for specific sentence commitments, the lower court violated these defendants' right to due process of law.

In Parker, the Fourth Department agreed with the long-standing view of the Second Department that the sentence condition under review does not relate to the sentencing function of the court and, consequently, that an alleged breach of it does not warrant additional punishment. The court also held the sentence condition violated public policy because it upsets the "'reasonable assurance of certainty' provided by the negotiated sentence" and thereby threatens to destabilize the entire plea-bargaining system in this State by eroding public trust in the fairness and integrity of the process. People v Parker, 271 A.D.2d at 71, *quoting* People v. McConnell, 49 N.Y.2d 340, 346.

Amici submits that there is an additional public policy reason to reject the lower court's sentence condition: it is fundamentally incompatible with the court's duty to ensure that a defendant's guilty plea is knowing, voluntary and intelligent. By inhibiting a guilty-pleading defendant from later claiming innocence, the court's condition effectively deters all motions – even well-founded ones - to withdraw a guilty plea pursuant to CPL § 220.60 (3). Because review of such motions is an integral part of the court's supervisory authority over the plea bargaining process, a criminal court cannot perform this function properly when it structures a sentence promise in such a way as to stifle all post-plea claims of innocence.

Anyone familiar with the day-to-day workings of criminal courts knows that defendants who have pleaded guilty to criminal charges sometimes later claim to be innocent. There are many reasons why this occurs, and they are as varied as the lives of the defendants themselves. When the crime is repugnant, defendants sometimes deny guilt in order to avoid physical attack or social isolation within the prison environment.

Sometimes defendants deny guilt because they are psychologically unprepared to admit guilt to their families. Sometimes they deny guilt because they are genuinely convinced of their innocence and have pleaded guilty to a lesser charge solely to avoid the risk of a greater sentence after trial. Sometimes defendants deny guilt because they are emotionally immature, or mentally impaired, or simply in a state of denial about their criminal culpability. Sometimes the looming reality of a prison sentence causes a defendant to panic and to voice regrets about his decision to plead guilty. Sometimes defendants claim they were mentally confused or under the influence of alcohol or drugs when they pleaded guilty, or that they were improperly influenced by an overbearing defense counsel. Sometimes cultural or religious factors are at the root of a defendant's assertion of innocence after a guilty plea. Generally speaking, a belated claim of innocence made under any of these circumstances, standing alone, does not provide a sound legal basis for a defendant to seek withdrawal of an otherwise validly entered guilty plea.

On the other hand, a motion to withdraw a guilty plea that is premised on a claim of innocence coupled with an assertion that the plea was involuntary - the product of some fraud, mistake, coercion or ineffective lawyering - does provide a legal basis for relief. Although "often asserted" and seldom granted [People v. Flowers, 30 N.Y.2d 315 (1972)], such claims must be carefully reviewed by the courts because they are occasionally meritorious. *See, e.g.* Britt v. Legal Aid Society, 95 N.Y.2d 443 (2000); Matter of Randall v. Rothwax, 78 N.Y.2d 494 (1991); People v. Pelchat, 62 N.Y.2d 97 (1984); People v. Wheaton, 45 N.Y.2d 769 (1978); People v. Flowers, 30 N.Y.2d 315

(1972); People v. Beasley, 25 N.Y.2d 483 (1969); People v. Berger, 9 N.Y.2d 692 (1961). Review of these post-plea claims under CPL § 220.60 (3) is an integral part of a criminal courts judge's oversight and supervision of "the delicate balancing of public and private interests in the process of plea bargaining." People v. Selikoff, 35 N.Y.2d 227, 243 (1974).

However, the lower court's sentence condition – its vow to increase a defendant's bargained-for sentence for "lying" during a pre-sentence interview concerning his culpability – impossibly compromises its ability to safeguard the integrity of the plea-bargaining process through proper review of a motion to withdraw a guilty plea. The court's condition inhibits all post-plea claims of innocence – including well-founded and meritorious ones – because it attaches severe consequences to virtually *any* unsuccessful motion to withdraw a guilty plea under CPL § 220.60 (3). A defendant with a colorable basis to seek withdrawal of his plea must not only weigh the risks and possible benefits of a jury trial should the motion be granted; he must also consider that the very act of *making* such a motion might automatically result in a harsher sentence if the court were to discredit it. Indeed, this is precisely what happened to Elias Seoud, who saw his sentence increased from a promised 9 – 18 years to 12 ½ to 25 years simply because he moved to withdraw his guilty plea and Judge Bristol concluded that he lied in an affidavit in support of the motion. People v. Parker (Seoud), 271 A.D.2d 63, 67 (4th Dept. 2000). Criminal court judges cannot properly perform their duty to ensure that a guilty plea has been entered knowingly, voluntarily and intelligently when they subject a defendant to what, in effect, is official intimidation.

In the instant case, defendant never moved to withdraw his guilty plea. Whether this is because he never seriously entertained thoughts about withdrawing the plea (despite his assertion of innocence), or because defense counsel later convinced him to refrain from doing so, is unimportant. What does matter is that, in either event, the sentencing court's implicit threat to impose a harsher sentence if Respondent "lied" about his culpability might have had a chilling effect on the decision-making process. A criminal defendant's decision to plead guilty or stand trial must be the product of a free and voluntary choice among the available alternatives, and must never be the result of official intimidation or coercion. *See* Boykin v. Alabama, 395 U.S. 238 (1969); People v. Beverly, 139 A.D.2d 971 (4th Dept. 1988). This same principle logically applies to a defendant's decision to exercise his statutory right to move to withdraw a guilty plea pursuant to CPL § 220.60 (3) or, alternatively, to stand by that plea. This critical decision must likewise remain unaffected by overbearing or intimidating influences emanating from the court. For this reason, the lower court's sentence condition should be rejected as contrary to public policy in this State.

Rejection of the lower court's unusual sentence condition clearly does not mean that a criminal court judge may never consider a defendant's *lack of remorse* as a sentencing factor. If a court reasonably concludes that a defendant's false assertion of innocence is attributable to a lack of remorse, and this so poorly reflects on his character that the court cannot in good conscience honor the sentence promise, it can refuse to abide by the agreed-upon sentence and impose a harsher one, *provided it first offers the defendant an opportunity to withdraw the plea. See* People v. Farrar, 52 N.Y.2d 302 (1981);

People v. Augustine, 265 A.D.2d 671 (3d Dept. 1999). This straightforward procedure preserves the court's discretion to impose an appropriate sentence in light of "the crimes charged, the particular circumstances of the offender, and the purposes of a penal sanction." People v. Suitte, 90 A.D.2d 80 (2d Dept. 1982). But, unlike the sentence condition under review, it also preserves the court's ability to oversee the fairness of the plea bargaining process and respects the defendant's constitutional rights.

Point Two

This Court should reject the lower court's sentence condition because widespread acceptance of it by criminal court judges in New York would lead to increased costs and delays without any corresponding benefit to the administration of justice.

Under the plea bargaining regime devised by the lower court, a routine pre-sentence investigation is transformed into a high-stakes interview at which a defendant can doom himself to years of additional imprisonment by making a single comment that is later disbelieved by the sentencing judge. The People now ask this Court to endorse such a regime for criminal court judges throughout New York State. However, putting aside issues of legality and public policy, the rule of law now advocated by the People raises serious practical concerns. For example, will defendants have a right to counsel at these perilous new presentence interviews?

Typically, defense attorneys in this State do not appear with their clients at pre-sentence interviews because it is generally understood that these routine interviews are not "critical stages" of the criminal proceeding. *See* People v. Palazo, 147 Misc.2d 829

(Sup. Ct. New York County 1990). However, under the lower court's sentencing scheme – where a single factual misstep by a client at the interview could spell certain disaster later on - defense lawyers would have strong grounds to demand access to these unrecorded interviews in order to effectively defend their clients at sentencing. *Cf.* United States v. Ming He, 94 F.3d 782 (2d Cir. 1996) (Right to counsel extended under court's supervisory authority to government debriefings of cooperating defendants inasmuch as defense counsel can serve important role at such interviews, including helping unsophisticated clients to "grasp a question's import," avoid "blur[ting] out unthinking answers," and "clarifying . . . answers to ensure they are complete and accurate"); *see also*, United States v. Herrera-Figuero, 918 F.2d 1430 (9th Cir. 1990) (Right to counsel extended to presentence interviews under court's supervisory authority because there is "no justification" for excluding counsel from the interview.)

In 2000, local probation departments in New York State completed approximately 61,000 pre-sentence reports in cases pending in superior courts and local criminal courts, including town and village courts. [1] If defense attorneys were to now seek access to even a fraction of these interviews each year, delays in sentencing would almost certainly result because the timely preparation of reports "would depend on the uncertain availability and schedules of counsel." People v. Palazo, *supra* at 832. Moreover, counsel fees for indigent defendants would certainly rise in proportion to the

[1] 33,602 reports were completed in misdemeanor cases and 27, 341 in felony cases – Source New York State Division of Probation and Correctional Alternatives.

increased number of hours needed to defend these clients' interests, both at pre-sentence interviews and in court. Finally, additional judicial resources would be needed to keep pace with the increased litigation that endorsement of the lower court's sentence condition would undoubtedly generate. *See e.g.* People v. Parker, 271 A.D.2d 63.

Given these costs, and the lack of any obvious advantage to the lower court's unusual method of accepting a guilty plea from a criminal defendant, this Court should decline the People's invitation to experiment with the law governing plea-bargaining in this State. The order of the Appellate Division should be affirmed.

CONCLUSION

FOR THE ABOVE-STATED REASONS, AND THE REASONS SET FORTH IN RESPONDENT'S BRIEF, THE ORDER OF THE APPELLATE DIVISION SHOULD BE AFFIRMED.

Respectfully submitted,

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Alfred O'Connor

Jonathan E. Gradess
Alfred O'Connor
New York State Defenders Assoc.
194 Washington Ave., Suite 500
Albany, New York 12210
(518) 465-3524

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