

People v Richardson
2007 NY Slip Op 30241(U)
March 20, 2007
Supreme Court, New York County
Docket Number: 0003012
Judge: Charles H. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 82

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THE PEOPLE OF THE STATE OF NEW YORK, : **DECISION AND ORDER**
: INDICTMENT 3012-01
-against- :
: SEDDY RICHARDSON, DEFENDANT :
-----X
CHARLES H. SOLOMON, J.:

In a *pro se* motion dated August 29, 2006, defendant moves to vacate the judgment of conviction under CPL 440.10. The People filed a response in opposition on November 6, 2006. Based on the papers submitted and the court record, defendant's motion must be denied.

Defendant was charged by indictment with two counts of Robbery in the First Degree [Penal Law §160.15(4)], Attempted Robbery in the First Degree [Penal Law §110/160.15(4)], Attempted Robbery in the Second Degree [Penal Law §110/160.10(2)(a)], Criminal Possession of a Weapon in the Second Degree [Penal Law §265.03(2)] and two counts of Criminal Possession of a Weapon in the Third Degree [Penal Law §265.02(4) and (3)]. Defendant was arraigned in Supreme Court on June 5, 2001. On March 6, 2002, defendant entered a plea to count one, Robbery in the First Degree [Penal Law §160.15(4)], a class B violent felony, and count five, Criminal Possession of a Weapon in the Second Degree [Penal Law §265.03(2)], a class C violent felony, in full satisfaction of the indictment. In exchange for his plea of guilty defendant was promised an eight year determinate sentence on the robbery count and a five year determinate sentence on the weapon possession count to run concurrently with each other. Defendant was adjudicated a second felony offender that same day. On April 11, 2002, defendant was sentenced as promised.

Defendant now moves to vacate the judgment of conviction under CPL 440.10.

Defendant claims that he was not advised either by counsel or the Court that, as a second felony offender, he faced a five year period of post-release supervision. Further, defendant claims that he would not have pleaded guilty had he been properly advised. While the People do not contest the fact that defendant was not advised of post-release supervision, which is borne out by the record, they oppose defendant's motion. They argue that he is procedurally barred from raising the claim at this late juncture.

CPL 440.10(2)(c) provides that a court *must* deny a motion to vacate a conviction when:

Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, *no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period* or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him. (Emphasis added)

It is abundantly clear from the record herein that defendant was not advised of post-release supervision by the Court either at the time he entered the plea or at the time of sentence. Because sufficient evidence of this omission appears on the record which would have allowed defendant to raise this claim on appeal, he is procedurally barred, at this late juncture, from raising it under CPL 440.10. *See, People v. Cuadrado*, __ AD3d __, 207 WL 446358 (1st Dept 2007); *People v. Pignataro*, 20 AD3d 892 (4th Dept 2005), *lv denied*, 5 NY3d 855; *People v. Murray*, 2 AD3d 1160 (3^d Dept 2003); *People v. Swansbrough*, 307 AD2d 389 (3^d Dept 2003), *lv denied* 100 NY2d 624. The Court notes that defendant failed to appeal from the judgment of conviction herein. As such, defendant is procedurally barred from raising a claim under CPL 440.10(2)(c). Accordingly, defendant's motion to vacate the judgment of conviction is denied.

This opinion constitutes the decision and order of the Court.

Dated: March 20, 2007
New York, New York

A handwritten signature in black ink, appearing to read 'CHS', is written above a horizontal line.

CHARLES H. SOLOMON, J.S.C.