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SUPREME COURT
CRIMINAL TERM
NEW YORK COUNTY

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: PART 32

-----X
THE PEOPLE OF THE STATE OF NEW YORK,

PLAINTIFFS,

-AGAINST-

DOMINIC M. FRANZA,

DEFENDANT.

-----X

NOTICE OF MOTION

AFFIDAVIT

FOR

SUMMARY JUDGMENT

ON C.P.L. § 440.10

FILED 7/20/93

INDICTMENT #11987/91

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AFFIDAVIT PAGES 1-4

Dominic M. Franza

DOMINIC M. FRANZA

relief as the Court may deem just and proper.

Dated: 19th of August

1993

Dominic M. Franza

Dominic M Franza

92A3659

P.O. BOX 500

ELMIRA, N.Y.

14902-500

PRO SE.

To: Robert Morgenthau, Esq.

District Attorney of

New York County

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

-----X
The People of the State of New York, : AFFIDAVIT IN SUPPORT
Plaintiffs, : OF SUMMARY JUDGMENT
-against- : ON DEFENDANTS C.P.L.
Dominic M. Franza, : \$440.10 MOTION FILED
Defendant. : ON 7/20/93

-----X INDICTMENT #11987/91

State of New York)

County of Chemung) ss.:

DOMINIC M, FRANZA, being duly sworn, deposes and says:

1) I am the defendant in the above-entitled proceeding.

I make this affidavit in support of Summary Judgment, to Vacate the Judgment of Conviction herein, upon the grounds:

1) Peoples failure to serve Opposition Motion upon Defendant and Court. The D.A. has Defaulted.

2) Peoples failure to Dispute Defendants sworn allegations of fact, with Documentary Proof.

2) Defendant as this Court is aware of filed a 440.10 Motion to Vacate Judgment on 7/20/93, the Defendant also served D.A. on 7/20/93.

It has been in excess of 30 days since filing, and Defendant has not received any opposition to his Motion.

This Court is to follow the perscribed procedure in deciding this Motion:

It is fundamental that a Motion may be decided without

a hearing unless the Papers submitted raise a Factual dispute on a material point which must be resolved before a Court can decide the legal issue (C.P.L.R. 2218).

Upon considering the merits of the Motion, the Court must grant it without conducting a hearing and vacate the judgment or set aside the sentence, as the case may be, if;

(A) The moving papers allege a ground constituting legal basis for the Motion; and

(B) Such grounds, if based upon the existence or occurrence of fact, is supported by sworn allegations thereof; and

(C) The sworn allegations of fact essential to support the Motion are either conceded by the People to be true or are conclusively substantiated by unquestionable documentary proof (C.P.L. 440.10, subd 3 [A][B][C]).

The same standard applies in sections dealing with Motions to Suppress (C.P.L. 710.60, subd. 2 par [B]), Motion to set aside a verdict (C.P.L. 330.40, subd. 2, par [D]) and Motions to Vacate a Judgment or set aside a Sentence (C.P.L. 440.30, subd 3, par [C]).

In short it is the standard procedure to be followed in connection with nearly every pretrial and posttrial Motion made in a Criminal action (People V. Gruden 42 NY²D 214, 397 NYS²D 704).

The People have not Controverted Defendants Fact's contained in Motion. The failure of the People to raise

an issue of fact is tantamount to a concession on their part as to the truth of the allegations contained in Defendants Motion.

There is no Factual Dispute presented through any opposition. Should D.A. arbitrarily demand a hearing it would be to conduct a Fishing Expedition, This Court should not assume that the legislature intended to establish such a useless and wasteful procedure. In the History of the statutes mentioned previously never did the Legislature ever intend to establish such a new and unusual motion practice in criminal cases.

The D.A. does not have a final option of demanding a hearing, by INACTION, even though they may realize that the Facts alleged are accurate. This is a procedural luxury of the purest sort which should be abolished. Should any such request be made by the D.A."S office it should be deined.

The Fact's alleged in Defendants Motion were available to both sides, the Rosario Material came directly from the D.A."S office, the same Rosario Material in Defendants Motion. The fact's alleged are within the D.A. knowledge, and not from an independent source which would require time to investigate, There has been NO HINDERING done to the Prosecution by the Defendant in preparing his Opposition, nor are the facts solely within the knowledge or possession of Defendant, or based upon information and belief. For this fact the D.A. cannot ask this Court to put Defendant to his proof.

There is no issue raised, by contradiction or avoidance by the D.A."S office. Due to the fact there is no Factual

Dispute for the Court to resolve therefore there is NO NEED FOR A HEARING.

Defendant basses these assertions on People V. Gruden 42 NY²D 214, 397 NYS²D 704. Defendant asserts C.P.L. §440.10 filed on 7/20/93 the Facts Alleged along with Documentary Evidence Warrant relief sought, even though there is no Factual Dispute presented by an opposition Motion or had there been an opposition.

The Grounds for relief raised upon this Motion has not previously been determined on the merits upon a prior motion or proceeding in a Court of this State, or upon an Appeal from Judgment, or upon a prior motion or prior proceeding in a Federal Court.

WHEREFORE THE Defendant asks this HONORABLE COURT to GRANT Defendants Summary Judgment Motion on the grounds:

1) Peoples failure to serve Opposition Motion upon Defendant and Court. The D.A. has Defaulted.

2) Peoples failure to Dispute Defendants sworn Allegations of Fact, with Documentary Proof.

Defendant further request the Grounds raised for relief in Defendants C.P.L. §440.10 Motion filed 7/20/93 be GRANTED IN IT'S ENTIRETY, and that this Court grant such and other and further relief as it may deem just and proper.

SWORN TO BEFORE ME THIS

17 DAY OF August, 1993

Richard N. Johnson

NOTARY PUBLIC
RICHARD N. JOHNSON
Notary Public, State of New York
Chemung County, No. 4856291
Commission Expires April 7, 1994

Dominic M. Franza

DOMINIC M. FRANZA