



DEFENDANT’S MOTION TO VACATE HIS CONVICTION BY GUILTY PLEA ON INEFFECTIVE ASSISTANCE GROUNDS WAS PROPERLY DENIED WITHOUT A HEARING; THE TWO DISSENTERS ARGUED THE PRO SE MOTION WAS SUFFICIENT TO WARRANT A HEARING, DESPITE THE TECHNICAL DEFECTS (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined defendant’s pro se motion to vacate his conviction by guilty plea, on ineffective assistance of counsel grounds, was properly denied without a hearing. The dissenters argued defendant raised the issue sufficiently to warrant a hearing:

Defendant contends that defense counsel was ineffective because he failed to advise defendant, prior to the guilty plea, of a potentially viable affirmative defense concerning the operability of the firearm used in the robberies Defendant did not submit, however, the statutorily-required “sworn allegations” of “the existence or occurrence of facts” in support of his motion to warrant such a hearing The rule that a CPL 440.10 motion must be predicated on sworn allegations is a fundamental statutory requirement that a defendant must satisfy to be entitled to a hearing Absent sworn allegations substantiating defendant’s contentions, the court did not abuse its discretion in summarily denying the motion

Specifically, defendant did not aver in his initial motion papers that he would have rejected the favorable plea deal and insisted on proceeding to trial had he been made aware of the potentially viable affirmative defense. Inasmuch as defendant “must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial” ... , his failure to swear that he would have done so is fatal to his motion, and thus the court did not err in denying it without a hearing [People v Dogan, 2020 NY Slip Op 02021, Fourth Dept 3-20-20](#)