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publication in the New York Reports.

No. 205
The People &c.,
Respondent,
v.
Daniel Boyer,
Appellant.

No. 206
The People &c.,
Appellant,
v.
Equan Sanders,
Respondent.

Case No. 205:
Mark C. Davison, for appellant.
Steven M. Sharp, for respondent.

Case No. 206:
Dana Poole, for appellant.
Elon Harpaz, for respondent.

ABDUS-SALAAM, J.:

The primary issue before us is whether, for purposes of determining the sequentiality of a defendant's current and prior convictions under New York's sentence enhancement statutes, the controlling date of sentence for the defendant's prior conviction is the original date of sentence for that conviction or the date of a later resentencing which rectifies the flawed imposition of

postrelease supervision (PRS) in accordance with our decision in People v Sparber (10 NY3d 457 [2008]). We hold that, in this context, the date of sentence for a defendant's prior conviction is the original date on which the defendant received a lawful prison term upon a valid conviction for that prior crime, regardless of whether the defendant or the government seeks resentencing on that conviction to correct the error described in Sparber. Therefore, at sentencing for a more recent crime, the defendant's prior conviction qualifies as a predicate felony conviction if the original date of sentence precedes the commission of the present offense.

I

People v Boyer

Prior to 2008, defendant Daniel Boyer had several felony convictions. In his most recent prior felony case, defendant received a valid conviction for Attempted Burglary in the Second Degree in 2002, and after further proceedings not relevant to his present appeal, defendant was sentenced on that conviction to a lawful determinate prison term in 2005. Upon the imposition of that sentence, the trial court did not pronounce a mandatory PRS term (see Penal Law § 70.45 [1]), though a five-year PRS term was entered on the commitment order.

Defendant completed his prison term and started to serve a period of PRS in 2008. However, shortly after his release to PRS, defendant was arrested for committing a new

burglary, and he was indicted on charges of Grand Larceny in the Fourth Degree and Burglary in the Second Degree. Defendant entered a negotiated guilty plea to Attempted Burglary in the Second Degree (Penal Law §§ 110.00; 140.25 [2]) in exchange for a promised indeterminate prison term of from 13½ years to life. On February 18, 2009, the court adjudicated defendant a persistent violent felony offender based in part on defendant's 2002 conviction, and the court imposed the promised sentence.

Thereafter, the Department of Corrections and Community Supervision (DOCCS) notified the trial court that the court had to resentence defendant for his 2002 conviction pursuant to Correction Law § 601-d by either pronouncing a term of PRS or excising PRS from defendant's sentence upon consent of the People.¹ In November 2009, upon receiving the People's consent, the court resented defendant on his 2002 conviction by maintaining his original prison term and declining to add a PRS term to his sentence (see Penal Law § 70.85).²

¹ Correction Law § 601-d provides that, whenever DOCCS determines that the trial court did not pronounce a defendant's term of PRS at sentencing, DOCCS must notify the court of that fact, and once the court receives such notification from DOCCS, the court must hold a resentencing proceeding as outlined in Sparber (see Correction Law §§ 601-d [1]; 601-d [2]; 601-d [3]). At that resentencing, the court must either pronounce a term of PRS or, upon consent of the People, omit the PRS term from the defendant's sentence and re-impose the original determinate prison term without PRS (see Correction Law §§ 601-d [3]; 601-d [4]; Penal Law § 70.85).

² Penal Law § 70.85 states, "[F]or consideration of whether to resentence [pursuant to Correction Law § 601-d], the court

On November 24, 2009, defendant moved to vacate his sentence for his 2009 conviction. Defendant pointed out that, under Penal Law § 70.04 (1) (b) (ii), a prior conviction does not qualify as a predicate felony conviction that can enhance a defendant's sentence unless the sentence for the prior conviction was "imposed before commission of the present felony." Citing this sequentiality requirement, defendant maintained that the 2009 resentencing on his 2002 conviction shifted the date of sentence for the 2002 conviction to the date of resentencing, such that the sentence for his 2002 conviction was not imposed until after his commission of his current felony in 2008. Thus, defendant argued, his 2002 conviction no longer qualified as a predicate felony conviction, and the court had to vacate his persistent violent felony offender adjudication and resentence him as a second felony offender. The court denied defendant's motion to vacate his sentence. Defendant appealed.

The Appellate Division affirmed the judgment of conviction and sentence, as well as the trial court's order denying defendant's motion to vacate his sentence. The Appellate Division held that "the original sentencing date on the prior conviction -- as opposed to the resentencing date -- controls in

may, notwithstanding any other provision of law but only on consent of the district attorney, re-impose the originally imposed determinate sentence of imprisonment without any term of post-release supervision, which then shall be deemed a lawful sentence."

determining whether the prior conviction may be considered as a predicate in sentencing for subsequent crimes, and defendant's CPL 440.20 motion was properly denied" (see People v Boyer, 91 AD3d 1183, 1185 [3d Dept 2012]). A Judge of this Court granted defendant leave to appeal (see 19 NY3d 1024), and we now affirm. People v Sanders

Before 2007, defendant Equan Sanders had two felony convictions. In 2002, defendant was sentenced to a lawful determinate prison term for his most recent prior felony conviction for Attempted Criminal Possession of a Weapon in the Third Degree. The sentencing court did not pronounce the mandatory PRS component of defendant's sentence. Defendant served his prison term and was released to an administratively imposed term of PRS under the supervision of the Department of Parole (DOP).

About a month later, in July 2007, defendant was arrested and indicted on two counts of Criminal Possession of a Weapon in the Second Degree stemming from an incident in New York County. Defendant absconded and, about 10 months later, was involuntarily returned to New York County after his arrest in another county on unrelated charges. On July 31, 2008, DOP notified the sentencing court for defendant's 2002 conviction that it was required to resentence defendant on that conviction to the extent of either eliminating his PRS term upon consent of the People or orally pronouncing a term of PRS. The court

resentenced defendant on his 2002 conviction by maintaining the original prison term and striking the PRS term from his sentence with the People's consent.

About a year later, defendant and the People were engaged in plea negotiations with respect to the present crime committed in 2007, and the parties asked the court to specify in advance whether it would sentence defendant as a second violent felony offender or a persistent violent felony offender. Defendant argued that he was a second violent felony offender because the resentencing on his 2002 conviction caused the date of sentence for that conviction to occur after his commission of the instant crime, thus disqualifying his 2002 conviction from serving as the predicate for an enhanced sentence for his current crime under Penal Law § 70.04 (1) (b) (ii). The People responded that defendant was a persistent violent felony offender because the original date of sentence for his 2002 conviction preceded his commission of the instant crime. The court initially ruled that, if defendant pleaded guilty, he would be sentenced, as a persistent violent felony offender, to a determinate 12-year prison term because the original date of sentence for his 2002 conviction controlled for purposes of sentence enhancement. Defendant pleaded guilty with that understanding.

While defendant was awaiting sentencing, the Appellate Division, First Department issued its decision in People v Acevedo, wherein the Appellate Division determined that a

resentencing to correct a trial court's failure to orally pronounce PRS at the original sentencing on a prior conviction automatically resets the date of sentence for the prior conviction under the sentence enhancement statutes (see People v Acevedo, 75 AD3d 255, 258-260 [1st Dept 2010], rev'd, 17 NY3d 297 [2011]). Consequently, at sentencing in this case, the court effectively reversed its previous determination and adjudicated defendant a second violent felony offender, reasoning that, under the First Department's Acevedo decision, the resentencing on defendant's 2002 conviction reset the date of sentence for that conviction and precluded its use as a predicate felony conviction. The court sentenced defendant, as a second violent felony offender, to a seven-year determinate prison term, to be followed by five years of PRS. The People appealed the judgment of conviction and sentence. In the interim, we reversed the First Department's decision in Acevedo (see Acevedo, 17 NY3d at 302-305).

The Appellate Division affirmed the judgment of conviction and sentence (see People v Sanders, 99 AD3d 575, 575-576 [1st Dept 2012]). Noting that defendant's resentence had been imposed after his commission of the current offense, the court held that, "[i]n this situation, the resentencing date controls whether the conviction meets the sequentiality requirement for sentencing as a persistent violent felony offender" (id. at 575-576). The court cited People v Butler (88

AD3d 470 [1st Dept 2011]), wherein the court had held that "where, in the normal course, the government seeks resentencing of a prior conviction and the sentence is vacated for failure to pronounce a term of PRS[,] the resentencing date should be considered in determining whether the prior conviction meets the sequentiality requirement of the predicate felony offender statutes" (Butler, 88 AD3d at 473).

In a concurring opinion, Justice Sweeny, joined by Justice Gonzalez, stated that he felt constrained by Butler to affirm the sentencing court's decision (see Sanders, 99 AD3d at 576 [Sweeny, J., concurring]). Justice Sweeny noted, however, that the Second Department had concluded that "it is irrelevant whether the defendant or the government brought the application for a resentence" under Sparber and that "the original sentence date is always determinative as the predicate for persistent violent felony offender status" (id.). Given that this Court's decision in Acevedo "did not clarify this question," Justice Sweeny "look[ed] to the Court of Appeals for guidance on this crucial sentencing issue" (id.). Justice Sweeny granted the People leave to appeal, and we now reverse.

II

In both cases, the People contend that, because the court at a resentencing pursuant to Sparber and Correction Law § 601-d merely corrects its prior clerical error in failing to pronounce a term of PRS and does not otherwise disturb the

defendant's sentence or conviction, a Sparber resentencing does not alter the sequentiality of the defendant's conviction in relation to any subsequently committed crime for purposes of the sentence enhancement statutes.

Defendants respond that, at a Sparber resentencing, the court vacates the defendant's prior illegal sentence and replaces it with a lawful sentence that includes PRS. Furthermore, in defendants' view, because PRS is an inseparable component of the defendant's sentence, the Sparber resentencing necessarily vacates the defendant's entire original unlawful sentence and replaces it with a completely new lawful sentence, thus resetting the date of all components of the defendant's sentence. And so, the argument goes, if the defendant commits another crime after the original sentence date for his or her prior conviction but before the Sparber resentencing on the prior conviction, the prior conviction cannot serve as a predicate for an enhanced sentence for the new crime because the new offense was committed before the date of resentence for the prior conviction. Our precedent compels us to reject defendants' arguments and conclude that the controlling date of sentence for a defendant's prior conviction is the original date on which the defendant received a lawful prison term pursuant to a valid conviction for that prior crime.

In Sparber, the defendants did not receive oral pronouncement of their mandatory PRS terms at sentencing, and

they asked us to remedy that error by vacating any PRS terms that were not properly pronounced (see Sparber, 10 NY3d at 471). We rejected the defendants' request for such broad relief. Instead, we provided the defendants with the modest remedy of a resentencing meant solely to correct the discrete "procedural error, akin to a misstatement or clerical error," occasioned by a sentencing judge's failure to orally pronounce a term of PRS (id. at 472). In applying this remedy to the defendants' sentences in Sparber, we made a passing statement that we were "vacat[ing]" the defendants' original sentences (id. at 472).

However, in People v Lingle (16 NY3d 621 [2011]), we clarified that a vacatur of a defendant's entire original sentence "is clearly not what we meant" by including the term "vacate" in our Sparber decision (id. at 634). In fact, in Lingle, we held that, because "resentencing to set right the flawed imposition of PRS at the original sentencing is not a plenary proceeding" but rather a discrete proceeding designed to correct the "clerical error" at issue in Sparber, a Sparber resentencing "is limited to remedying this specific procedural error" and does not permit the resentencing court to alter the defendant's prison term or otherwise change any aspect of his or her sentence (id. at 634-635). Thus, taken together, Sparber and Lingle clearly establish that a resentencing to correct the flawed imposition of PRS does not vacate the original sentence and replace it with an entirely new sentence, but instead merely

corrects a clerical error and leaves the original sentence, along with the date of that sentence, undisturbed.

Applying that premise in People v Acevedo, we considered the interplay between a Sparber resentencing on a defendant's prior conviction and the recidivist sentencing laws' sequentiality requirement (see Penal Law §§ 70.04 [1] [b] [ii]; 70.06 [1] [b] [ii]; 70.10 [1] [b] [ii]). An overwhelming majority of six Judges of this Court agreed that a Sparber resentencing does not automatically reset the date of sentence for a prior conviction and thereby disable that conviction's use as a predicate felony conviction. Three of those Judges concluded that, because the defendants had initiated resentencing purely as a contrivance to prevent the courts below from using their prior convictions as predicates to enhance the sentences for their current convictions, defendants' impermissible gamesmanship could not thwart otherwise valid predicate felony offender adjudications by resetting the dates of their sentences for their prior convictions (see Acevedo, 17 NY3d at 302-303 [Lippman, C.J., concurring]). Those Judges left open the question of whether a Sparber resentencing initiated by the State could alter the sequentiality of a prior conviction for sentence enhancement purposes (see id. at 303). The three other Judges in the majority would have found that, regardless of whether the State or the defendant initiates resentencing, the Sparber resentencing on the defendant's prior conviction does not reset

the date of sentence "because the resentencing court[] lack[s] the power to reconsider either the conviction or the incarceration component of the original sentence," thereby leaving the original sentence and the date thereof essentially unchanged (id. at 305 [Pigott J., concurring]).

In this case, we must decide the question left open by Acevedo, namely whether a Sparber resentencing initiated by the State, as opposed to the defendant, resets the date of sentence for a felony conviction such that it may no longer serve as a predicate felony conviction in relation to a subsequently committed crime. Under Sparber and Lingle, the answer must be that, regardless of which party commences the proceeding, a Sparber resentencing cannot alter the original date of sentence. Given that the resentencing court cannot disturb the defendant's prison sentence for the prior conviction, the original sentence is not a legal nullity vacated by the pronouncement of PRS. Rather, the conviction and sentence imposed on the original sentence date still stand, and the sentence is simply modified to the limited extent of pronouncing the PRS term required by law. In other words, irrespective of any "resentence" pursuant to Sparber, the original "[s]entence" for "such prior conviction" remains valid, and that original sentence was "imposed before commission of the present felony," thereby qualifying the prior conviction as a predicate felony conviction for purposes of sentencing on the current crime (Penal Law § 70.04 [1] [b] [ii];

see also Penal Law §§ 70.06 [1] [b] [ii]; 70.10 [1] [b] [ii]).³

Importantly, the rule that the original sentence date controls for purposes of a conviction's qualification as a predicate felony conviction serves the public policy underlying the recidivist sentencing statutes. As we have previously observed, those laws are meant to enhance sentences for defendants who refuse to reform after receiving a valid conviction for a crime and hearing the court pronounce sentence (see People v Morse, 62 NY2d 205, 222 [1984]). Under this rationale, a defendant who was sentenced for a prior conviction and then commits a new crime plainly deserves enhanced punishment for the new crime because the defendant remains unchastened after the court's pronouncement of the sentence for the prior conviction, and the defendant's heightened culpability cannot be mitigated in any way by a subsequent Sparber resentencing. Under those circumstances, it would make no sense to set the date of sentence for the defendant's prior conviction to the date of the Sparber resentencing and thereby prevent the court from enhancing the defendant's sentence for the current crime.

Moreover, in the sentence enhancement context, a rule premised on the original date of sentence for a prior conviction

³ In reaching this conclusion regarding the significance of a Sparber resentencing under the sequentiality requirement for recidivist sentencing, we do not opine on the relationship between the recidivist sentencing statutes and any other form of resentencing.

promotes clarity and fairness. Under this bright line rule, the defendant and the People alike can easily discern the date of sentence for a prior conviction and know with certainty whether the conviction can serve to enhance the defendant's sentence. Additionally, the rule is fair because it does not favor one party over the other. The People will not be able to rely on the later date of resentencing to bring an otherwise ineligible decades-old conviction within the 10-year look-back period for predicate felony offender adjudication under Penal Law § 70.04 (1) (b) (iv), and the defendant will not be able to avoid a well-deserved sentence enhancement by claiming that the Sparber resentencing upset the sequentiality of his or her predicate felony conviction. Both sides will have to abide by a clear, even-handed rule.

Under this framework, both defendants here should have been sentenced as persistent violent felony offenders because the dates of sentence for their prior convictions were not reset by Sparber resentencings on those convictions, and therefore those convictions were valid predicate felony convictions that could be used to sentence defendants as persistent violent felony offenders for their current crimes. Thus, County Court in Boyer properly sentenced defendant as a persistent violent felony offender, whereas Supreme Court in Sanders erred in refusing to do the same.

Finally, we reject defendant Boyer's challenge to the

validity of his guilty plea based on the court's failure to inform him that his sentence would run consecutively to a prior undischarged term (see People v Belliard, 20 NY3d 381, 388 [2013]).

Accordingly, in People v Boyer, the order of the Appellate Division should be affirmed. In People v Sanders, the order of the Appellate Division should be reversed and the matter remitted to Supreme Court for resentencing in accordance with this opinion.

People v Daniel Boyer
People v Equan Sanders

No. 205 & 206

RIVERA, J.(dissenting) :

The majority interprets our law to permit the government to rely on a sentence that is illegal under People v Sparber (10 NY3d 457 [2008]) for purposes of the sequentiality requirement in New York's sentencing enhancement statutes. In doing so, the majority gives legal significance to an unlawful sentence where such sentence is obviated by a statutorily prescribed resentencing process. This is an untenable interpretation of the law. I dissent.

The majority reads Sparber and People v Lingle (16 NY3d 621 [2011]) as compelling its conclusion that "a resentencing to correct the flawed imposition of PRS does not vacate the original sentence and replace it with an entirely new sentence, but instead merely corrects a clerical error and leaves the original sentence, along with the date of that sentence, undisturbed" (majority op at 11). This conclusion is incorrect and unsupported by our precedent.

We have previously stated that a sentence with a

"flawed imposition of PRS" is an illegal sentence (People v Brinson, 21 NY3d 490, 495-496 [2013]; Lingle, 16 NY3d at 630; People v Williams, 14 NY3d 198, 206, 217 [2010]; Sparber, 10 NY3d at 469-471). The proper cure for this defect is for a court to resentence the defendant and impose all the elements of the punishment mandated by law. (Sparber, 10 NY3d at 469-470). As we stated in Sparber, "[t]he sole remedy for a procedural error [such as failing to pronounce a mandatory term of PRS] is to vacate the sentence and remit for a resentencing hearing" (id. at 471).

Two statutory procedures provide for resentencing to address these Sparber errors. Correction Law § 601-d provides a procedural vehicle for the Department of Corrections and Community Supervision to commence a resentencing hearing (see People v Velez, 19 NY3d 642, 645-646 [2012]; People v Acevedo, 17 NY3d 297, 303 [2011]; Williams, 14 NY3d at 207-208). Under Penal Law § 70.85, a court may resentence a defendant, with the People's consent, to a determinate sentence without PRS, which "shall be deemed a lawful sentence" (Penal Law § 70.85). In either case, a court replaces an illegal sentence with a sentence that is in compliance with New York's criminal laws. As we stated in People v Acevedo (17 NY3d 297, 303 [2011]), Sparber resentencing ensures "that a sentence in connection with which PRS is required will in fact *legally impose* that prescribed element of punishment" (id. [emphasis added]).

Rather than accept that we meant what we said when we concluded that failure to impose PRS results in an illegal sentence which is cured by vacating the sentence and resentencing the defendant, the majority concludes that the illegal sentence retains a certain validity and may be considered for sequentiality purposes under the sentencing enhancement statutes. This is so, according to the majority, because the underlying illegality is clerical in nature and can be cured in a non-plenary proceeding (majority op at 10-11). Whether we call it a "clerical error" or a "procedural error," the failure to impose PRS rendered the original sentence illegal (see Williams, 14 NY3d at 217). There is no way around this conclusion, just as there is no way of avoiding that the method by which this error is cured cannot retroactively make an illegal sentence into a valid one.

Our decisions in Sparber and Lingle do not ignore the fundamental sentencing structure of our criminal law, which recognizes that there can be only one lawful sentence imposed for a conviction (United States v DiFrancesco, 449 US 117, 129 [1980]; People v Biggs, 1 NY3d 225, 228-229 [2003]). It follows that a court corrects an illegal sentence by vacating that sentence and imposing a new one, not superimposing a second, simultaneous sentence over the first.

The majority's policy arguments in support of its decision are also unpersuasive. While the policy behind

enhancing punishment for certain recidivist offenders is significant, the sentencing enhancement statutes can only apply to sentences that conform with the Penal Law, not to illegal sentences. The Penal Law does not impose piecemeal sentences, and no provision permits or otherwise acknowledges what the majority allows: an opportunity for the People to relate a lawful sentence back to an unlawful one for purposes of sequencing an enhanced sentence.

The majority states its preference for a bright line rule, which will promote clarity and fairness, but there is no logical basis for finding that the majority's rule is preferable, or any better at promoting a definite answer to the question posed by these appeals. The original unlawful sentence date and the resentencing date are equally easy to determine. A rule that recognizes that the lawful sentence is the one imposed in accordance with all of the statutory elements of the Penal Law, and that only a lawful sentence counts under the enhancement statutes, is just as clear, if not clearer, as one that draws the line at the date when the court imposed the unlawful sentence. Certainly, if we are to pronounce a rule, it should be grounded in a sentence intended to meet all the legal requirements, not one that is statutorily defective.

I would reverse the Appellate Division's order in Boyer and affirm in Sanders.

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For Case No. 205: Order affirmed. Opinion by Judge Abdus-Salaam. Judges Graffeo, Read, Smith and Pigott concur. Judge Rivera dissents and votes to reverse in an opinion in which Chief Judge Lippman concurs.

For Case No. 206: Order reversed and case remitted to Supreme Court, New York County, for resentencing. Opinion by Judge Abdus-Salaam. Judges Graffeo, Read, Smith and Pigott concur. Judge Rivera dissents and votes to affirm in an opinion in which Chief Judge Lippman concurs.

Decided November 14, 2013