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Committee on Opinions (22 NYCRR 7300.1)**

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

PRESENT:

HON. SEYMOUR ROTKER
Justice.

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

-against-

Indictment No.: 2130-98

ANTHONY UTTINGER,

Motion: TO VACATE SENTENCE
CPL 440.20

Defendant.

-----X

LYNN W. L. FAHEY, ESQ.
For the Motion

RICHARD A. BROWN, DA

BY: SHARON Y. BRODT, ADA
Opposed

Upon the foregoing papers, and due deliberation had, the motion is denied. See accompanying memorandum this date.

Kew Gardens, New York
Dated: August 28, 2000

SEYMOUR ROTKER, Acting J.S.C.

-against-

Indictment No. 2130-98

ANTHONY UTTINGER,

MEMORANDUM DECISION

Defendant.

-----X

On June 19, 1998, an indictment was filed against this defendant charging him with robbery in the first degree and related crimes. On October 7, 1998, the defendant plead guilty to a reduced charge of attempted robbery first degree in full satisfaction of the indictment. This plea was entered as a result of a plea bargain whereby People agreed to recommend to the Court that the defendant be sentenced to an indeterminate term of from 16 years to life imprisonment as a persistent violent felony offender. Upon entry of the plea, the Court allocuted the defendant and, upon his admission, found him to be a persistent violent felony offender. The matter was then adjourned for sentencing.

On November 2, 1998, the day scheduled for sentencing, the defendant contended that the felony conviction dated February 2, 1994 which had formed a part of the allocution as a persistent violent felony offender was not, in fact, a violent felony offense. After some colloquy which is set forth in detail in the defendant's papers¹, it became clear that the prior conviction in question was for the crime of assault in the second degree, a crime which was, in fact, a violent felony offense and which, as such, formed a proper predicate for the indeterminate sentence that the court then proceeded to impose.

The defendant by motion pursuant to CPL 440.20(1), dated July 10, 2000, now seeks to set aside the sentence which was imposed by this Court on November 2, 1998 as "unauthorized, illegally imposed or otherwise invalid as a matter of law."

¹. See defendant's Exhibit C, pages 3-4.

In his moving papers the defendant does not argue that the allocution conducted by this Court at the time of his sentence was defective. Rather he alleges that “a plea colloquy under indictment 2384/93” (which occurred before another judge) was constitutionally faulty under Boykin v. Alabama, 395 U.S. 238 (1969) and that, as a result of said error, the prior conviction cannot serve as a predicate violent felony conviction in the instant case. The defendant’s application to this Court is directed at errors allegedly made by another court at another time². It is directed at errors which the defendant never raised either on a direct appeal from the prior conviction or at the time of his allocution by this Court.

CPL 440.20(4)(a) provides that the court may summarily deny a motion made pursuant to CPL 440.20 if “the moving papers do not allege any ground constituting a legal basis for the motion.”

Subsection six of CPL 400.20 governs the manner in which the Court is mandated to determine whether or not a defendant is a persistent violent felony offender. The subsection provides a procedure whereby the defendant is given an opportunity to challenge the constitutionality of his alleged predicate convictions. The last line of the subsection explicitly states that a “failure to challenge the previous conviction . . . constitutes a waiver by the defendant of any allegation of unconstitutionality unless good cause be shown for such failure to make a timely challenge” (emphasis added), (See, People v. Cruchfield, 115 AD 2d 189(3 Dept. 1985), People v. Lasky, 31 NY 2d 146, 149).

Even assuming for the purposes of this motion that the allocution with respect to the prior conviction was defective, the defendant concedes and the record supports the conclusion that this Court fully complied with the terms and requirements of CPL 400.20 when it sentenced the defendant as a persistent violent felony offender and that, therefore, this Court’s sentence is neither “unauthorized, illegally imposed or otherwise invalid as a matter of law.” Moreover, under the terms of CPL 400.20(6), the defendant’s failure to raise any objection to the validity of his prior conviction constitutes a full and complete waiver of his right to do so.

². The allocution complained of was conducted by Justice John J. Leahy on December 13, 1993 in connection with Indictment No. 2384-93.

On October 7, 1998, the defendant was fully advised of his right to challenge either or both of the two prior convictions which (subsequently) were to form the basis of his sentence as a persistent violent felon, (Minutes, page 12). This Court specifically advised the defendant in no uncertain terms that it would not sentence him as a persistent violent felon if “as a matter of law (the prior conviction) was not a violent felony offense “because that would be unconscionable,” (Minutes, page 10). The defendant who was represented by counsel and who was familiar with the justice system was directly asked “Do you wish to raise the constitutionality of the prior felony convictions?” He answered “no”, (Minutes, page 12).

On the date set for sentencing, November 2, 1998, the defendant again addressed the issue of the February 2, 1994 conviction for assault in the first degree. He did not argue that he was innocent of the prior charges or that his plea had been coerced, nor did he even raise the issues that he raises now. His argument was limited to an allegation that the prior conviction was not for a violent felony offense.

The Court correctly ruled that as a matter of law the prior conviction for assault second degree in violation of the Penal Law 120.05(6) was indeed a violent felony offense as that term is defined by Penal Law, Section 70.02. The defendant never attempted to appeal this ruling.

The defendant states no legal basis under which this Court’s sentence imposed on November 2, 1998 can be considered “unauthorized, illegally imposed, or otherwise invalid.” Based upon the allegations in the defendant’s motion papers and based upon the record as reflected in the minutes supplied by the defendant, he was given, prior to the imposition of a sentence by this Court, a full and fair opportunity to challenge the constitutionality of the prior conviction.

Furthermore, even if there were some defect with respect to the sentence or to the predicate conviction on which it in part rests, the defendant failed to raise his current objections or any other constitutional objections when he had the opportunity to do so³. The defendant’s motion papers are completely silent as to this issue. He offers absolutely no excuse or explanation for his failure to

³. In fact, the defendant has had three opportunities to object to the allocation in connection with the assault second degree conviction, at the time of sentence on the assault conviction, on direct appeal from that judgment, and when allocuted as a persistent violent offender by this Court.

raise these issues in a timely fashion or to set forth any “good cause” for such failure. As a result, these issues are deemed waived as a matter of law.

For these reasons the defendant’s motion to vacate the sentence is denied.

Kew Gardens, New York
Dated: August 28, 2000.

SEYMOUR ROTKER, Acting J.S.C.