NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 52

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The People of the State of New York

Ind. No: 5727-03

-against-

Jason Rodriguez,

Defendant.

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Daniel P. FitzGerald, J.

On November 18, 2004, in full satisfaction of an indictment charging the defendant with drug and weapons charges, the defendant pleaded guilty to a single count of criminal possession of a weapon in the second degree. As part of the plea, the court expressly promised the defendant a determinate sentence of three and a half years *plus a period of post release supervision*. Subsequently, on December 9, 2004, the court sentenced the defendant to the promised determinate sentence of three and a half years. No mention was made, however, of the period of post release supervision. Recognizing that a period of post release supervision is mandatory (*see* PL § 70.45(2)), the Department of Correction, in what has become a routine practice, later provided for a period of post release supervision in calculating the defendant's sentence.

The defendant now moves to set aside that portion of the sentence involving the period of post release supervision administratively reflected by the Department of Correction. The defendant's motion follows those cases that hold that a sentence may

only include that which was orally pronounced by the court at the time of the sentence (*see Early v Murray*, 451 F.3d 71), and that the Department of Corrections had no authority to simply add a provision that was not part of the commitment order (*see Murray v Goord*, 1 NY3d 29).

Initially, I note that the defendant has not asked to have his plea vacated, and in any event would not be entitled to that relief. Although the Court of Appeals has recognized that post release supervision is a "direct consequence" of a conviction, and that therefore the defendant must be made aware at the time of the plea that it will be imposed (*see People v Catu*, 4 NY3d 242; *see also People v Van Deusen*, 7 NY3d 744), in this case the court advised the defendant that his plea would be subject to a period of post-release supervision. Thus, it is clear that the defendant's plea was knowingly, voluntarily and intelligently made (*People v Harris*, 61 NY2d 9).

The defendant instead asks that the plea be vacated solely insofar as it imposes any period of post release supervision. The only ground he cites is that the court failed to note any period of post release supervision at his sentencing. It is far from clear, however, that a court is required to impose a period of post release supervision by oral pronouncement at the time of sentence. As the First Department has noted on similar facts,

> "The Penal Law does not merely direct or require a court to impose PRS when imposing a determinate sentence; instead, it provides that 'Each determinate sentence also *includes, as a part thereof*, an additional period of post-release supervision' (Penal

> Law § 70.45[1][Emphasis added] . . ." (*People v Sparber*, 34 AD2d 405, 406).

In *Sparber*, the court ruled that the trial court's silence regarding a period of post release supervision did not entitle the defendant to specific performance of a sentence that contains no period of post release supervision. The Appellate Division emphasized the mandatory nature of post release supervision and commented that it was "already included in the sentence by operation of law" (*id. at* 406; *see also People v Adams*, 13 AD3d 76; *People v Hollenbach*, 307 AD2d 776 *People v Edwards*, 15 Misc.3d 1115(A), 2007 WL 969416).

The only distinguishing feature of *Sparber* is that there the court clerk set forth the period of post release supervision on the defendant's commitment sheet, which was then signed by the trial court. The Appellate Division found that the court clerk's ministerial act satisfied any constitutional requirement that the period of post release supervision be "entered upon the records of the court" (*id., at* 406, *citing Hill v United States ex re. Wampler*, 298 U.S. 460). Thus, it is possible to read *Sparber* in two ways: first, that any formal statement about post release supervision at sentence is mere surplusage because it is imposed automatically; or, second, that the sentencing procedure requires some formal "entry" in the court records of the post release supervision portion of a defendant's sentence. In the present case, no entry of the period of post release supervision was made in the court record at the time of sentence; rather, it was done at a later time by the Department of Corrections. This raises the question as to whether the formal entry in the court's records is critical.

Yet, assuming *arguendo* that it is critical, and that the sentencing court must formally enter a period of post release supervision on its records, the issue doesn't end there unless the court is now powerless to do anything about it. In evaluating whether a court may revisit a sentence after the defendant has begun serving it, the court must consider whether the sentence which it did impose is unauthorized (*see People v Richardson*, 100 NY2d 847; *People v Williams*, 87 NY2d 1014; *People v Hill*, __ AD2d __, 830 NYS2d 33). For no matter how much the sentence may have varied from the promised plea, if the sentence actually meted out was "in accordance with the law," the sentencing court is generally powerless to amend the sentence.

The issue thus turns on whether a court's failure to enter the period of post release supervision on its records is lawful. If the failure to enter it was not in "accordance with the law," then the sentence was "unauthorized," and a trial court has the inherent power to correct its own sentence (see *People v Hill, supra*, 830 NYS2d *at* 38). But as *Hill* also makes plain, a sentencing court simply has no power or authority to impose a determinate sentence without also imposing a period of post release supervision. So, to the extent it is necessary to formally enter the period of post release supervision on the record in order that it be imposed, where a court fails to do so, any resulting sentence that does not impose a period of post release supervision would be unauthorized. Therefore, the sentencing court would have the authority to revisit its sentence in order to insure a period of post release supervision is correctly imposed (*id., at* 42).

Accordingly, it therefore seems that in the first instance a trial court need not utter, in talismanic fashion, that a determinate sentence includes a period of post release

supervision. The period of post release supervision is included by operation of law (see *People v Sparber, supra*, 34 AD2d at 406; *People v Edwards*, 15 Misc.3d 1115(A), 2007 WL 969416). However, to the extent that the period of post release supervision must be noted on the court record in order for it to be imposed, the remedy for a court's failure to do so is not specific performance of a sentence that does not include a period of post supervision, as the defendant requests. Instead, if it is truly not imposed by operation of law, then the appropriate remedy is to return the defendant before the court for clarification of the defendant's sentence, and to formally enter the period of post release supervision on the record.

The People are therefore ordered to produce the defendant to court in order that the original sentence can be restated on the record, and so that a formal entry of the mandatory imposition of the period of post release supervision can be made

So ordered.

Daniel P. FitzGerald, J.S.C.
HON. DANIEL P. FITZGERALD

May 17, 2007