

People v Johnson

2007 NY Slip Op 32252(U)

July 10, 2007

Supreme Court, New York County

Docket Number: 0000912/2000

Judge: Roger S. Hayes

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM

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THE PEOPLE OF THE STATE OF NEW YORK

: Indictment No.
912/2000

-against-

:

ANTHONY JOHNSON

: Motion: CPL § 440.20

Defendant.

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Robert Morgenthau, District Attorney, New York County (ADA Anthony Capozzolo of counsel) for the People.

Defendant, pro se.

Honorable Roger S. Hayes:

Factual and Procedural History

Defendant was convicted, after a guilty plea, of Robbery in the Second Degree (Penal Law § 160.10). On April 24, 2000, the Court sentenced defendant as promised to a determinate term of imprisonment of five years (Bradley, J.). Prior to the imposition of the sentence, he was arraigned as a second felony offender as a result of a felony conviction of Criminal Sale of a Controlled Substance in the Fifth Degree entered on December 28, 1994, and he admitted he was a predicate felon. Pursuant to Penal Law §§ 70.00(6) and 70.45(1), (2), the determinate sentence automatically included a five-year period of post release supervision (“PRS”). Defendant did not appeal the judgment of conviction.

On November 21, 2002, defendant moved pursuant to CPL § 440.20 to “reduce the [PRS] portion of the sentence from five years to the minimum allowable, to wit: two and one

half years.” On March 18, 2003, the Court denied defendant’s motion to modify the PRS pursuant to CPL § 440.10[2][b] and [2][c] and PL § 70.06 (Bradley, J.)

Now, by papers dated April 3, 2007, defendant pro se moves for the second time pursuant to CPL § 440.20 to set aside the sentence. Defendant again argues his sentence should be set aside because he was never advised that there would be a mandatory five-year PRS included as part of his sentence. Defendant does not specifically seek to withdraw his guilty plea. Instead, he seeks to have his original plea enforced without the PRS component. The People oppose defendant’s motion.

Conclusions of Law

A sentencing Court’s failure to advise defendant of the PRS component of his sentence would be a ground for vacatur of the plea (*see People v. Van Deusen*, 7 NY3d 744 [2006]; *People v. Catu*, 4 NY3d 242 [2005]). In the instant matter, however, it is clear defendant has no interest in seeking withdrawal of his plea. Rather, the sole relief defendant seeks is to retain his plea and remove the mandatory PRS component from his sentence.

The First Department specifically addressed this issue in *People v. Sparber*, 34 AD3d 265 (1st Dept. 2006). *Sparber*, a second violent felony offender, also sought to have the period of PRS stricken from his sentence claiming the PRS was a nullity because it was not part of the sentence. The First Department, however, perceived no basis for reducing *Sparber*’s sentence holding that:

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]), which, in defendant’s situation, is precisely five years (Penal Law § 70.45 [1]). Therefore, even though the court’s oral sentence was silent as to PRS, it necessarily included a five-year term thereof (*see People v. Crump*, 302 AD2d 901 [2003]; *lv denied* 100 NY2d 537 [2003]; *People v. Thweatt*, 300 AD2d 1100 [2002]; *People v. Bloom*, 269 AD2d 838 [2000], *lv denied* 94 NY2d 945 [2000])

(*People v. Sparber*, 34 AD3d at 265-266).

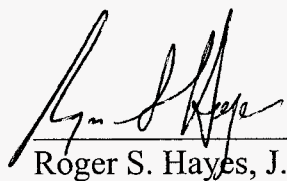
Similarly, defendant, a second felony offender, seeks to retain his plea and remove the mandatory PRS component from his sentence. As decided in *Sparber*, the determinate sentence for a second felony offender automatically includes a five-year period of PRS, by operation of law, (see PL § 70.45[1]), irrespective of whether the sentencing Judge expressly announced its inclusion as part of the sentence. Therefore, the relief requested by defendant to remove the mandatory PRS may not be granted as it would render his sentence illegal. Moreover, since defendant has not explicitly stated he wants to withdraw his plea, defendant’s motion to set aside the sentence is denied.

Defendant will be produced in Part 85 of the New York State Supreme Court on Friday, September 14, 2007 with counsel. On that date, the Court will clarify defendant’s sentence to explain and pronounce that by operation of law it contains a period of PRS of five years. This was a procedure adopted by the Honorable Marcy L. Kahn in *People v. Edwards*, Sup Ct, NY County, March 21, 2007, Kahn, J., Indictment No. 5588-2001.

This Court believes Justice Kahn's reasoning is persuasive and will follow the procedure she utilized in *Edwards*.

This constitutes the Decision and Order of the Court.

New York, New York
July 10, 2007



Roger S. Hayes, J.S.C.