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. 7289/99 & 4209/00

-against- :

Roy Jones, : Motion: CPL § 440.20

Defendant.

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Robert Morgenthau, Esq., District Attorney, New York County, New York City (ADA Nitin Savur of counsel) for the People.

Lori Cohen, Esq. for defendant.

Honorable Roger S. Hayes:

Procedural History

On October 16, 2000, defendant pled guilty to Attempted Robbery in the Second Degree and Bail Jumping in the Second Degree. On October 27, 2000, Justice Stackhouse sentenced defendant, a second felony offender, to a determinate sentence of three years on the attempted robbery count and an indeterminate sentence of one-and-one-half to three years on the bail jumping count. The sentences were to run concurrently.[1] Pursuant to Penal Law §§ 70.00(6) and 70.45(1), the determinate sentence automatically included a five-year period of post release supervision ("PRS"). Defendant was not informed of PRS at plea or sentence nor was it reflected on the commitment order. Defendant did not appeal the judgment of conviction.

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[1] Justice Stackhouse is currently assigned to the Civil Term.

On January 30, 2003, defendant, pro se, moved pursuant to CPL § 440.20 to set aside the sentence because "defendant was never informed of a five year [PRS], thereby, violating his plea agreement." In a letter dated May 29, 2003, this Court asked defendant to clarify his request to be re-sentenced "in accordance with the plea deal" and to specify whether he wished to withdraw his guilty plea. Defendant responded in a letter dated June 9, 2003 that he did not want to withdraw his plea and wanted the original plea agreement enforced, which he said did not include PRS. On July 7, 2003, this Court denied defendant's request.

On January 16, 2007, defendant again moved pro se to set aside his sentence pursuant to CPL § 440.20. Defendant claimed his sentence should be set aside because he was never advised that there would be a mandatory five-year period of PRS included as part of his sentence. On April 12, 2007, this Court denied defendant's second request to set aside the sentence pursuant to CPL § 440.20.

On April 23, 2007, the Court, *sua sponte*, supplemented its April 12, 2007 Decision. It directed defendant be produced so that the Court could clarify defendant's sentence -- to explain and pronounce that by operation of law it contained a five-year period of PRS.

The Court also appointed defendant's original counsel to represent him. On August 20, 2007, defendant filed the instant motion moving to vacate the judgment of his conviction pursuant to CPL § 440.10. Defendant now wants to withdraw his guilty plea. The People oppose defendant's motion, on the sole ground "a CPL § 440.10 motion is the incorrect

forum for pressing his claim as per the recent New York Court of Appeals decision in People v Louree."

Conclusions of Law

It is well settled when a defendant waives the fundamental right to trial by jury and pleads guilty, due process requires that the waiver be knowing, voluntary and intelligent (*see* NY Const, art I, §6; *see also People v Ford*, 86 NY2d 397, 403 [1995]). Therefore, prior to accepting a guilty plea, a court must inform a defendant of the direct consequences of the plea (*People v Catu*, 4 NY3d 242, 245 [2005]). Among the direct consequences of a criminal conviction is the period of PRS that follows a determinate sentence of incarceration (*People v Catu*, 4 NY3d 242). As the Court of Appeals explained in *Catu*, "[b]ecause a defendant pleading guilty to a determinate sentence must be aware of the [PRS] component of that sentence in order to knowingly, voluntarily and intelligently choose among alternative courses of action, the failure of a court to advise of [PRS] requires reversal of the conviction" (*see id.* at 245).

More recently, on November 15, 2007 the Court of Appeals decided *People v Hill*, __ NE2d __, 2007 NY Slip Op 08782 [2007]. In *Hill*, the defendant was not informed, either during the plea or initial sentencing, that a period of PRS would follow his term of incarceration. The defendant in *Hill* subsequently moved pursuant to CPL § 440.10 to vacate his conviction relying on *Catu*. The trial court denied the motion but modified the defendant's sentence to a determinate sentence of twelve and one-half years plus two and

one-half years PRS. In essence, the trial court attempted to place the defendant in a position where he would be no worse off and possibly better than if his original sentence did not have a period of PRS. The Appellate Division upheld the trial court's modification (*People v Hill*, 39 AD3d 1 [1st Dept 2007]). The Court of Appeals reversed the Appellate Division and the trial court. It held the defendant's decision to plead guilty was not knowing, voluntary and intelligent and permitted the defendant to withdraw his plea.

It is clear from a reading of these cases that if defendant was subject to a period of PRS his motion to vacate his conviction would have to be granted because his plea was not knowing, voluntary and intelligently entered.[2] Certainly, it appeared to defendant that he was subject to PRS. In fact, he was returned to prison for violating PRS and defendant's two prior pro se motions were to remove the period of PRS he claimed were illegally added to his sentence by the Department of Correctional Services (hereinafter "DOCS"). There is no factual dispute that DOCS, not a judge, added the period of PRS to defendant's sentence. The Appellate Division, First Department very recently clarified

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[2] *People v Louree*, 8 NY3d 541 [2007], does not require a contrary finding. In *Louree*, the trial judge failed to advise the defendant that PRS was part of his sentence during the plea allocution, but later imposed PRS during the sentencing proceeding. The fact that there would be a period of PRS was thus clear on the face of the record. In such an instance the issue must be raised on direct appeal and not in a CPL § 440.10 motion. However, where the defect is not clear on the face of the record, a CPL § 440.10 motion is the correct vehicle to raise the issue. *Louree*, therefore, does not preclude the relief sought by the defendant since the defect here was not clear on the face of the record.

whether or not a defendant who should have been informed prior to pleading guilty that the sentence included PRS but who was not so informed can have the PRS imposed by DOCS. In *People v Figueroa*, __ NYS2d __, 2007 NY Slip Op 08352, [1st Dept 2007]), the Appellate Division held that where PRS is not imposed by the court, nor reflected in the court's order of commitment, the sentence does not include any period of PRS. The Appellate Division explicitly said DOCS lacks the authority to add PRS to a defendant's sentence. The Appellate Division held it was therefore not error for the trial court to deny the defendant's motion to modify his sentence, nor was there any ground to vacate the judgment based on the *Catu* ground.

Based on the holding in *Figueroa*, defendant's sentence does not now, and never did include a period of PRS. Since defendant's sentence is the very sentence he bargained for, with no PRS, there is no basis to grant his motion to vacate the judgment. Accordingly, his motion to vacate the judgment is denied. Although it is clear to this Court that DOCS has no legal authority to hold defendant or subject him to PRS, if defendant has not been released pursuant to *Figueroa*, then the remedy lies in a *writ of habeus corpus*.

This constitutes the Decision and Order of the Court.

New York, New York
November 30, 2007

Roger S. Hayes, J.S.C.

HON. ROGER S. HAYES
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