

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

D17077
Y/kmg

_____AD3d_____

Argued - November 8, 2007

GLORIA GOLDSTEIN, J.P.
STEVEN W. FISHER
EDWARD D. CARNI
WILLIAM E. McCARTHY, JJ.

2006-04384
2007-03503

DECISION & ORDER

The People, etc., respondent,
v Angela Marinaro, appellant.

(Ind. No. 132/05)

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 (1) a judgment of the Supreme Court, Kings County (D'Emic, J.), rendered February 16, 2006, convicting her of manslaughter in the first degree, upon her plea of guilty, and imposing sentence, and (2) a resentencing of the same court imposed April 3, 2006, sentencing her to a determinate term of imprisonment of 7½ years and a 5-year period of post-release supervision.

ORDERED that the appeal from so much of the judgment as sought review of the sentence is dismissed, as that portion of the judgment was superseded by the resentencing; and it is further,

ORDERED that the judgment is affirmed insofar as reviewed; and it is further,

ORDERED that the resentencing is modified, as a matter of discretion in the interest of justice, by reducing the period of post-release supervision from 5 years to 2½ years; as so modified, the resentencing is affirmed.

The defendant pleaded guilty to manslaughter in the first degree, with the

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understanding that she would be sentenced to a determinate term of imprisonment of 7½ years. Thereafter, the Supreme Court sentenced the defendant to a 7½-year prison term. At a subsequent resentencing proceeding, the court added a 5-year period of post-release supervision to the defendant's sentence.

Since the Supreme Court failed to advise the defendant during the plea proceeding that her sentence would include a period of post-release supervision, the defendant is entitled to vacatur of her guilty plea (*see People v Catu*, 4 NY3d 242). On appeal, however, the defendant informs this Court that she does not wish to withdraw her plea. Instead, she seeks a modification of her sentence to a 5-year term of imprisonment and a 2½-year period of post-release supervision, so as to give effect to the Supreme Court's alleged promise to impose a 7½-year sentence.

To the extent that the defendant's claim is based upon the Supreme Court's failure to advise her of the post-release supervision component of her sentence at the plea proceeding, thus preventing her from making a voluntary and intelligent choice among alternative courses of action, the proper remedy is vacatur of the defendant's guilty plea (*see People v Hill*, _____ NY3d _____ [Nov. 15, 2007] ["In that the constitutional defect lies in the plea itself and not in the resulting sentence, vacatur of the plea is the remedy for a *Catu* error"]; *see also People v Van Deusen*, 7 NY3d 744; *People v Catu*, 4 NY3d at 244, 245). "The failure to inform a defendant of the post release supervision component of a sentence does not, in and of itself, provide a basis for modifying the sentence" (*People v Housman*, 291 AD2d 665, 667; *see People v Boyce*, 12 AD3d 728, 729; *People v Vahedi*, 305 AD2d 866; *People v Lack*, 299 AD2d 872).

To the extent that the defendant's claim is based upon the Supreme Court's failure to fulfill its alleged sentencing promise (*see People v Selikoff*, 35 NY2d 227, 239, *cert denied* 419 US 1122), it is not preserved for appellate review. The principle that a promise which induces guilty plea must be honored "is not applicable where . . . the defendant's claim has not been preserved for appellate review and where the sentence actually imposed was not abusive or illegal" (*People v Lewis*, 216 AD2d 328; *see People v Ganoe*, 31 AD3d 463; *People v Ifill*, 108 AD2d 202). At the resentencing proceeding in this case, the defendant did not argue that the addition of the period of post-release supervision violated a promise made at the plea proceeding, or otherwise object to the amendment of the sentence. Nor was the sentence that was ultimately imposed abusive or illegal. Thus, the defendant is not entitled to a sentence modification to fulfill the alleged sentencing promise.

The resentence imposed was excessive to the extent indicated herein.

GOLDSTEIN, J.P., FISHER, CARNI and McCARTHY, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court