

SUPREME COURT OF THE STATE OF NEW YORK  
CRIMINAL TERM: PART K-TRP

P R E S E N T: HON. BARRY KRON,  
Judge.

-----X  
THE PEOPLE OF THE STATE OF NEW YORK

- against-

Indictment No.:1723-05

JOSEPH LEE,

Motion: To Vacate Sentence  
pursuant to CPL 440.20

Defendant.

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DEFENDANT PRO SE  
For the Motion

RICHARD A. BROWN, D.A.

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BY: A.D.A. QUYNDA L. HENRY, ESQ.  
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Upon the foregoing papers, the motion is denied. See the accompanying memorandum.

Kew Gardens, New York  
Dated: March 20, 2007

\_\_\_\_\_  
BARRY KRON  
A.J.S.C

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

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THE PEOPLE OF THE STATE OF NEW YORK

- against-

Indictment No.:1723-05

BY: BARRY KRON, A.J.S.C.

JOSEPH LEE,

Defendant.

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The following constitutes the opinion, decision and order of the Court.

Defendant seeks an order of the Court to vacate his sentence pursuant to CPL § 440.20 upon the ground that he was improperly sentenced as a persistent violent felony offender and that he received ineffective assistance of counsel.

In response, the People have filed an affirmation stating that defendant's claims are procedurally barred and without merit.

For the reasons stated herein, defendant's motion is denied.

**FACTS**

On July 21, 2005, an indictment was filed against defendant, accusing him, *inter alia*, of the crimes of Burglary in the Second Degree (3 counts); Grand Larceny in the Third Degree; Grand Larceny in the Fourth Degree; Criminal Mischief in the Third Degree; and Criminal Mischief in the Fourth Degree (3 counts), for an incidents occurring in Queens County on March 1, 2004, May 12, 2004 and May 13, 2004. On March 7, 2006, defendant pled guilty to Attempted Burglary in the Second Degree, a class D violent felony offense. Defendant stated that he understood that he would be sentenced that day to 12 years to life concurrent with the 12 years to life sentence that he had received after trial under Indictment 2087-2004 as a mandatory persistent violent felony offender (Plea and Sentence Minutes pp. 4-5,8). All parties acknowledged that defendant qualified as a mandatory persistent violent felony offender based upon the prior arraignment as such at his

sentence proceeding under Indictment 2087-2004 (Minutes p. 8)<sup>1</sup>. Defendant executed a Waiver of his Right to Appeal his conviction and sentence under Indictments 1723-2005 and 2087-2004 (Minutes pp.7-8). Thereafter, defendant waived his right to a probation report and was sentenced to twelve years to life incarceration as a persistent violent felony offender.<sup>2</sup>

### DECISION

A motion to set aside a sentence pursuant to CPL §440.20 is applicable only to a sentence which is "unauthorized, illegally imposed, or otherwise invalid as a matter of law" (see People v. Minaya, 54 NY2d 360, cert denied, 455 US 1024). Defendant's sentence is none of these things.

In the instant matter, defendant was properly sentenced as a mandatory persistent violent felony offender . Specifically, the record indicates that defendant had been previously adjudicated a persistent violent felony offender under Indictment 2087-2004.

Criminal Procedure Law §400.16 governs the procedure for determining whether a defendant is a persistent violent felony offender. According to that statute, the provisions of C.P.L. § 400.15 with respect to second violent felony offenders apply to a determination of a persistent violent felony offender.

Criminal Procedure Law §400.15 provides that where a finding has been entered pursuant to this section, such finding will be binding upon that defendant in any future proceeding in which the issue may arise. Here, at the time of his plea and sentence, defendant had previously been adjudicated a mandatory persistent violent felony offender for his prior conviction under Indictment 2087-2004. As such, that determination was binding upon the defendant for the purposes on his sentence under this indictment (CPL §§400.16(2); 400.15(8);People v. Alston, 1 A.D.3d 627(3rd Dept. 2003); People v. Seifert,209 A.D.2d 555 (2<sup>nd</sup> Dept. 1994)).

Finally, at the time of his plea, defendant waived any right to challenge his status as a mandatory persistent violent felony offender and agreed to accept the prior adjudication for the

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<sup>1</sup>Under Indictment 2087-2004, defendant was sentenced as a persistent violent felony offender on November 18, 2005 by Judge Lewis.

<sup>2</sup>A probation report had already been prepared for indictment 2087-04. The court relied upon it because defendant had been continuously incarcerated since his conviction on November 18, 2005(Minutes p.4).

purposes of the negotiated concurrent sentence. Thus, his challenge to the determination that he was a mandatory persistent violent felony offender is foreclosed (People v. Abruzzese, 30 A.D.3d 219 (1<sup>st</sup> Dept. 2006)). Accordingly, defendant has not established a basis for his sentence to be set aside under CPL §440.20.

Defendant's claim that he received ineffective assistance of counsel because his attorney did not inform him that he could challenge the constitutionality of his prior convictions cannot be determined in a motion pursuant to §440.20 of the Criminal Procedure Law. If defendant's motion were deemed to be a motion to vacate the judgment of conviction pursuant to CPL § 440.10 based on his claim that he did not receive effective assistance of counsel the motion would be denied.

Criminal Procedure Law §§ 440.30 (4)(d)(i) provides that a motion to vacate a judgment and set aside a sentence may be denied, when the court reaches the merits if:

(d) An allegation of fact essential to support the motion ( i) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true.

Defendant's claim that his attorney was ineffective is unsupported by anything other than his own self-serving statement. Moreover, based upon the favorable plea and jail sentence defendant received, his claim is unlikely to be true. Under this indictment, defendant faced a maximum sentence of 25 years to life incarceration that could have been imposed consecutively for each occurrence, and consecutive to his sentence under Indictment 2087-2004. Nevertheless, by negotiating a plea deal which defendant accepted, counsel was able to secure a jail term substantially less than the maximum terms defendant could have received if convicted.

Furthermore, the transcript of the plea and sentence proceeding indicates that counsel had fully discussed the matter with defendant. The Court fully informed defendant of the rights he was forfeiting by pleading guilty and defendant indicated that he understood all of these rights (Minutes pp.2-9).

Thus, for these reasons outlined herein, defendant has not shown that there is a reasonable possibility that his allegations are true. Defendant's motion is denied without a hearing after considering the merits (CPL § 440.30 (4)(d)).

Moreover, the procedure to be followed in seeking to vacate a judgment of conviction is outlined in Criminal Procedure Law § 440.30. Pursuant to this statute, the motion papers, if they are based upon the existence or occurrence of facts, must contain sworn allegations thereof (See CPL § 440.30(1)). Here, defendant's motion does not meet this criteria. Defendant has not conformed to the statute and makes only bald unsupported assertions. For this additional reason, the Court summarily denies defendant's application. No hearing is necessary because it is procedurally barred (See CPL § 440.30(4)(b); People v. Hall, 28 A.D.3d 678(2d Dept. 2006); People v. Spencer, 272 A.D.2d 682 (3<sup>rd</sup> Dept. 2000); People v. Lake, 235 A.D.2d 921 (3<sup>rd</sup> Dept. 1997); People v. Bacchi, 186 A.D.2d 663 (2d Dept. 1992); see also, People v. Culpepper, 149 Misc.2d 550 (N.Y. Sup. Ct. 1990)).

Accordingly, defendant's motion is denied.

Order entered accordingly.

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

Kew Gardens, New York  
Dated: March 20, 2007

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BARRY KRON  
A.J.S.C