

**People v Byrd**

2007 NY Slip Op 31407(U)

March 29, 2007

Supreme Court, New York County

Docket Number: 0000125/1993

Judge: Renee A. White

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 62

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

- against - : Indictment No. 125/93  
Terry Byrd, : Decision and Order

Defendant. :

- - - - -X  
RENEE A. WHITE, J.

In 1974, defendant was convicted of Robbery in the Third Degree, and was sentenced to Probation for a period of 5 years. In 1976, defendant was convicted of Murder in the Second Degree, and was sentenced to 15 years to life.

In the instant matter, on June 17, 1993, defendant was convicted after jury trial of Attempted Murder in the Second Degree, Assault in the First Degree and Criminal Possession of a Weapon in the Second Degree; and on July 7, 1993, defendant was sentenced, as a violent predicate felony offender, to terms of imprisonment of 12 ½ to 25 years, 7 ½ to 15 years, and 7 ½ to 15 years, respectively, to run concurrently with each other. Defendant's conviction was affirmed on appeal, 239 AD2d 162 (1<sup>st</sup> Dept. 1997), lv denied 90 NY2d 891 (1997).

The July 7, 1993 sentencing minutes, attached as an exhibit to defendant's moving papers, show that the Court was not asked whether the sentences imposed on this case would run concurrently or consecutively to the undischarged term of imprisonment on defendant's 1976 conviction for Murder in the Second Degree; and the Court did not specify whether the sentences imposed on this

case would run concurrently or consecutively to that undischarged term.

Defendant pro se moves for an order setting aside the sentences imposed on the instant indictment on the grounds that the sentences should run concurrent, and not consecutive, to the undischarged term of imprisonment imposed on the prior murder conviction.

On the instant indictment, defendant was properly sentenced as a second violent felony offender pursuant to Penal Law §70.04. The statutory provision applicable to defendant's claim is Penal Law §70.25(2-a) which provides, in pertinent part:

"When an indeterminate or determinate sentence of imprisonment is imposed pursuant to section 70.04 ... and such person is subject to an undischarged indeterminate or determinate sentence of imprisonment imposed prior to the date on which the present crime was committed, the court must impose a sentence to run consecutively with respect to such undischarged sentence."

Thus, defendant's sentences of imprisonment on the instant indictment were required by law to run consecutive to defendant's undischarged term of imprisonment on the prior murder conviction.

Defendant's reliance upon People v Richardson, 100 NY2d 847 (2003) is misplaced. In Richardson, defendant had previously been convicted of murder, and was now convicted, inter alia, of two counts of intentional murder. The Court sentenced him to consecutive terms of 25 years to life on the two counts of intentional murder. The applicable sentencing provision was Penal

Law §70.25(1)(a) and not, as here, Penal Law §70.25 (2-a). Under Penal Law §70.25(1), the sentencing Court could run the sentences on the two counts of intentional murder either concurrent or consecutive to the undischarged term on the prior murder conviction. Since the sentencing Court failed to specify whether the sentences would run concurrent or consecutive to the undischarged sentence on his prior murder conviction, Penal Law §70.25(1)(a) required that the sentences would run concurrent with the undischarged sentence on his prior murder conviction.

But here, the applicable sentencing provision, Penal Law §70.25(2-a), did not afford the Court the discretion to impose sentences to run concurrent to the undischarged term of imprisonment. Therefore, the Richardson holding is inapplicable.

Contrary to defendant's assertions, the sentences imposed pursuant to Penal Law §70.25(2-a) did not deny him equal protection or due process of law; and the application of the sentencing provisions of the law was not arbitrary or capricious. Defendant's claim that the Department of Corrections effectively re-sentenced him so that his terms of imprisonment would run consecutive to his undischarged term of imprisonment is contrary to the facts and to the law.

Defendant's claim that his attorney's purported failure to inform him of his right to question the information contained in

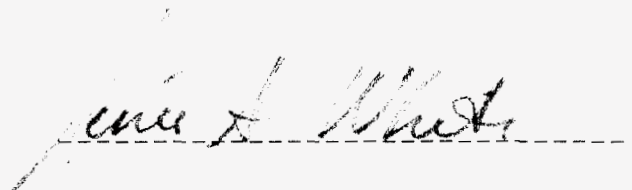
his pre-sentence report violated his right to effective assistance of counsel is without merit.

Defendant's pro se motion seeking to set aside the sentences imposed is denied in its entirety.

This opinion constitutes the decision and order of the Court.

Dated: May 29 , 2007

New York, New York

A handwritten signature in cursive script, appearing to read "Renee A. White", is written over a horizontal dashed line.

Renee A. White, J.