

People v Stewartson

2007 NY Slip Op 32424(U)

July 25, 2007

Supreme Court, Kings County

Docket Number: 0002979/1999

Judge: Ira B. Harkavy

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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

Indictment No.: 2979/99

- against -

DECISION, OPINION
and ORDER

MARVIN STEWARTSON,

Defendant.

-----X
PRESENT: IRA B. HARKAVY
Justice of the Supreme Court

By pro se motion, dated January 24, 2007, the defendant Marvin Stewartson seeks an Order vacating his judgment of conviction and setting aside his sentence on the grounds that the Court, at sentencing, failed to refer to a statutorily-mandated period of post-release supervision. The District Attorney opposes the motion, and argues that defendant can be resentenced, so that the Court may explicitly specify a period of post-release supervision.

On March 16, 2000, defendant was convicted after a jury trial of two counts of Robbery in the First Degree. On April 10, 2000, this Court sentenced defendant to consecutive, determinate terms of imprisonment of fifteen years. At sentencing, the Court did not explicitly refer to a term of post-release supervision, and there is no mention of post-release supervision in the Sentence and Order of Commitment.

Defendant appealed from his judgement of conviction on various grounds. On January 17, 2006, the Appellate Division, Second Department, affirmed the judgment of conviction and held that the lineup was fair; that this Court's *Sandoval* ruling was a provident exercise of

[* 2]

discretion; that defendant's guilt was proven beyond a reasonable doubt; and that defendant's claims of prosecutorial misconduct were either unpreserved, without merit, or harmless (*People v Stewartson*, 25 AD3d 629, 630 [2006]). The Appellate Division also held that the consecutive sentences were proper and that the remaining contentions were either unpreserved for appellate review or without merit (*id.* at 630-631). On March 29, 2006, defendant's application for leave to appeal to the Court of Appeals was denied (*People v Stewartson*, 6 NY3d 839 [2006]).

In light of recent decisions of the Appellate Division, Second Department, where the imposition of post-release supervision is not mentioned either explicitly by the Court at sentencing or in the order of commitment, the sentence actually imposed does not include a period of post-release supervision (*People v Benson*, 38 AD3d 563 [2007]; *People v Wilson*, 37 AD3d 55 [2007]; *People v Noble*, 37 AD3d 622 [2007]; *People v Smith*, 37 AD3d 499 [2007]). Thus, the defendant does not raise any challenge to his sentence as actually imposed (*Benson*, 38 AD3d at 563; *Smith*, 37 AD3d at 499).

Moreover, the fact that the Court did not explicitly refer to post-release supervision at the time of sentencing does not entitle him to a vacatur of his conviction. Defendant was convicted after trial, and thus the same issues do not come into play as they would if defendant had been convicted as the result of a bargained-for plea of guilty (*compare People v Catu*, 4 NY3d 242, 245 [2005])[“Because a defendant pleading guilty to a determinate sentence must be aware of the postrelease supervision component of the sentence in order to knowingly, voluntarily and intelligently choose among alternative courses of action, the failure of a court to advise of

postrelease supervision requires reversal of the conviction.”)].

Furthermore, pursuant to law, a period of post-release supervision is to be automatically included in a determinate sentence of imprisonment, and the imposition of post-release supervision is non-discretionary (*see* Penal Law §§ 70.00 [6] and 70.45 [1]). However, as the Second Department has recently held that a period of post-release supervision was imposed, if it was not explicitly mentioned at sentencing or in the order of commitment (*Benson*, 38 AD3d 563; *Wilson*, 37 AD3d 55; *Noble*, 37 AD3d 622; *Smith*, 37 AD3d 499), the failure of the Court to include a period of post-release supervision in defendant’s sentence renders defendant’s sentence illegal.

A Court does, however, have the inherent authority to correct its own inadvertent error made at sentencing (*People v Richardson*, 100 NY2d 847, 850-851 [2003]; *People v DeValle*, 94 NY2d 870 [2000]; *People v Wright*, 56 NY2d 613 [1982]; *see also People v Rivera*, 1 AD3d 385 [2003][court had inherent power to resentence defendant to correct illegal sentence it had imposed]; *People v Hollis*, 309 AD2d 764 [2003][court had inherent power to correct unlawful sentence by resentencing defendant to change term of post-release supervision]). Further, constitutional considerations require that the correction of such an error require a resentencing in open court, with the defendant present (*see People v Edwards*, 15 Misc 3d 1151[A], *11 [Sup Ct, New York County 2007], citing *Earley v Murray*, 462 F3d 147 [2d Cir 2006]; *People v Simons*, Sup Ct, Kings County, January 2, 2007, Marrus, J., Indictment No. 9566/98, citing *Earley*). Moreover, the Court notes that in this case, resentencing defendant to include a period

of post-release supervision will not change, suspend or interrupt defendant's sentence already imposed under New York law (*Edwards*, 15 Misc 3d at *13).

Accordingly, the defendant's motion is denied; the Clerk of the Court is directed to calendar this matter before a Justice currently serving in the Criminal Term for resentencing consistent with this decision as set forth herein; and the defendant is to be produced in court and resented to the same determinate sentence previously imposed, with the mandatory period of post-relief supervision required by CPL § 70.45 stated clearly for the record.

This constitutes the Decision, Opinion and Order of this Court.

Dated: July 25, 2007

E N T E R,



IRA B. HARKAVY
J.S.C.

IRA B. HARKAVY
Justice of the Supreme Court

ENTERED

AUG - 3 2007

NANCY T. SUNSHINE
COUNTY CLERK