SUPREME COURT STATE OF NEW YORK
COUNTY OF KINGS

CRIMINAL TERM PART 15
HON. JAMES G. STARKEY

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THE PEOPLE OF THE STATE OF NEW YORK :

Respondent, : Ind. No.: 3318/01

- against - :

PATRICE SMITH, : Dated: March 13, 2007

Defendant. :

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APPEARANCES OF COUNSEL

For the People:

Charles J. Hynes, Kings County District Attorney
Renaissance Plaza
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Brooklyn, N.Y. 11201-2908
By: Caroline Campomanes, Esq.
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For the Defendant:

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PATRICE SMITH **Ind. No.: 3318-01**

Defendant, *pro se*, moves pursuant to C.P.L. § 440.10 for an order vacating a judgment for the crime of robbery in the first degree (two counts). Defendant also moves for an order permitting him to proceed as a poor person and that he be furnished a transcript of the proceeding and an attorney to represent him.

PRIOR PROCEEDINGS

Defendant was convicted on September 23, 2002 of two counts of robbery in the first degree. Prior to the sentencing hearing, defendant made a motion to set aside the verdict on the grounds that two of the witnesses called by the People committed perjury during direct examination. On October 24, 2002 the court denied the motion. On October 29, 2002 defendant was sentenced, as a second violent felony offender, to two concurrent determinate sentences of twenty-five years.

On his direct appeal, defendant made various claims contending that he was deprived a fair trial. These contentions included improper jury instructions jury by the trial court; the failure of the trial court to obtain subject matter jurisdiction and various errors relating to the grand jury proceeding. The convictions were affirmed by the Appellate Division in People v. Smith, 21 AD 3d 386 (2d Dep't 2005), *lv. denied*, People v. Smith, 5 N.Y. 3d 885 (2005).

DEFENDANT'S CONTENTION

Defendant's motion is grounded upon the claim that his constitutional right to effective assistance of counsel was denied due to defense counsel's failure to ascertain correctly, prior to trial, defendant status as a second violent felony offender

rather than a persistent violent felony offender. Defendant contends that due to this failure, defendant was unable to secure a more favorable plea offer and disposition.

THE FACTS

On the afternoon of March 1, 2001 defendant entered a lingerie shop on Flatbush Avenue, Brooklyn and asked an employee for assistance. After obtaining various items, defendant approached the cashier, displayed a handgun, announced a holdup and ordered the three employees to lie on the floor. Defendant then removed money from the cash register and fled. In the early evening of March 30, 2001, defendant entered a Flatbush Avenue grocery store, displayed a handgun to the cashier and demanded money. Defendant then removed money from each of the store's two registers and fled.

Defendant was indicted for Robbery in the First Degree and related charges. Counsel was assigned to represent him but, prior to trial, defendant requested new counsel and on August 1, 2002 Samuel Militello, esq. was assigned to represent him. At that point, it does not appear to be disputed that — in accordance with defendant's contention — both the Assistant District Attorney and the defense attorney were under the mistaken impression that defendant, if convicted of a violent felony, would be a persistent violent felony offender.

Nevertheless, contrary to defendant's position, the record reflects that the true situation — that defendant would only be a predicate violent felon if convicted — had been established by September 17, 2002, the date the case was referred to Criminal Term, Part 15, for trial.

On that date, immediately before argument of defendant's Sandoval Motion, the following colloquy occurred, with defendant and his attorney present, in the context of a reference to a habeas corpus petition filed by defendant himself.

MR. MILITELLO: I don't know if the People answered or not. All I know it was calendered on his behalf. I don't know if the People responded to that writ.

A.D.A. DeFAZIO: I never received any motion to that effect, and I think its only really appropriate on pending cases. If he's looking for a reduction of bail based on the fact that its set — if the bail is in itself unconstitutional at the rate that it is set out at I think that's the only reason for a habeas corpus petition in this part. **In any case pending that we are on trial, that he's a violent predicate, that the bail is only ten thousand dollars and he's facing a minimum of ten years if convicted of the top count of either of the robberies, that amount is not too high**, (emphasis added).

In his motion papers, defendant asserted that he "would have been amenable to a more favorable plea" offer and that his attorney's error concerning his predicate felony status — to the effect that he would be a mandatory persistent violent felony offender if convicted — prejudiced his plea negotiations. He also asserted that his true status — that of only a predicate felony offender — was not ascertained until after trial and conviction.

Attached to papers later filed by defendant, however, is a letter dated June 14, 2006 from his appellate counsel in which she informed defendant that she would not file a post-judgement motion on his behalf. In the letter, she stated that she had spoken to defendant's trial counsel, as well as the assistant district attorney assigned at trial; that each had informed her that they had become aware prior to trial that defendant was a

second violent felony offender, not a persistent violent felony offender and that defendant, after learning of his true predicate status, rejected a plea offer of eight years before choosing to proceed to trial. A copy of that letter is annexed as exhibit one.[1]

CONCLUSIONS OF LAW

The court may deny a motion to vacate a judgment pursuant to C. P. L. §440.30 (4) (d) which in relevant part states:

> (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 he was deprived of effective assistance of counsel because the parties were unaware that defendant was not a persistent violent felony offender, is a claim which is contradicted by the court record. While it is true that the parties proceeded for a time prior to trial under that mistaken understanding, a later court record (as noted in the above excerpted transcript of September 17, 2002) established that all of the parties were on notice of defendant's correct predicate status. See attached exhibit. [2]

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[1]Attached to the same papers was a copy of a letter from Mr. Militello dated February 9, 2006 – four months earlier – responding to a grievance filed by defendant, the contents of which seem inconsistent with statements described by appellate counsel. A copy of that letter is annexed as exhibit two.

[2]The original misunderstanding was based upon the fact that at the time of his indictment, defendant had three prior violent felony convictions but that – for predicate violent felony and persistent violent felony purposes – the three only counted as one violent felony conviction because the sentences for two of the three were not imposed prior to the commission of the third violent felony. See N.Y. Penal Law §§70.02, 70.04

This is so because the most serious count in defendant's indictment was robbery in the first degree, a class "B" violent felony offense. The sentencing range for a second violent felon convicted of such an offense is a determinate term of imprisonment of ten to twenty-five years. See N.Y. Penal Law §§ 70.04. Further, as noted in the transcript of September 17, 2002, the People described defendant's sentence exposure as a "minimum of ten years." Thus, there can be no doubt that the sentence referred to by the Assistant District Attorney refers to the minimum for a second violent felony offender, since the sentence for a persistent violent felony offender convicted of robbery in the first degree is an indeterminate term for which the minimum is twenty to twenty-five years imprisonment and the maximum is life. (See P.L.§ 70.08). The court record, therefore, clearly established that all of the parties were aware of defendant's status as a second violent felony offender status if convicted of a violent felony offense.

Defendant's reliance on Mask v. McGinnis, 28 F Supp 2d 122 (U.S. Dist. Ct., S.D. NY, 1998); *affd* Mask v. McGinnis, 233 F3d 132 (2d Cir. 2000) is misplaced. In People v. Mask, supra, the defendant rejected a plea agreement of ten years to life, due to the mistaken impression of the prosecution, the defense and the trial court that defendant was a mandatory persistent violent felony offender. In fact, the parties did not become aware of defendant's status as a second violent felony offender until after conviction and prior to sentencing. The court held that the petitioner was not properly advised and that he was not properly represented in his plea negotiations. The court also found that but for defense counsel's error, the result of the plea proceedings would have been different.

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(1) (b) and 70.08. See also People v. Morse, 62 NY 2d 205 (1984); People v. Williams, 118 AD 2d 410 (First Dep't 1986).

In the present case, it is clear that no such mistaken impression existed at the time the trial began. In fact, defendant's reply papers tend to support that which is contained in the record: that the prosecution, defense counsel and defendant were each aware of his status as a second violent felony offender if convicted.

Defendant's belated request for a hearing to determine if he was prejudiced by a failure by counsel to convey the prosecution's proposal to him is also without merit. Defendant does not allege such a failure occurred — he simply assumes it (contrary to the contents of the Appellate Advocate's letter relied upon by him). Further, the correspondence in question strongly indicates that counsel's memory simply failed him when he wrote to the Grievance Committee and was refreshed by the time he spoke to the Appellate Advocate four months later.

Regarding defendant's request for appointment of counsel, there is no requirement that counsel be assigned for a collateral, post-conviction proceeding. Pennsylvania v. Finley, 481 US 551 (1987), People v. Richardson, 159 Misc. 2d 167 (Sup. Ct. Kings Co. 1993). Although the court does have the inherent power to assign counsel for a post-conviction motion, there is no basis for doing so here since defendant's papers fail to establish a proper or possible basis for relief, People v. Calhoun,784 N.Y.S. 2d 922 (Oswego Co. 2003); People v. Darling, 54 Misc. 2d 442 (Broome Co. 1967), *affd* 290 N.Y.S., 2d 1023.

In light of the above, defendant's motion is denied in all respects. This constitutes

the decision and order of the court. The clerk is directed to send copies of this decision and order to defendant and to the District Attorney.

James G. Starkey

J. S. C.