SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

967

KA 08-01677

PRESENT: SCUDDER, P.J., HURLBUTT, FAHEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLIFTON A. JACKSON, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (WALTER M. JERAM, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered June 30, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of marihuana in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of marihuana in the second degree (Penal Law § 221.25). We reject the contention of defendant that his plea was coerced by statements of County Court. Although the statements to which defendant objects are similar to those that we determined to be coercive in *People v Flinn* (60 AD3d 1304), here the court engaged defendant in an extensive discussion concerning the consequences of pleading guilty prior to the plea colloquy, unlike the court in *Flinn*. In addition, the court explained to defendant that he could enter an *Alford* plea and afforded defendant an opportunity to discuss the plea offer with his family. The court further indicated that defendant had raised "some really good arguments" but informed defendant that those arguments would have to be raised at trial. We thus conclude on the record before us that defendant's reliance on *Flinn* is misplaced.

We agree with defendant, however, that his plea was not knowingly, intelligently and voluntarily entered. Although defendant failed to preserve that contention for our review by failing to move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v VanDeViver*, 56 AD3d 1118, *lv denied* 11 NY3d 931, 12 NY3d 788), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). It is clear from the record that defendant retained his right

to appeal pursuant to the plea agreement. There is no indication in the record, however, that defendant understood that he forfeited other rights by pleading guilty, including his right to contend that he was denied his statutory right to a speedy trial (*see generally People v O'Brien*, 56 NY2d 1009, 1010). Although we would thus vacate the plea (*see generally People v Morbillo*, 56 AD3d 694, *lv denied* 12 NY3d 786, 788), defendant has expressly rejected that relief, and we therefore affirm the judgment (*see People v Dean*, 52 AD3d 1308, *lv denied* 11 NY3d 736).

Although the contention of defendant that he was denied his statutory right to a speedy trial is properly before us inasmuch as it was not forfeited by the involuntary plea, we reject that contention (*see generally* CPL 30.30). The People's notice of readiness was not illusory despite the fact that it was filed prior to defendant's arraignment because "it was possible for the defendant to be arraigned——and the trial to proceed——" during the 24 days remaining in the statutory six-month period (*People v Goss*, 87 NY2d 792, 794; *see* CPL 30.30 [1] [a]). Any postreadiness delay in arraigning defendant is not attributable to the People inasmuch as "[a]rraigning . . . defendant upon indictment is exclusively a court function" (*Goss*, 87 NY2d at 797; *see generally* CPL 210.10). Even assuming, arguendo, that the 22 days between the date on which defense counsel informed the court that defendant was in federal custody and the date on which the order to produce defendant was issued are chargeable to the People, based on their failure to utilize the applicable statutory procedure to secure defendant's presence (*see People v Cropper*, 202 AD2d 603, 605, *lv denied* 84 NY2d 824; *see generally* CPL 560.10), we nevertheless conclude that the People declared their readiness for trial within the six-month period. We reject the further contention of defendant that the failure of defense counsel to pursue his contention that he was denied his statutory right to a speedy trial constituted ineffective assistance of counsel, inasmuch as defendant was not in fact denied his statutory right to a speedy trial (*see People v Caban*, 5 NY3d 143, 152; *cf. People v O'Connell*, 133 AD2d 970, 971-972).

Entered: July 10, 2009 Patricia L. Morgan
Clerk of the Court