SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 9

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THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER
Indictment #2453/05

-against-

SAL DEANGELO,

Defendant.

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RAYMOND GUZMAN, J.S.C.

On November 10, 2005, the defendant plead guilty before this court to attempted criminal possession of a weapon in the third degree (a class E violent[1] felony under PL §110/265.02[4]) in satisfaction of Indictment #2453/05, and in exchange for a promised sentence of 3 years in prison, plus 5 years post-release supervision (PRS). On November 28, 2005, this court adjudicated the defendant a second-violent felony offender, based upon his prior conviction under Indictment #83/99, and imposed the promised sentence. The defendant was represented throughout the proceedings by counsel associated with the Legal Aid Society (LAS).

In papers dated January 26, 2007, the defendant, again represented by counsel associated with LAS, now moves this court, pursuant to CPL §440.20[1], to set aside the sentence imposed under Indictment #2453/05, and to re-sentence him as a first felony offender to a determinate prison term of 1-1/2 years. On March 13, 2007, the People filed reply papers in opposition to the defendant's motion. On April 16, 2007, the defendant's counsel, who was granted time to submit additional papers, filed a "reply affirmation."

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[1] This is a violent felony only when, as in the case at bar, the defendant is convicted thereof by guilty plea, and it is a lesser included offense of a crime charged in the indictment. PL 70.02[1][d].

In the meantime, the defendant's conviction was affirmed by the Appellate Division on the defendant's direct appeal (*People v DeAngelo*, 833 N.Y.S.2d 413 [2d Dept. 2007]).

This court has reviewed the Supreme Court case files pertaining to both Indictments #2453/05 and #83/99, as well as the papers filed by both parties, including the transcribed minutes of the defendant's plea and sentence proceedings under both Indictments #2453/05 and #83/99, submitted as exhibits to the defendant's motion.

For the reasons set forth below, the defendant's motion to set aside his sentence under Indictment #2453/05, and to be re-sentenced as a first-felony offender is summarily denied.

Background Facts

Indictment #83/99. The defendant and a co-defendant were arrested for mugging a woman in the Park Slope section of Brooklyn, on January 3, 1999, and were subsequently charged by Indictment #83/99, with robbery in the second degree (a class C violent felony), assault in the second degree (a class D violent felony), and several related offenses.

On October 27, 1999, the defendant, represented by counsel associated with LAS, plead guilty to robbery in the second degree in satisfaction of Indictment #83/99, and in exchange for a promised sentence of 3-1/2 years[2] in prison. As part of the plea agreement, the defendant admitted to the crime, stating that he and his co-defendant "grabbed the lady by the mouth and***grabbed [her] bag," and also waived his right to appeal.

The minutes from the plea proceeding reveal that while the court advised the defendant that the maximum sentence for second-degree robbery was 15 years in prison, the court did not

[2] The defendant refers in his papers to a prison term of 3 years, but court records reflect a prison sentence of 3-1/2 years, the minimum authorized for the crime of 2nd degree robbery. PL 70.02[3][b].

advise the defendant that a sentence for second-degree robbery would include a period of PRS, under PL §§70.00[6] and 70.45[2], regardless of whether he was convicted of that crime by plea in exchange for the 3-1/2 year prison sentence, or was convicted after trial and sentenced to a longer [up to15-year] prison term. Neither the People nor counsel mentioned PRS either.

The People objected to the terms of the plea, stating that they were ready for trial, and noting that they had recommended that a plea be accepted only in exchange for a 5-year prison sentence. The court acknowledged the People's opposition, and accepted the defendant's plea.

On February 3, 2000, the court sentenced the defendant to the 3-1/2 year determinate prison term as promised, with no period of PRS; the order of commitment reflects the same sentence (Greenberg, J., at plea and sentence). The defendant did not appeal this conviction, nor challenge its validity in a collateral proceeding, prior to filing the instant motion.

According to court records, the defendant was released from prison on January 13, 2003,[3] his "conditional release date."[4] According to the defendant, the Department of Correctional Services (DOC) imposed a period of PRS upon him when he was released.

Indictment #2453/05. On April 9, 2005, the defendant was arrested for weapon possession when police approached the defendant on a Brooklyn street to investigate an assault complaint, and observed a gun tucked in his waistband. The defendant allegedly told the arresting officer [in substance]: "You got me with the gun; now I know I'm going to jail." The defendant was subsequently charged by Indictment #2453/05 with criminal possession of a

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[3] The defendant refers in his papers to January 3, 2003, as his release date, but the release date reported on his NYSID sheet is January 13, 2003.

[4] The conditional release date is the date on which the "good time" an inmate has earned equals the unserved portion of his sentence; an offender serving a determinate term may be credited for good time up to a maximum of 1/7th of his prison sentence. PL 70.40[1][b].

weapon in both the third degree (a class D violent felony under PL §265.02[4]), and the fourth degree (a misdemeanor under PL §265.01[1]).

On October 25, 2005, after conducting a *Dunaway/Mapp/Huntley* hearing, this court denied the defendant's motion to suppress both the gun and the defendant's statement to the police officer, and adjourned for trial or disposition.

On November 10, 2005, the parties told this court that after discussions, the People "went off the top count," which carried a mandatory minimum 5-year determinate prison term for a second violent felony offender, and the defendant agreed to plead guilty to the lesser included offense of attempted criminal possession of a weapon in the third degree, in exchange for a 3-year determinate prison term. This court asked whether the defendant understood that PRS would be included in the sentence, and counsel replied that the defendant had been told he would be subject to a 5-year period of PRS.

During the ensuing plea colloquy, this court, *inter alia*, asked the defendant if he were currently on either probation or parole. When the defendant replied "parole," this court warned the defendant that by pleading guilty he was admitting to a violation of parole, and might be liable for additional punishment; the defendant said he understood.[5] This court reiterated that the defendant would be subject to PRS; again, the defendant said he understood. As part of the plea agreement, the defendant acknowledged that he had "attempted" to possess a loaded gun, and signed a document waiving his right to appeal. This court accepted the defendant's guilty plea, and scheduled sentencing for November 28, 2005.

On November 28, 2005, the People filed a "predicate statement," a document stating that

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[5] The People told this court they took no position on whether the defendant should receive additional punishment for violating parole.

the defendant had previously been convicted and sentenced under Indictment #83/99, on February 3, 2000, for second-degree robbery. This court asked the defendant whether he had received the statement and discussed it with his attorney, and whether he was the person convicted of this prior felony; the defendant replied "yes" to both questions. This court then asked the defendant if he wished to challenge the constitutionality of the prior conviction; the defendant said "no." Accordingly, this court deemed the defendant a second-violent felon, and sentenced him to the promised determinate prison term of 3 years, with a 5-year period of PRS.

The defendant is currently incarcerated pursuant to this sentence.

The Pertinent Sentencing Laws

PRS. When the Legislature created "determinate sentencing," requiring violent felony offenders to be sentenced to prison for a fixed number of years (rather than to an "indeterminate" period between a minimum and maximum number of years), it also eliminated the eligibility of such offenders for "discretionary release"[6] on parole. An offender sentenced to a determinate term is eligible only for "conditional release," after serving at least 6/7 of the determinate term, and is subject to parole supervision until the date his full prison term expires. PL §70.40[1][b].[7]

The Legislature subsequently became concerned about a negative consequence of eliminating discretionary release for violent offenders, namely, that because the period of parole supervision following conditional release is typically much shorter than the period of supervision following discretionary release, violent offenders were returning to society with less oversight

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[6] An offender serving an indeterminate sentence is typically eligible for discretionary release after he has been incarcerated for the minimum term of his sentence, less any "good time" he has earned up to a maximum of 1/6th of the minimum term, and pursuant to the Executive Law, is subject to parole supervision until the expiration of the maximum term of his sentence.

[7] In the instant case, the defendant's prison term under Ind. #83/99 expired on July 15, 2003.

than non-violent offenders. In an effort to rectify this problem, the Legislature created a new type of parole supervision for offenders serving determinate sentences, called "post-release supervision" (PRS), codified at PL §§70.00[6] and 70.45. Under PRS, an offender is subject to a fixed period of supervision which commences on the date he is released from prison, but is otherwise unrelated to the length of his prison sentence. The statute sets the period of PRS at 5 years for a second or second-violent felon; 5 years for a first-time felon convicted of a violent B or C felony, with the sentencing court having the option to specify a shorter period of no less than 2-1/2 years; and 3 years for a first-time felon convicted of a violent D or E felony, with the court having the option to specify a period as short as 1-1/2 years. PL §70.45[1]&[2].

Determination of Predicate Violent Felon Status. When it appears that a defendant convicted of a violent felony has previously been convicted of a violent felony, and may qualify as a second violent felony offender for sentencing purposes, the People must file a statement prior to sentencing, identifying each alleged predicate violent felony conviction. The defendant must be given a copy of such statement and the court must ask him whether he wishes to controvert any allegation made therein. CPL §400.15[1],[2] and [3]. A previous conviction obtained in violation of the defendant's constitutional rights must not be counted, and the defendant may, at any time during the course of the proceeding, challenge the validity of a previous conviction on constitutional grounds. The defendant's failure to challenge a previous conviction in this manner constitutes a waiver of any claim of unconstitutionality, unless "good cause" can be shown for the failure to raise such challenge timely. CPL §400.15[7][b].

Where the uncontroverted allegations are sufficient to support a finding that the defendant has been subject to a predicate violent felony conviction, the court must enter such finding and sentence the defendant accordingly. The court's finding that the defendant has been subject to a

predicate felony conviction is binding upon him in any subsequent proceeding in which the issue may arise. CPL §400.15[4] and [8].

The Defendant's Motion and the People's Reply

The defendant moves this court to set aside the sentence imposed under Indictment 2453/05, and to re-sentence him to a determinate prison term of 1-1/2 years, on the ground that his prior conviction under Indictment #83/99, upon which his adjudication as a second-violent felony offender was based, was unconstitutional "because the court [in the prior case] never mentioned that the bargained-for plea would include a period of PRS." The defendant cites *People v Catu*, 4 NY3d 242 [2005] and *Earley v Murray*, 451 F.3d 71 [2d Cir. 2006], *rearg. denied* 462 F.3d 147, in support.

The defendant further argues that he should not be foreclosed from challenging his prior conviction now, notwithstanding that he failed to do so at his predicate felony adjudication on November 28, 2005, because his failure can be explained by "good cause." Counsel asserts that the defendant "was in no position" to recall that the court in the prior case had failed to inform him about PRS, and that even if the defendant had so recalled, he is a "layman" who could not have understood the legal implications of the court's omission. Counsel also contends, citing *People v Dominique*, 90 NY2d 880[1997], that in the absence of contrary information from the defendant, the defendant's trial attorney, who represented the defendant at his predicate felony adjudication, had the right to rely on the "presumption of regularity"of the prior plea and sentence proceedings.

In reply, the People cite *People v Smith*, 37 AD3d 499 [2d Dept 2007], and *People v Benson*, 831 NYS2d 266 [2d Dept. 2007], to argue that the defendant's motion is without merit under the law in the Second Department, where the Appellate Division has held that when a

court fails to advise a defendant that the sentence includes a period of PRS, and the court's order of commitment makes no reference to such supervision either, then PRS is not part of the defendant's sentence. Accordingly, the People assert, the sentence imposed on the defendant under Indictment #83/99 did not, and does not, include a period of PRS, and therefore, the defendant's conviction could not have been unconstitutionally obtained by the sentencing court's failure to advise him of PRS.

The People also maintain that the defendant's failure to challenge the constitutionality of his prior conviction under Indictment #83/99, when given the opportunity to do so at his predicate felony offender adjudication, constituted a waiver of such challenge under CPL §400.15[7][b]. The People cite *People v Mann*, 216 AD2d 492 [2d Dept. 1995], and *People v Jackson*, 151 AD2d 781 [2d Dept. 1989], for the proposition that an admission to a prior felony conviction at a predicate felony offender hearing, coupled with a failure to challenge the constitutionality of such conviction at such hearing, generally precludes any future claim that the prior conviction was unconstitutional. The People note that the defendant cites no authority to support his contention that as a lay person, his ignorance of the law entitles him to assert an untimely constitutional challenge to his prior conviction, and they point out that because virtually any criminal defendant could claim such ignorance, CPL §400.15[7][b] would be rendered meaningless if such claim were credited.

In the defendant's supplemental "reply affirmation," counsel expands on the defendant's "understandable lack of knowledge" of the law pertaining to PRS, remarking on the "extensive" failure of professionals throughout the legal system, including courts, prosecutors and defense counsel, to interpret and apply the requirements of PL §70.45 correctly. Counsel argues that due to this "systemic" failure, neither the defendant in the instant case nor his trial attorney should be

held to have waived the defendant's right to challenge the constitutionality of the defendant's predicate conviction under Indictment #83/99.

In the alternative, counsel asserts, if this court finds that the defendant has waived such claim, then this court must also find that his trial attorney rendered ineffective assistance at the predicate felony proceeding, under the standard articulated in *Strickland v Washington*, 466 US 668 [1984]. Counsel notes that under this scenario, new counsel must be appointed, because both the defendant's trial attorney, and his counsel on the instant motion, are employed by LAS.

Decision

CPL §440.20 provides that "[a]t any time after the entry of a judgment, the court in which the judgment was entered may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law." The statute further provides that an order setting aside a sentence does not affect the status of the underlying conviction, and that after entering such an order, the court must re-sentence the defendant in accordance with the law.

This court would first note that the determinate prison term of 3 years, to which this court sentenced the defendant pursuant to his negotiated plea under Indictment #2543/05, is in accordance with the law for the crime to which he plead guilty (the Class E violent felony of attempted criminal possession of a weapon in the third degree), regardless of whether he is deemed a first or second-violent felony offender. PL §§70.04[2], 70.04[3][d], 60.01[3][a], and 70.02[3][d]]. Only the authorized period of PRS would differ (3 years, rather than 5) if the defendant were deemed a first felony offender. PL §§70.00[6], and 70.45[2]. Ironically, in moving to be re-classified as a first-time felon on the ground that the court in the prior case did not mention PRS, the defendant asks to be re-sentenced in the instant case to a shorter prison

term -- to which he would not be entitled regardless of his predicate status -- but does not mention PRS.

This court would also note that the defendant has not submitted "release papers" to document his allegation that DOC imposed PRS upon him when he was released from prison in the prior case (in January 2003), nor does he specify the period of PRS to which he was allegedly subjected. However, the People do not dispute that DOC purported to impose PRS on the defendant, and this court finds the record sufficient to establish that it did so;[8] instead, the People contend that under the law as interpreted by the Appellate Division in the Second Department, DOC's administrative imposition of PRS is a nullity. This court agrees. See, *e.g.*, *People v Noble* 37 AD3d 622 [2007]; *People v Smith*, 37 AD3d 499, *supra*; *People v Benson*, 831 NYS2d 266, *supra*.

The defendant is quite right to assert that the application of the 1998 statute creating PRS has caused considerable confusion throughout the criminal justice system. At plea and sentence proceedings, the parties (the defendant, his counsel, the People and the court) are typically focused on the defendant's prison sentence, and not on his post-incarceration parole supervision. Moreover, courts typically play no role in determining a defendant's eligibility for release on parole: the calculation of a defendant's various "release dates," and the evaluation of his readiness to return to society are within the purview of DOC and the Parole Board. Accordingly,

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[8] Had the defendant been subject to parole supervision *only* under "conditional release," such supervision would have ended when his determinate prison term expired on July 15, 2003; instead, the defendant's NYSID report states that the defendant was still "on parole" on April 9, 2005, when he was arrested in the instant case. In addition, as noted *supra*, the defendant told this court he was still on parole on November 28, 2005, the date of his sentencing in the instant case, and the defendant has submitted a DOC document describing the defendant's admission to prison on December 7, 2005, as "RETURN FROM PAROLE/COND REL."

courts have never been required to advise defendants about other forms of parole supervision as part of the colloquy at plea and sentencing, and for several years, many sentencing courts likewise omitted mention of PRS. Moreover, the language of the pertinent statutory provisions (*e.g.*, stating that a determinate sentence "shall include" and "also includes" PRS "as a part thereof") invited the interpretation that a determinate sentence is statutorily defined to include PRS, and that it therefore need not be separately imposed or even mentioned by the court at plea or sentencing. Indeed, for a time, the "automatic enforcement of post-release supervision by DOCS was seemingly settled as a matter of interpretation of State statutory law"(*People v Giles*, 13 Misc.3d 1242[A], 2006 WL 3489100 [N.Y. Sup., Kings Co.], citing, *Matter of Deal v Goord*, 8 AD3d 769 [3rd Dept. 2004], appeal dismissed, 3 NY3d 737 [2004], reconsideration denied, 4 NY3d 795 [2005]; *People v Crump*, 302 AD2d 901 [4th Dept. 2003], *lv denied*, 100 NY2d 537 [2003]; *People v Bloom*, 269 AD2d 838 [4th Dept. 2000], *lv denied*, 94 NY2d 945 [2000]). See also *People v Dale*, 14 AD3d 712 [2d Dept. 2005], *lv denied*, 4 NY3d 885 [2005]. In any event, "it took some time for many trial courts and practitioners to realize that the 'additional period' of PRS makes PRS substantively different from the parole associated with indeterminate sentences" (*People v Giles, supra*). It took some time for appellate courts to "realize" this as well.

In March 2005, the Court of Appeals decided *People v Catu*, 4 NY3d 242, *supra*, one of the two cases upon which the defendant in the instant case relies, which held that a court's failure to advise a defendant during plea allocution that his sentence would include a term of PRS renders the plea involuntary, and requires reversal of the conviction. The following year, the United States Court of Appeals for the Second Circuit decided *Earley v Murray*, 451 F3d 71, *supra*, the other case upon which the defendant relies -- albeit mistakenly.

The defendant in *Earley*, like the defendant in the instant case, was not advised at his plea

or sentence proceeding that PRS would be included in his sentence, nor was it mentioned in his commitment papers; when he subsequently learned that DOC had imposed a period of PRS, he unsuccessfully challenged this "administrative modification" to his sentence in state court, and then sought a writ of federal *habeas corpus*. In ruling that the PRS "added" by DOC was a "nullity," the federal appellate court relied heavily on what it described as the United States Supreme Court's "broader holding" in *Hill v United States ex rel. Wampler*, 298 U.S. 460 [1936], namely, that "[t]he judgment of the court establishes a defendant's sentence, and that sentence may not be increased by an administrator's amendment" (*Earley v Murray*, supra, at 75); the court opined in *dicta* that the rule articulated in *Hill v United States ex rel. Wampler* is based on the due process guarantees of the U.S. Constitution (see *Id.* at 76, *fn* 1), and declared that "the only cognizable sentence is the one imposed by the judge" (*Id.* at 75).

The Appellate Division, Second Department, cited *Earley* and *Hill v U.S. ex rel. Wampler*, in reaching the same conclusion in its recent decisions in *Smith*, *Benson* and *Noble*, *supra*, and a bevy of other cases.[9] The Appellate Division holds that when "neither the sentencing minutes nor the court's order of commitment mention the imposition of any period of post-release supervision ***the sentence actually imposed by the court never included, and does not now include, any period of post-release supervision" (*People v Noble*, 37 AD3d 622, *supra*). Noting that the sentencing court in *Noble* had imposed a determinate prison term of 8 years and imposed no period of PRS, "precisely" the same sentence promised in his plea agreement, the Appellate Division found that the defendant had failed to articulate any reason that his judgment of conviction should be vacated or his sentence modified in any way.

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[9] See, *e.g.*, *People v Sebastian*, 38 AD3d 576 [2d Dept. 2007]; *People v Brown*, 39 AD3d 659 [2d Dept. 2007]; *People v Royster*, — N.Y.S.2d —, 2007 WL 1439741 (N.Y.A.D. 2 Dept), 2007 N.Y. Slip Op. 04325; *People v Martinez*, — N.Y.S.2d — , 2007 WL 1502033 (N.Y.A.D. 2 Dept).

This court adheres to the Second Department's view. The defendant in the instant matter was sentenced under Indictment #83/99 to a determinate term of 3-1/2 years, and neither the sentencing minutes nor the court's order of commitment mention the imposition of any period of PRS; thus, the defendant was sentenced to precisely the same sentence as promised in his plea agreement. The sentence actually imposed by the court did not, and does not now, include any period of PRS, and any period imposed administratively by DOC is a nullity.

Following the defendant's release from prison on January 13, 2003, his "conditional release" date under his previous sentence, he should have remained under parole supervision only until July 15, 2003, the expiration of his full prison term. The defendant does not claim to have received any "additional punishment," as a consequence of having purportedly been subject to DOC-imposed PRS beyond that date, but to the extent that DOC or any other agency imposes, or attempts to impose, any penalties or obligations upon the defendant deriving from any administratively-imposed PRS, it does so without legal authority.

Finally, this court would comment briefly on the other two arguments advanced in the defendant's instant papers. First, this court agrees with the People that the defendant's "ignorance of the law" does not constitute "good cause" for failing to challenge the constitutionality of his prior conviction at the time this court adjudicated him a predicate violent felony offender; accordingly, the defendant should be precluded from challenging the use of that conviction as a predicate conviction. Second, the defendant's counsel's failure to challenge the constitutionality of the defendant's prior conviction at his predicate felony offender adjudication did not constitute ineffective assistance of counsel: the defendant both declined to raise such a challenge when this court gave him the opportunity to do so, and apparently provided his attorney with no information which would have supported such a challenge. See *People* v

Uttinger, 286 AD2d 741 [2d Dept. 2001]; *People v Ennis*, 261 AD2d 332 [1st Dept. 1999].

Accordingly, the defendant's motion to set aside his sentence under Indictment #2453/05 is summarily denied.

The foregoing constitutes the opinion, decision and order of the court.

Dated: May 30, 2007
Brooklyn, New York

Raymond Guzman
Supreme Court Justice

ENTERED
JUN - 4 2007
NANCY T. SUNSHINE
COUNTY CLERK

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York 11201, for a certificate granting leave to appeal from this determination. This application must be made within 30 days of service of this decision. Upon proof of financial inability to retain counsel and to pay the costs and expenses of such appeal, the defendant may apply to the Appellate Division for the assignment of cousel and for leave to prosecute the appeal as a poor person and to dispense with printing. Application for poor person relief will be entertained only if and when permission to appeal or a certificate granting leave to appeal is granted. See 22 NYCRR §671.5.

Justice Raymond Guzman

ENTERED

JUN – 4 2007

NANCY T. SUNSHINE
COUNTY CLERK