

M E M O R A N D U M

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART K-TRP

THE PEOPLE OF THE STATE OF NEW YORK	:	BY: BARRY KRON, AJSC
	:	
-against-	:	DATED: JULY 28, 2006
	:	
PATRICK RYAN,	:	
	:	
Defendant.	:	IND. NO.: N10386/94
	:	4110-98

Defendant has moved for reargument¹ of his prior motion for an order directing that his Certificate of Commitment be amended to reflect a post release supervision of two and one half years, that the Office of the Division of Parole be directed to withdraw its citation for a violation of parole, and that he be released from custody. Defendant argues that because the sentencing court indicated that his post release supervision would be two and one half years as part of his plea, the imposition of the five year parole release supervision by the New York State Department of

¹A motion for reargument is addressed to the sound discretion of the court that decided the prior motion, and may be granted upon a showing that the court overlooked or misapprehended facts or law or for some other reason mistakenly arrived at its earlier decision (CPL § 2221(d); see Long v Long, 251 A.D.2d 631(2d Dept. 1998)).

Correctional Services and the Division of Parole was improper.

The People, approximately five years and five months after defendant's sentence commenced², now oppose defendant's application, contending that he is not entitled to the requested relief because it would result in an illegal sentence, that the Second Circuit case of Earley v. Murray, cited by defendant is not binding on this court and that the only appropriate remedy would be for defendant to move to vacate his conviction and be restored to his pre-plea status.

The People never moved by any prior application to have the sentencing error rectified, although by statute that is the appropriate remedy (see CPL § 440.40). Initially, the People did not oppose defendant's current application before this court to have his Sentence and Commitment under indictment 4110/98 amended to reflect the two and a half years post relief parole supervision(see People's affirmation at 5).

FACTS/PROCEDURAL HISTORY

Defendant was indicted under Indictment 4110/98 for Criminal Possession of a Weapon in the Second Degree, Criminal Possession of a Weapon in the Third Degree (3 counts), Criminal Possession of a Weapon in the Fourth Degree, Unlawful Possession of a Knife,

²Defendant was sentenced on February 28, 2001 (Rotker,J.).

Resisting Arrest, Assault in the Second Degree (2 counts), and Reckless Endangerment in the First Degree. On February 5, 2001, he pled guilty to all of the counts in the indictment. On February 28, 2001, defendant was sentenced as a second felony offender to an aggregate concurrent determinate prison term of five years, to be followed by two and one half years of post release supervision. As part of the plea agreement defendant also pled guilty to a violation of probation under Indictment SCI-N13086/94. He received an indeterminate sentence of one to three years to run concurrent with the sentence under Indictment 4110/98. The Court records reflect that no period of parole release supervision was endorsed on defendant's Sentence and Commitment form.

According to the Division of Parole Certificate of Release submitted by defendant, defendant was informed that his parole supervision would extend to 2008 when he was released in April of 2003. Defendant did not appeal his conviction.

Subsequently, defendant was arrested for violations of parole occurring between December 15, 2005 and February 6, 2006. According to the documents submitted by defendant, the New York State Division of Parole imposed a five year term of post release supervision upon his release from incarceration. Defendant has a current pending case, Queens County Indictment 01807/2006.

On April 26, 2006, this Court denied defendant's motion for an order amending his Certificate of Commitment to include a term of

post release supervision of two and one half years. This Court stated that because defendant was a second felony offender convicted of a violent felony, the law mandated that his post release supervision must be five years for his conviction under Indictment 4110/98. No formal written order was issued, the court's decision being reflected solely in the minutes of the court proceedings. The court now grants reargument.

DECISION

Penal Law § 70.45(2) states that the post release supervision period for a determinate sentence shall be five years. In the case of a first time felony offender a court may specify a shorter period of post release supervision of not less than two and a half years upon a conviction of a class B or class C violent felony. In the instant case because defendant was a second felony offender, he was subject to a mandatory post release supervision period of five years. Nonetheless, at sentencing the court indicated that the period of post release supervision on his conviction was two and one half years (see Sentencing Minutes, dated February 28, 2001, annexed as defendant's Exhibit "A").

Recently, in Earley v. Murray, (451 F.3d 71(2006)), the United States Court of Appeals for the Second Circuit held that where a Court, the attorneys and the defendant were not aware of the law

requiring post release supervision (hereinafter "PRS") at the time of the plea and sentence, the New York Department of Correctional Services could not impose a five year PRS term upon defendant without authorization from the Court (Earley, *supra*). Specifically, the Earley Court stated that the only cognizable sentence was the one imposed by the Judge, and any alteration made to the sentence, unless made by the judge at a subsequent proceeding, is of no effect (Earley, *supra*). "The sentence imposed by the sentencing judge is controlling; it is this sentence that constitutes the court's judgment and authorizes custody of a defendant" (Earley, *supra* citing Hill v. United States ex rel. Wampler, 298 U.S. 460).³

In this case, the Court at sentencing specifically indicated that the period of PRS was to be two and one half years. At the time of sentence the parties were apparently unaware that the law required that defendant receive five years PRS because he was a second felony offender. After the sentence was imposed, however, the People never moved pursuant to CPL § 440.40(1) to have the illegal sentence vacated and the defendant correctly sentenced to the five year term of PRS.⁴

³In Wampler, the court clerk added a condition at sentencing that the defendant remain in custody until his fine was paid. The Supreme Court struck this condition, holding that the clerk did not have the power to add it to the court's sentence.

⁴Pursuant to CPL § 440.40 the People may move by motion to set aside a sentence: "1. At any time not more than one year

Although the court itself is not restricted by this one year time limit to correct errors, the court's inherent power to correct a sentence more than one year after its imposition is limited to situations where a judge misspoke when imposing sentence, or to merely correct clerical errors (People v. Moss, 234 A.D.2d 610 [2d Dept. 1996]). Here, it is pellucidly clear from the record that the intent of the court was to impose a period of two and one half years PRS, albeit incorrectly.

The New York State Court of Appeals has held that **prior** to imposing a sentence the court may use its inherent authority to vacate an illegally accepted plea (People v. Moquin, 77 N.Y.2d 449 (1991) *citing* People v. Bartley, 47 N.Y.2d 965; see also People v. Wright, 56 N.Y.2d 613; People v. Minaya, 54 N.Y.2d 360) (emphasis added). The court may also vacate a final judgment on the grounds of fraud or misrepresentation, absent a specific constitutional impediment (see Moquin, *supra* at 452 (citations omitted)). Again, once a sentence has commenced the court may correct clerical errors or errors where it misspoke (Id.). The court may not vacate a plea after sentence has been imposed to remedy a "substantive legal error in the acceptance of the plea" once a defendant has commenced serving his sentence. "A court which has

after the entry of a judgment, . . ., upon the ground that it was invalid as a matter of law."

accepted a plea in violation of the Criminal Procedure Law may not vacate the illegal plea and reinstate the original charges after sentence has commenced" (Kisloff v. Covington, 73 N.Y.2d 445, 450).

This case is distinguishable from a situation where the court does not advise a defendant of any PRS as part of the sentence (see e.g. People v. Bell, 305 A.D.2d 694 (2d Dept. 2003)). In such a situation, the defendant must be given an opportunity to withdraw the plea because such plea is not a knowing, intelligent and voluntary plea. In People v. Catu, 4 N.Y.3d 242(2005), the Court of Appeals held that "because a defendant pleading guilty to a determinate sentence must be aware of the post-release supervision component of that sentence in order to knowingly, voluntarily and intelligently choose among the alternative courses of action, the failure of a court to advise of post release supervision requires reversal of the conviction" (Id. at 245; see also, People v. Weekes, 28 A.D.3d 499(2d Dept. 2006). Here, defendant was aware that PRS was part of his plea; in fact he was told that the PRS period was two and one half years. He relied upon this representation as part of his decision when entering into the plea. In a situation where a defendant is moving to strike PRS in its entirety because of a lack of awareness of same, the proper remedy would be to afford the defendant an opportunity to withdraw his plea because the appropriate period of PRS will be imposed as part of the sentence

(see Weekes, supra). Defendant herein is not moving to withdraw his plea because he was unaware of post release supervision; he is moving to enforce the negotiated disposition. To reemphasize, only a judge has the legal right to impose sentence. A Department of Correction clerk is unauthorized to unilaterally amend a sentence imposed by a sentencing judge.

Under these circumstances, the defendant is entitled to enforcement of the sentence imposed by the court which included a two and one half year term of PRS(Earley v. Murray, supra). At this juncture, defendant has served his sentence. To offer that he be given the opportunity to vacate the judgment and be placed in a pre-plea status, as suggested by the People, when they failed to move to correct the error within one year as mandated by statute, and when he has fully served the determinate part of his sentence, would result in a manifest injustice. It is thus clear that defendant has "detrimentally relied upon the illegal sentence in a way that could not be rectified by restoring him to his pre-plea status. . . ." (People v. DeValle, 94 N.Y.2d 870).

While the Court recognizes that the Earley decision is not technically binding on this Court (People v. Kin Kan, 78 N.Y.2d 54, 59-60 (1991)), it is still a significant, persuasive authority that the Court has considered. Although a divergence of opinion may exist between state law and federal law as to what consequences are the appropriate remedy when no period of PRS is imposed upon a

defendant and the People fail to initiate a challenge within one year, this Court's ruling is limited to the fact specific situation that exists in this case wherein a period of PRS was imposed, albeit in an erroneous fashion. Thus, the legal conundrum that exists as to the consequences of a complete failure to advise a defendant of PRS need not be definitively resolved within the present fact situation.⁵

Accordingly, defendant's motion is granted and the Certificate of Commitment is amended to include a period of two and one half years of parole release supervision.

Any charges arising from subsequent criminal behavior defendant has been indicted for may proceed on their individual merits.

Based upon the foregoing, the motion to amend the Certificate

⁵A line of New York State Appellate Division, Third Department, cases holds that the defendant must be given an opportunity to withdraw a plea if the defendant is not advised of the mandatory PRS that attaches to the sentence (see People v. Cass, 301 A.D.2d 681 (3d Dept. 2003); People v. Rawdon, 296 A.D.2d 599 (3d Dept. 2002); People v. Cooney, 290 A.D.2d 727 (3d Dept. 2002); People v. Yekel, 288 A.D.2d 762 (3d Dept. 2001)). Thus, in the Third Department, a defendant will not be able to strike the period of PRS, but will only be able to withdraw the plea if he/she chooses.

Under federal law, as evinced by the Earley case, *supra*, if a defendant is not advised of PRS, the sentence will not be increased to reflect the mandatory period of PRS; nor will a defendant be required to seek to vacate the plea. Therefore, the sentence is enforced without the PRS and it will remain the same without change or addition of the PRS, unless of course, a proper motion is made by the People pursuant to CPL § 440.40.

of Commitment is granted.

Order entered accordingly.

The Clerk of the Court is directed to forward a copy of this decision and order to counsel for the defendant, the District

Attorney, the New York State Department of Correctional Services and the New York State Division of Parole.

BARRY KRON, A.J.S.C.