

People v Rodriguez

2007 NY Slip Op 32452(U)

July 23, 2007

Supreme Court, New York County

Docket Number: 0001678/1999

Judge: Micki A. Scherer

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 81

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PEOPLE OF THE STATE OF NEW YORK

Decision and Order

-against-

July 23, 2007

SALLY RODRIGUEZ,
Defendant.

Ind. No. 1678-99

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HON. MICKI A. SCHERER:

Defendant has moved pursuant to Criminal Procedure Law Section 440 for an order setting aside her sentence on the grounds that it was illegally imposed and invalid as a matter of law. The People oppose the motion.

On September 8, 1999, the defendant entered a plea of guilty to three counts of Robbery in the First Degree in full satisfaction of the above indictment. On September 22, 1999, the defendant was sentenced as a violent predicate and as promised to concurrent determinate sentences of 14 years.¹

The above plea stemmed from the defendant's conduct in committing five armed robberies. The defendant made a full confession.

In her plea allocution, the defendant, under oath, admitted to her participation in the three robberies to which she pled. The court notes, however, that despite a detailed allocution, neither the plea minutes, nor the sentencing minutes mention that the defendant would be subject to a period of post-release supervision (hereinafter "PRS") upon her release from prison.²

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The defendant appealed the alleged excessiveness of her sentence in this matter to the Appellate Division, First Department. The judgment was affirmed without opinion on October 17, 2002. People v. Rodriguez, 298 AD 2d 1009 (1st Dept. 2002). Thereafter, leave to appeal to the Court of Appeals was denied on December 17, 2002. People v. Rodriguez, 99 NY 2d 563 (2002).

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In this case, given the defendant's status as a second violent felony offender, the imposition of five years of PRS is mandatory.

Now, almost eight years later, defendant has moved for an order setting aside her sentence pursuant to CPL § 440.10.³ In addition to raising this court's failure to inform the defendant that PRS would follow her incarceration, the defendant also maintains that she was erroneously adjudicated a predicate felon, and that her confession was made without benefit of counsel.

While this court is aware of the Court of Appeals holding in People v. Catu, 4 NY 3d 242 (2005), which requires vacatur of a plea when a defendant is not advised of the mandatory period of post-release supervision, the defendant in the instant case is not seeking such relief. Instead, she is seeking to vacate *her sentence* on the grounds that it was illegally imposed and invalid as a matter of law.

Earlier this month, the Court of Appeals, in People v. Louree, 8 NY 3d 541 (reversing the Appellate Division for affirming the trial court's decision denying defendant's motion to withdraw his plea despite the failure to mention PRS during the allocution), held that since the trial court's failure to mention PRS is clear from the face of the record, it is not properly raised in a CPL §440 motion. Thus, the within court is precluded from hearing this matter.

If, however, the Court of Appeals did not intend to have the Louree holding applied in cases in which the defendant is seeking only to vacate his/her sentence, this court makes the following findings. The defendant pled guilty to class B violent felonies for crimes that occurred between January 1, 1999 and February 8, 1999. The authorized sentences for the defendant, a violent predicate felon, were determinate sentences ranging from ten to twenty-five years. The sentences imposed were within the legally permissible range. Thus, they were *not* illegally imposed or otherwise invalid. See

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It is important to note that the defendant has *not* moved to vacate her plea.

generally, Early v. Murray, 451 F.3d 71 (2d Cir. 2006); People v. Sparber, 34 AD 3d 265 (1st Dept. 2006).

With respect to the defendant's challenge to her adjudication as a predicate felon, her calculations are clearly erroneous. The defendant's prior violent felony conviction for attempted Robbery in the Second Degree, the conviction which formed the basis of her adjudication, occurred on September 25, 1989 which is clearly *within 10 years of the commission* of the instant felonies. Penal Law §70.04(b)(iv). Thus, there is no merit to this ground for vacatur of the defendant's sentence.

Finally, defendant's challenge to the statement made to the police based upon her alleged illiteracy, is not properly before this court. On July 26, 1999, a Huntley/Wade hearing was conducted. Thereafter, this court denied the defendant's motion to suppress her statement and the identification evidence sought to be introduced by the People. The record of this hearing was forwarded to the Appellate Division on March 9, 2001 as part of the record on appeal. Criminal Procedure Law § 440.10(2)(c) states that a court must deny a motion to vacate a judgment when:

Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him;

(emphasis added).


The court finds that the defendant's failure to raise the within issue on her direct appeal was unjustifiable. See, People v. Cooks, 67 NY 2d 100 (1986). The Court of Appeals made it clear in Cooks, *supra*, that the purpose of CPL §

440.10(2)(b) and (c) is to “prevent CPL 440.10 from being employed as a substitute for direct appeal when defendant was in a position to . . . readily have raised it on appeal but failed to do so.” The transcripts of the hearings and trial provided an adequate record as to the claim now raised. Thus, as reiterated in Louree, *supra*, if the defendant wished to challenge the court’s ruling, she should have done so on her direct appeal.⁴

Based upon the foregoing, the court finds that there is no basis in law for the relief sought by the defendant.

Accordingly, the defendant’s motion is denied.

This constitutes the decision and order of the court.



MICKI A. SCHERER, J.S.C.

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The court notes that the defendant had an attorney assigned to represent her on appeal. Thus, it is reasonable to conclude that either the defendant failed to communicate her concerns regarding the within issue or, the more likely scenario, that her attorney found the issue to be without merit.