

People ex rel. Foote v Piscotti
2006 NY Slip Op 30179(U)
October 31, 2006
Wayne County Ct
Docket Number: 0060164/2006
Judge: Dennis M. Kehoe
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STATE OF NEW YORK
COUNTY COURT COUNTY OF WAYNE

PEOPLE ex rel. LUCAS A. FOOTE,

Petitioner,

DECISION
AND
JUDGMENT

-vs-

RICHARD J. PISCOTTI, Sheriff of
Wayne County

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Respondent

Wayne County Public Defender
James S. Kernan, Esq.
Attorneys for Petitioner

Office of the Attorney General
Emil J. Bove, Jr., Assistant Attorney General
Attorneys for Respondent

On September 6, 2006, this Court issued a Writ of Habeas Corpus to the Sheriff of Wayne County, upon the application of the Petitioner Lucas Foote. The Petitioner is currently detained in the Wayne County Jail by virtue of a parole violation warrant issued by the New York State Division of Parole. The Petitioner maintains that he has been illegally imprisoned and restrained as a result of the issuance of said warrant.

The Petitioner was convicted after plea on the charges of Sodomy in

the First Degree and Sexual Assault in the First Degree. He was sentenced to a determinate sentence of five (5) years and a determinate sentence of two (2) years, respectively, to run concurrent with each other. At the time of sentencing, no mention was ever made as to the imposition of a period of post release supervision, nor is there any reference to such a period in the written commitment. The Petitioner maintains that he was never advised prior to plea that there would be such a period of supervision. The Petitioner served the entire five year sentence and was released from custody on February 24, 2004. At the time of his release, the Petitioner was placed upon five years of post release supervision under the Division of Parole. He was subsequently incarcerated for a violation of post relief supervision on May 24, 2006, and was awaiting a final hearing on the alleged violation at the time of the issuance of the writ.

The Petitioner maintains that his detention is unauthorized, in that he has fully served the sentence imposed upon him by the Court. He further maintains that the five year period of post release supervision was illegally added to his sentence by the Department of Correctional Services, and therefore his custody is based solely on the alleged violation of a condition of his sentence which was not imposed by the Court. He asks that the

imposition of post release supervision be held null and void, that the warrant be vacated and that he be immediately released.

The office of the Attorney General appearing on behalf of the Wayne County Sheriff has opposed the release of the Petitioner. The Attorney General maintains that the Petitioner is not entitled to habeas corpus relief, in that he has an adequate remedy at law, and in that he is legally in custody pursuant to a valid parole violation warrant, thereby rendering him ineligible for immediate release.

Penal law §70.00(6) requires that persons convicted of crimes designated therein as Violent Felony Offenses must be sentenced to a determinate term of incarceration and a period of post release supervision. Therefore, the Petitioner's plea to Sodomy in the First Degree subjected him to a period of five years supervision, unless the Court specified a shorter period of no less than one and one half years as part of its sentence. It is conceded by all parties that, in the instant case, no mention was made of any period of post release supervision by the sentencing court.

The Petitioner relies on the rationale set forth by the United States Court of Appeals for the Second Circuit in Earley v Murray, 451F3d 71

(2006). In this recent opinion, the Second Circuit held that a New York defendant convicted of a violent felony offense cannot be subject to a period of post release supervision unless it is specifically imposed by the Court at sentencing. The Court rejected the State's argument that the five year post release supervision was mandated by statute and therefore, necessarily part of the Defendant's sentence by operation of law. The Court stated that the imposition of a sentence is a judicial act, and that the Department of Correctional Services had no power to alter a sentence. Therefore, the court concluded, the additional provision for post release supervision added by Department of Correctional Services was a nullity.

The Attorney General rejects the arguments of the Petitioner for a number of reasons. First, the Attorney General maintains that the Petitioner has an adequate remedy at law, in the form of a motion to vacate his conviction pursuant to CPL §440.10. (In fact, under People v Catu, 4 NY3d 242 (2005), upon motion of a defendant, the failure of a court to advise a defendant of post release supervision requires reversal of his conviction.) The Petitioner responds that he is not seeking to withdraw his plea - he simply requests that the sentence as originally imposed by the trial court be enforced. However, the Attorney General insists that the

New York courts have held that a defendant's only remedy in such circumstances is a motion to withdraw his plea. (See, e.g. People v Vahedi, 305 AD2d 866 (3rd Dept, 2003); People v Jachimowicz, 292 AD2d 688 (3rd Dept, 2002)).

The Attorney General also rejects the Petitioner's contention that this Court should rely on Early, as "useful and persuasive authority" for the immediate release of the Petitioner. (See, People v KinKan, 78 NY2d 54 (1991)). While this Court agrees that Early is well-reasoned, it is not binding, and this Court is unable to ignore the line of New York appellate cases which hold otherwise.


Finally, the Attorney General maintains that the five year post release supervision period was not "added" by the Department of Correctional Services, that is, the sentence imposed by the trial court was not unilaterally modified by Department of Correctional Services. The inclusion of the supervision period is mandatory. As previously stated, Penal Law §70.45 requires as a matter of law that a period of post release supervision be included as part of the sentence. Therefore, "imposition of a determinate sentence without a provision for post release supervision would violate the requirements of Penal Law §70.45 rendering it illegal."

(People v Cooney, 290 AD2 727 (3rd Dept, 2002)). Since the Defendant in Cooney sought only to modify her sentence by eliminating any period of post release supervision, the Third Department found that this remedy was unavailable and denied her appeal. Under the circumstances, this Court agrees that it cannot nullify a condition which is mandated by law, thereby rendering the sentence invalid.

Therefore, given the current status of New York decisional law and the absence of any state authority for the relief requested, the Petitioner's application for immediate release is denied, and the proceeding is dismissed. The order setting bail is vacated, and the Petitioner shall be remanded to proper detention.

The Office of the Attorney General is directed to submit an Order and Judgment for signature.

Dated: October 31, 2006
 Lyons, New York



Honorable Dennis M. Kehoe
County Court Judge