SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 71

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THE PEOPLE OF THE STATE OF NEW YORK

- against- Indictment # 5346/00

SEAN ROBINSON,

Defendant.

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CAROL BERKMAN, J.:

Defendant has moved for relief pursuant to C.P.L. §440.20. He pled guilty to attempted robbery in the second degree in satisfaction of an indictment charging robbery in the second degree and was sentenced as a violent predicate felony offender, on February 2, 2000, to a determinate five-year term.[1] The court did not specify the term of post-release supervision; nor was post-release supervision noted on the worksheet or the commitment order. Defendant, now arrested and indicted for a new felony, claims that his post-release supervision was illegally imposed by the New York State Department of Correction. He asks that the post-release supervision portion of his sentence be set aside. Defendant explicitly states that he does not request *vacatur* of his plea notwithstanding the fact that the minutes do not reflect that he was advised of the post-release portion of his sentence and that counsel cannot recall whether he advised defendant of that portion of his sentence.[2]

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[1]The cover-page of the sentencing minutes incorrectly reflect that defendant was sentenced by Justice Uviller.

[2]The defense reply also refers extensively to this error, which was in no way preserved on the record. *See People v. Alvaro,* 36 A.D.2d (1st Dep't 2006). Whatever the necessity of

Defendant was a violent predicate felony offender charged with a class C violent felony offense. The best plea available to him was a class D violent felony (C.P.L.§220.10[4][d][ii]) and the lowest legal sentence on this plea was five years determinate (P.L.§70.04(3)©, followed by five years of post-release supervision. P.L.§70.45(1) and (2). Under these circumstances, the fact that the commitment sheet states only "five years" under the column headed "determinate," where the commitment also recites that defendant is a "second" violent predicate felony offender, carries with it the implicit post-release supervision, the only possible legal term. *People v. Sparber,* 34 A.D.3d 265 (1st Dep't 2006). *Sparber* is distinguishable, in that the post-release supervision term was written on the commitment sheet (made out by the clerk and normally unsigned by the judge, that decisions maintains the validity of the ministerial imposition of the mandatory post-release supervision.[3] Nonetheless, it appears in *Sparber* that the Appellate Division did not approve the reasoning of *Early v. Murray,* 451 F.3rd 71 (2d Cir. 2006).

In any event, simply vacating the post-release supervision would result in an illegal sentence, and the next step in this "relief" would have to be the reimposition whether of the statutorily mandated sentence, five years with five years of post-release supervision, *nunc pro tunc*. The "mutual mistake" of not advising defendant of the post-release supervision might entitle him to demand in the proper forum that his plea be vacated (preservation issues aside), but it does not entitle him to an illegal sentence.

Accordingly, the motion to resentence, insofar as it requests that an illegal sentence be

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preservation under these circumstances, the defendant does not move for *vacatur* of his plea. In any event, as this issue of the validity of the plea involves matters of record, it is not properly raised on a post-judgment motion.

[3]Of course this ministerial act can be performed at this time as well.

imposed, is in all respects denied.

This constitutes the order and opinion of this court.

Dated: New York, New York
March 13, 2007

BERKMAN, J.