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Decided on April 28, 2008

Supreme Court, Queens County

The People of the State of New York

against

John Prendergast, Defendant

2367/01

The People are represented by Assistant District Attorney Anastasia Spanakos of the Queens District Attorney's Office. The defendant is represented by David W. Guy, Esq.

Stephen A. Knopf, J.

The People have filed a motion with this Court seeking an order of this Court permitting resentencing of the defendant and imposing, in accordance with Penal Law §70.45, a five-year period of post-release supervision and to include the five year period of post-release supervision on the defendant's commitment order. In addition, the People have requested that this Court appoint the defendant counsel to address this application, (which indeed, has been previously done), have the defendant produced before this Court, have this Court verbally pronounce the post-release supervision part of the defendant's sentence and subscribe the post-release supervision on defendant's commitment order. The People also ask that the defendant's earlier sentence of incarceration not be disturbed. The defendant opposes the People's motion contending that any attempt to resentence him to an increased sentence would be illegal and that the People are statutorily barred from seeking this relief pursuant to CPL §440.40 (1) arguing that this motion by the People is untimely since it has been more than one year since defendant's sentencing.

In this case, the defendant was charged in a two-count indictment with the crimes of robbery in the first degree and criminal possession of a weapon in the fourth degree. These charges [*2]relate to an incident that took place on June 25, 2001.

The defendant proceeded to trial before the Hon. Stanley Katz, J.S.C. and a jury. On December 10, 2002, the defendant was found guilty of robbery in the first degree and criminal possession of a weapon in the fourth degree. On January 6, 2003, the defendant was sentenced, as a second felony offender, to a determinate term of fifteen years on the robbery count and one year on the weapons possession count. The pronounced sentence did not include a term of post-release supervision; nor was it added to the defendant's commitment card.

The defendant proceeded to appeal this conviction. The only claims raised by the defendant was that the People improperly questioned his alibi witness and that the trial court failed to provide the jury with a curative instruction. The People opposed the defendant's claims, arguing they were inappropriate for appellate review.

On March 7, 2006, the Appellate Division, Second Department, affirmed the defendant's conviction. *People v Prendergast*, 27 AD3d 487 (2d Dept. 2006).

On March 15, 2006, the defendant sought leave to appeal this conviction to the Court of Appeals. The People opposed the defendant's application. The defendant's application for leave was subsequently denied. *People v Prendergast*, 6 NY3d 851 (2006).

On September 19, 2006, the defendant filed a petition in the United States District Court for the Eastern District of New York for a writ of habeas corpus. The defendant specifically argued that he was denied a fair trial when the prosecutor cross-examined his alibi witness at the grand jury hearing and at his pre-trial suppression hearing, and that the Court failed to alleviate the prejudice caused by the prosecutor's questions. The People opposed the defendant's petition, claiming the defendant's claims were procedurally barred from review. In March of 2007, the defendant submitted a reply to the People's response. In July of 2007, the defendant submitted a letter requesting a stay of these proceedings to allow him the opportunity to exhaust a new issue that he would later seek to add to his petition. Specifically, the defendant attached an Article 78 petition he had recently filed, whereby he moved to remove from his sentence a five year period of post-release supervision. In his Article 78 petition, the defendant sought this relief because the five year post-release supervision was imposed by the New York State Department of Correctional Services (hereinafter DOCS) and was not pronounced by the sentencing judge.

On August 23, 2007, the district Court granted the defendant's request for a stay, and ordered the People to address this new issue. On September 13, 2007, the People responded, requesting that the district court not consider the defendant's newest sentencing claim, and the newly raised ineffective assistance of counsel [*3]claim.

On September 14, 2007, the defendant moved pro se, in the Appellate Division for a writ of error coram nobis. The defendant argued that his appellate counsel was ineffective because he failed to raise the error of challenging jurors' outside of the defendant's presence. The People opposed the defendant's application. On December 26, 2007, the Appellate Division, Second Department, denied the defendant's *coram nobis* application __AD3d__, 2007 NY Slip Op. 10557, (2d Dept December 27,2007).

In April 2007, the defendant filed an Article 78 petition proceeding against DOCS challenging its "addition" of a five-year period of post-release supervision to the sentence imposed by the court. The Attorney General opposed the defendant's application. On November 5, 2007, the defendant's Article 78 petition was denied. Following the Appellate Division, Third Department precedent, the Albany Supreme Court held that the imposition of five years of post-release supervision was not improper since the imposition of post-release supervision is imposed by law and the trial court did not have any discretion to shorten and eliminate that period of supervision. The defendant appealed this decision to the Appellate Division, Third Department. This appeal is currently pending.

It is clear, based on statutory and current case precedent, that the defendant must be produced before the sentencing court for the purpose of amending defendant's prior sentence to impose and include the mandatory statutory five year period of post-release supervision. While this issue is now pending before this state's Court of Appeals, based on an conflicting holdings of the appellate courts, the position of the Appellate Division, Second Department is clear.

The New York State Penal Law mandates the inclusion of post-release supervision as it applies to offenses committed on or after September 1, 1998. Penal Law §70.45 (1) provides, in sum and substance, that a determinate sentence must include a term of post-release supervision. A determinate sentence without post-release supervision would be illegal under the circumstances of this case. See, *People v Bell*, 305 AD2d 694 (2d Dept 2003). If the defendant's sentence has no port-release supervision portion, it does not conform to the statute. As such, this Court is empowered to correct it. See, *People v Richardson*, 100 NY2d 847 (2003); see, also *People v DeValle*, 94 NY2d 870 (2000).

The current law in the Appellate Division, Second Department on this issue is that where the sentence has not been pronounced by a judge, it cannot be ministerially corrected by a clerk or by the Correction Department. The Appellate Division, Second Department has specifically held that where the sentencing minutes and the commitment order are silent as to the post-release supervision, the "...sentence actually imposed by the court never included, and does not now include, any period of post-release supervision...". *People [*4]v Benson*, 38 AD3d 563 , 564 (2d Dept 2007) see, also *People v Thompson*, 39 AD3d 572 , 573 (2d Dept 2007). Furthermore, the Appellate Division, Second Department has firmly held that a commitment order signed by the court clerk, but not the judge, where there is a notation of post-release supervision, is inadequate. See, *People v Duncan*, 42 AD3d 470 (2d Dept 2007).

This Court notes that the Appellate Division, First Department finds differently on this issue; holding that an entry on the commitment card ordering post-release supervision, where not pronounced by a court, is still legally sufficient. See, *People v Lingle*, 34 AD3d 287 (1st Dept 2006), lv granted 9 NY3d 877 (2007). By contrast, the Third Department, reversing its earlier line of thinking, now holds that only a trial court can impose or correct a sentence to include post-release supervision. See, *Matter of Dreher v Goord*, 46 AD3d 1261 , (3rd Dept 2007). This Court notes that the United States Court of Appeals for the Second Circuit has held that the imposition of post-release supervision is a judicial function, and imposition by the Department of Correction is invalid. See, *Earley v Murray*, 451 F3d 71 (2d Cir.) reh'g denied, 462 F3d 147

(2006). Yet, in the same decision, the Earley court held that: "Our ruling is not intended to preclude the state from moving in the New York courts to modify Earley's sentence to include the mandatory PRS term." Earley at 77.

As to the defendant's contention that the People's application is untimely, this Court does not agree. It is not this Court's intention to totally set aside defendant's original sentence as invalid as a matter of law, but rather, to amend such sentence to include the mandatory period of post-release supervision that was omitted from the original sentence. This Court rejects defendant's argument that such amendment would constitute an increased illegal sentence.

Accordingly, it is the conclusion of this Court that it has the inherent authority to amend a sentence that does not include the mandatory period of post-release supervision, and that the state of the law, as to this issue, is that the correction must be made by the sentencing judge in the presence of the defendant to be sentenced.

As such, this Court directs that the defendant be brought before this Court to amend his sentence to include the mandatory provision of a five-year period of post-release supervision in his sentence. The defendant's sentence is to otherwise remain undisturbed. At the time of the amended sentence, this Court will subscribe the sentence to the defendant's commitment card.

The foregoing constitutes the order, opinion and decision of this court.

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STEPHEN A. KNOPF, J.S.C.