

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D16877
W/kmg

_____AD3d_____

Submitted - October 18, 2007

REINALDO E. RIVERA, J.P.
PETER B. SKELOS
STEVEN W. FISHER
DANIEL D. ANGIOLILLO, JJ.

2004-02869
2004-02871

DECISION & ORDER

The People, etc., respondent,
v Michael J. Guare, appellant.

(Ind. Nos. 2605/02, 3387/03)

Lynn W. L. Fahey, New York, N.Y., for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Solomon Neubort of counsel), for respondent.

Appeals by the defendant from two judgments of the Supreme Court, Kings County (Firetog, J., at plea; D'Emic, J., at sentencing), both rendered March 23, 2004, convicting him of criminal contempt in the first degree and criminal contempt in the second degree under Indictment No. 2605/2002, and assault in the second degree under Indictment No. 3387/2003, upon his pleas of guilty, and imposing sentences.

ORDERED that the judgments are affirmed.

The defendant's purported waiver of his right to appeal was not valid (*see People v Moyett*, 7 NY3d 892, 893; *People v Lopez*, 6 NY3d 248, 257) and, thus, does not preclude the defendant's challenge to his sentence, upon his conviction for assault in the second degree, as excessive. However, that sentence was not excessive (*see People v Suitte*, 90 AD2d 80).

To the extent that the defendant contends that post-release supervision should not be a part of his sentences, neither the sentencing minutes nor the order of commitment mentioned the imposition of any period of post-release supervision. Therefore, the sentences actually imposed by

November 13, 2007

Page 1.

PEOPLE v GUARE, MICHAEL J.

the court never included, and do not now include, any period of postrelease supervision (*see Hill v United States ex rel. Wampler*, 298 US 460; *People v Thompson*, 39 AD3d 572, 573; *People v Benson*, 38 AD3d 563, 564; *People v Smith*, 37 AD3d 499; *Earley v Murray*, 451 F3d 71, rehearing denied 462 F3d 147, cert denied ___ US ___ [June 25, 2007]; but see *People v Sparber*, 34 AD3d 265).

The defendant's remaining contention is unpreserved for appellate review and, in any event, without merit.

RIVERA, J.P., SKELOS, FISHER and ANGIOLILLO, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court