SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY : CV19

THE PEOPLE OF THE STATE OF NEW YORK, v. ~~STANLEY BREWER,~~ Defendant.	**INDICTMENT NO. 58/03** **DECISION AND ORDER**

DEMAREST, C., J.S.C.

Defendant moves pursuant to CPL 440.20 for an order setting aside and vacating his sentence claiming that he should not have been sentenced as a second felony offender because the federal conviction upon which the predicate sentence was based did not constitute a felony offense in New York.

Following a plea of guilty to three separate violations of Penal Law § 140.25(2), Burglary in the Second Degree, Defendant was sentenced on October 30, 2003, to five years imprisonment and five years post-release supervision for each offense to run concurrently. Pursuant to a predicate statement filed by the District Attorney, Defendant was adjudicated a second felony offender based on a federal conviction on September 15, 1992, of credit card fraud in violation of 18 USCA § 1029 (a) (1) and (2). At the plea, Defendant admitted that he was the person who was convicted of a felony and stated he did not wish to challenge the constitutionality of the prior conviction.

Defendant now contends that the most similar offense in the New York Penal Law to the federal statute under which he was convicted is Penal Law § 165.17, a misdemeanor. He argues that, as such, he was not properly sentenced as

a predicate felon. Penal Law § 165.17 makes it illegal to use or display a credit card which defendant knows to be revoked or cancelled.

CPL 440.20(1) provides that at 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. However, Defendant is precluded from asserting a CPL 440.20 challenge at this time because he failed to raise the issue at the time of sentencing by not controverting the allegations in the predicate felony statement or show good cause for his failure to do so, and a challenge to the determination as to whether a foreign conviction is the equivalent of a New York felony requires preservation. See People v. Samms, 95 NY2d 52, 57 (2000); People v. Smith, 73 NY2d 961 (1989); People v. Polowczyk, 157 AD2d 865 (2d Dep't, 1990); People v. Crutchfield, 115 AD2d 189 (3d Dep't, 1985). Notwithstanding the procedural bar, Defendant raises an important issue that the Court will address.

To qualify as a predicate felony, a conviction which occurred in another jurisdiction must be for an offense which includes all of the essential elements of a felony under New York law for which a sentence to a term of imprisonment in excess of one year was authorized in New York. See CPL 400.21. "To determine whether a foreign crime is equivalent to a New York felony the court must examine the elements of the foreign statute and compare them to an analogous Penal Law felony." People v. Gonzalez, 61 NY2d 586, 589 (1984); see also People v. Smith, 8 AD3d 683 (2d Dep't, 2004); People v. Maglione, 305 AD2d 426 (2d Dep't, 2003). New York courts have applied a strict equivalency standard to determine whether a prior foreign offense corresponds to a New York felony, as

"technical distinctions between the New York and foreign penal statutes can preclude use of a prior felony as a predicate for enhanced sentencing, even though the actual criminal conduct leading to the foreign conviction would have fallen within the ambit of the New York offense." North v. Board of Examiners of Sex Offenders of State of New York, __NY3d__, 2007 NY Slip Op 05781 (July 2, 2007). Therefore, a violation of 18 USCA § 1029 (a) (1) and (2) may be used as a predicate in this state, only if the elements of the federal offense are equivalent to a felony under New York law. See People v. Muniz, 74 NY2d 464, 467 (1989); People v. Gonzalez, 61 NY2d 586, 589 (1984).

The federal statute under which defendant was convicted is entitled "Fraud and related activity in connection with access devices." 18 USCA § 1029. It prohibits knowing and intentional use of access devices under subdivision (a) (1), and knowing and intentional use of unauthorized access devices and by such conduct obtaining anything of value aggregating $1,000 or more, under subdivision (a) (2). An access device is defined as "any card . . . that can be used . . . to obtain money, goods, services, or any other thing of value." 18 USCA § 1029 (e) (1). Defendant was convicted under this statute for use of an unauthorized credit card at two separate retail stores in Manhattan, DeJaiz and Abraham & Strauss ("A & S"). See U.S. v. Brewer, 768 F.Supp 104 (SDNY, 1991).

In New York, the crime of unauthorized use of credit cards has been prosecuted under Penal Law § 170.10, Forgery in the Second Degree, a class D felony. See People v. Lewandowski, 255 AD2d 902 (4th Dep't, 1998); see also People v. Doty, 267 AD2d 616 (3d Dep't, 1999); People v. DeMarco, 235 AD2d

581 (3d Dep't, 1997); People v. LeGrand, 81 AD2d 945 (3d Dep't, 1981), appeal denied 54 NY2d 757 (1981). Penal Law § 170.10 reads, in part, as follows:

> "A person is guilty of forgery in the second degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument which is or purports to be, or which is calculated to become or to represent if completed: (1) A . . . credit card . . . or other instrument which does or may evidence, create, transfer, terminate or otherwise affect a legal right, interest, obligation or status."

As a credit card receipt constitutes a written instrument for purposes of forgery, any person who falsely signs that receipt in the name of the card owner is guilty of forgery in the second degree. See People v. LeGrand, supra. However, 18 USCA § 1029 (a) does not require an individual to sign a written instrument, but rather criminalizes the mere "use" of a counterfeit or unauthorized credit card. Thus, although the federal statute, 18 USCA § 1029, would appear to proscribe some of the conduct described in Penal Law § 170.10, as Defendant argues, it also encompasses conduct defined as "unlawful use of a credit card, debit card or public benefit card," a class A misdemeanor, as proscribed in Penal Law § 165.17. Penal Law § 165.17 provides:

> "A person is guilty of unlawful use of credit card, debit card or public benefit card when in the course of obtaining or attempting to obtain property or a service, he uses or displays a credit card, debit card or public benefit card which he knows to be revoked or cancelled."

In fact, many of the elements of 18 USCA § 1029 (a) (1) and (2) do not differ from the elements of Penal Law § 165.17. In prohibiting the knowing and intentional use of unauthorized access devices, the federal statute proscribes conduct which would satisfy the element of using a revoked or cancelled credit card under Penal Law § 165.17.

Moreover, it is well settled in New York that when a statute in a foreign jurisdiction renders criminal several acts, ' "some of which, if committed in New York, would be felonies and some misdemeanors," ' the foreign conviction may not be the basis for a predicate felony adjudication unless the acts which formed the basis for the conviction can be determined with specificity. People ex rel. Goldman v. Denno, 9 NY2d 138, 140 (1961); see also People v. Muniz, 74 NY2d 464, 468 (1989); People v. Gonzalez, supra at 590-592. The Court is thus permitted to scrutinize the accusatory instrument from the foreign jurisdiction in order to clarify the nature of the offense. People v. Muniz, 74 NY2d 464, 468 (1989); People v. Gonzalez, supra at 590; People v. Ricketts, 38 AD3d 291, 292 (1st Dep't, 2007); People v. Bates, 299 AD2d 727, 729-730 (3d Dep't, 2002); People v. Lopez, 286 AD2d 928, 929 (4th Dep't, 2001); People v. Searvance, 236 AD2d 306, 307 (1st Dep't, 1997); People v. Malanga, 201 AD2d 742 (2d Dep't, 1994); People v. James, 299 AD2d 932, 933 (4th Dep't, 2002); People v. Adams, 164 AD2d 546, 554 (2d Dep't, 1991). In this case, the People did not produce the federal indictment, nor did they specify the equivalent New York felony upon which they relied in their predicate felony statement. See People v. Bates, 299 AD2d 727 (3d Dep't, 2002); People v. James, supra; People v. Francis, 231 AD2d 839 (4th Dep't, 1996). Furthermore, the only documentation before the Court, Defendant's RAP sheet, and the brief recitation of facts in the federal court's decision on Defendant's motion to dismiss the indictment, (U.S. v. Brewer, 768 F.Supp 104 (SDNY,1991)), does not indicate the specific acts under the statute for which Defendant was convicted. This documentation is insufficient to determine whether the conduct underlying the federal conviction violated New York Penal Law § 165.17, unlawful use of a credit card, a misdemeanor, or Penal Law §

170.10, Forgery in the Second Degree, a felony. The Court therefore cannot determine whether Defendant committed a crime that is equivalent to a felony in New York, as there is no basis to determine what the felonious acts were. See People v. Yancy, 86 NY2d 239 (1995); People v. Gonzalez, supra; People v. James, supra. "The responsibility rests upon the prosecution to satisfy these requirements if it seeks additional punishment. If it is unable to do so because the record of the foreign conviction does not resolve the questions which must be answered before second offender status may be granted under New York law, then . . . enhanced sentencing must be denied." Gonzalez, supra at 592. Accordingly, the People failed to meet their burden of establishing that the federal conviction of credit card fraud constitutes a predicate felony and the predicate adjudication should be vacated. See People v. Yancy, 86 NY2d 239 (1995); People v. Francis, 231 AD2d 839 (4th Dep't, 1996); People v. Jackson, 118 AD2d 469 (1st Dep't, 1986), lv denied 67 NY2d 944 (1986).

However, notwithstanding the People's failure to establish that Defendant's conviction under 18 USCA § 1029 (a) (1) and (2) constituted a predicate felony, Defendant's sentence was legal and authorized. The authorized sentence for a second felony offender who stands convicted of a violent felony offense where the predicate conviction was a non-violent felony is a determinate sentence of five to fifteen years, plus five years post-release supervision. Penal Law §§ 70.06 (6)(b); 70.45 (1), (2). The authorized sentence for Defendant's conviction of Burglary in the Second Degree, a violent felony offense, had he not been adjudicated a predicate felon, was 3 ½ to 15 years determinate, plus five years post-release supervision. Penal Law 70.02 (1)(b); (2)(a), (3)(b); 70.45 (1), (2). Defendant's sentence of five years determinate with five years post-release supervision was

therefore authorized, legally imposed and valid. It is noted, moreover, that in light of Defendant's conviction before me on three separate burglaries, the sentence promised, and subsequently imposed, was reasonable and appropriate and was not affected by the predicate adjudication.

Accordingly, Defendant's adjudication as a second felony offender is vacated. However, since Defendant's sentence was legal and authorized, his motion to vacate the sentence is denied.

The foregoing constitutes the decision of the Court.

ENTER:

J.S.C.

Dated: August 3, 2007