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publication in the New York Reports.

No. 84 SSM 27
The People &c.,
Respondent,
v.
Katisha Beaty,
Appellant.

Submitted by Harvey L. Greenberg, for appellant.
Submitted by Donna A. Milling, for respondent.

PER CURIAM:

On November 13, 2000, defendant pleaded guilty to first-degree manslaughter for the shooting of Anton Bridgers on March 18, 2000. She was sentenced to a determinate sentence of 23 years incarceration. No mention of post-release supervision (PRS) was ever made to defendant, either during the plea

proceedings or at sentencing. After her incarceration, the Department of Correctional Services added a five-year PRS term to her certificate of commitment. The first time defendant learned of the PRS period was in August 2002, when her attorney wrote defendant to inform her. That attorney did not advise defendant as to whether she could raise an issue concerning the legality of the added PRS term on her then-pending appeal. Defendant's conviction was unanimously affirmed (303 AD2d 965 [4th Dept 2003], lv denied 100 NY2d 559).

In September 2009, following this Court's decision in People v Catu (4 NY3d 242 [2005]), defendant filed a *pro se* motion pursuant to CPL 440.10, claiming, among other things, that her plea was defective and thus her sentence was illegal because she was never informed during her plea or sentencing proceeding that she would be required to serve an additional term of five years PRS. She sought vacatur of both her plea and sentence. The People opposed the motion, but conceded that the sentence was illegal. The People consented, pursuant to the then-recently enacted Penal Law § 70.85, to the court re-sentencing defendant to the original determinate sentence of 23 years incarceration without a term of PRS.

Defendant timely appealed the resentence and was assigned counsel, who reviewed the file and informed defendant of our decision in People v Boyd (12 NY3d 390 [2009]), where this court upheld defendant Boyd's sentence under Penal Law § 70.85,

but left open the constitutionality of that statute, stating that it should be decided by the sentencing court in the first instance. Despite this open issue, counsel filed a motion pursuant to People v Crawford (71 AD2d 38 [1979])¹ arguing that there were no non-frivolous issues to be raised on defendant's behalf and asking to be relieved as counsel. Defendant filed a pro se supplemental brief arguing that her sentence was illegal, and that she was denied effective assistance of counsel. The Appellate Division granted counsel's motion and affirmed the resentence, without addressing defendant's *pro se* contentions (96 AD3d 1515 [2012]).

The rule in Crawford permits appellate counsel to withdraw from representing a defendant if the appeal is "wholly frivolous" because a defendant whose appeal is frivolous has no right to have an advocate make his case to the appellate court (71 AD2d 38, 38 [1979]).

Defendant argues that her appeal was not wholly frivolous because she had two claims: (1) the claim that Penal Law § 70.85 is unconstitutional as applied to her case, and (2) that defendant was denied effective assistance of counsel at every level. We agree with defendant that the Appellate Division erred in granting the Crawford motion. Without expressing any opinion on the ultimate merits, at the time defendant's appellate counsel filed his Crawford motion, the claims to that court were

¹See also Anders v California, 386 US 738 (1967).

not wholly frivolous and, therefore, the court should have denied appellate counsel's motion. As a result, a reversal and remittal for a de novo appeal is warranted (see People v Stokes, 95 NY2d 633 [2001]; see generally People v Pignataro, __ NY3d __ , Slip Op 08286 [12/12/2013]; People v Catu, 4 NY3d 242).

The order of the Appellate Division should be reversed and the case remitted to the Appellate Division for further proceedings in accordance with this opinion.

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On review of submissions pursuant to section 500.11 of the Rules, order reversed and case remitted to the Appellate Division, Fourth Department, for further proceedings in accordance with the opinion herein. Opinion Per Curiam. Chief Judge Lippman and Judges Graffeo, Read, Smith, Pigott, Rivera and Abdus-Salaam concur.

Decided January 16, 2014