

**People v Vasquez**

2008 NY Slip Op 33540(U)

October 28, 2008

Supreme Court, Kings County

Docket Number: 7519/1998

Judge: L. Priscilla Hall

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*appeals*

**ORIGINAL**

SUPREME COURT: KINGS COUNTY  
-----X  
PEOPLE OF THE STATE OF NEW YORK,

(Criminal Term, Part 14)

By: HALL, L. PRISCILLA, J

- against -

Dated: October 28, 2008

CARL VASQUEZ

Indictment No. 7519/1998

Defendant.

-----X

By Notice of Motion, dated August 22, 2007, the defendant, Carl Vasquez, requests an order setting aside his sentence of twelve years to life imprisonment on the grounds that his sentence was "unauthorized, illegally imposed or otherwise invalid as a matter of law" pursuant to C.P.L. § 440.20(1).

***Background***

Pursuant to a plea agreement entered into on May 19, 1999, the defendant was convicted of Attempted Burglary in the Second Degree (P.L. § 140.25[2]), a class D felony. On the same day, defendant was served by the District Attorney with a statement pursuant to C.P.L. § 400.16, which listed three prior violent felony convictions and one prior non-violent felony conviction: two prior convictions for burglary in the second degree, a conviction for attempted burglary in the second degree and a conviction for burglary in the third degree. Defendant admitted to the prior violent felony convictions and admitted that he was afforded his constitutional rights at those judicial proceedings. He was thereupon adjudicated a mandatory persistent violent felony offender by this court

pursuant to Penal Law § 70.08. On June 23, 1999, defendant was sentenced to the promised term of twelve years to life imprisonment. Defendant is presently incarcerated.

In *pro se* motion papers dated August 22, 2007, defendant now seeks to have this court set aside his sentence pursuant to Criminal Procedure Law § 440.20 on the grounds that: (1) the court failed to follow the proper procedures required under C.P.L. § 400.16 in adjudicating him a persistent violent felony offender and (2) that defendant's enhanced sentence was imposed in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and in violation of defendant's Sixth Amendment rights. Specifically, the defendant alleged that his sentence was enhanced based on facts not found by a jury or included in his indictment.

In their "Affirmation in Opposition to Motion to Set Aside Sentence" dated December 14, 2004, the People argue that the rule of *Apprendi* does not apply to the case at bar. Most notably, the People point out that Mr. Vasquez was given an enhanced sentence based on his adjudication as a mandatory persistent violent felony offender under C.P.L. §400.16. The People argue that *Apprendi*, and the rules established by its progeny; *Ring v. Arizona*, 536 U.S. 584 (2002) (determination of presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty solely by judge, rather than jury, violates Sixth Amendment), *Blakely v. Washington*, 542 U.S. 296 (2004) (upward departure from sentencing guidelines by judge based solely on judge's finding of deliberate cruelty and not based on facts either admitted by defendant

nor found by a jury violate defendant's Sixth Amendment rights) and *Cunningham v. California*, 549 U.S. 296 (2007) (California's determinate sentencing law, which authorized judge, not jury, to find facts exposing defendant to elevated upper term sentence violated defendant's Sixth Amendment rights), clearly stand for and further bolster the proposition first espoused in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), as further ratified by *Apprendi*, that "[e]xcept for a prior conviction, any fact that increases the penalty of a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 489 (*emphasis added*); see also *Almendarez-Torres*, 523 U.S. 224 (1998) (judge may constitutionally consider the fact of a prior conviction in enhancing a sentence beyond the statutory maximum without violating a defendant's Sixth Amendment rights).

For the reasons set forth below, defendant's motion is denied.

#### *Discussion*

Turning to defendant's first argument, defendant asserts that the court failed to follow the statutory procedures required in adjudicating the defendant to be a discretionary persistent felony offender. Defendant correctly states that under C.P.L. § 400.20 there is a two-pronged process which the court must perform before adjudicating a defendant a discretionary persistent felony offender: First, the court must determine if the defendant can be classified as a persistent felony offender under the Penal Law, and second, the court must determine on the record if "it is of the opinion that the history and

character of the petitioner are such that extended incarceration and lifetime supervision of the petition are warranted to best serve the public.” C.P.L. § 400.20. However, this statutory procedure is inapplicable to defendant’s case.

Defendant was not sentenced as a discretionary persistent felony offender under C.P.L. § 400.20, under which such a procedural scheme would be applicable, but rather as a mandatory persistent **violent** felony offender under C.P.L. § 400.16. Under Section 400.16, upon an uncontroverted finding that the defendant “has previously been subject to two or more predicate violent felony convictions”, this court was *required* to find Mr. Vasquez a persistent violent felony offender and was therefore also *required* to sentence the defendant to an “indeterminate sentence of imprisonment, the maximum term of which shall be life imprisonment.” P.L. § 70.08.

This court finds no evidence that the court did not follow the procedures set out in the law exactly as required for this defendant. According to the plea minutes and a copy of the statement of prior criminal history produced by the District Attorney, defendant had three prior predicate violent felony convictions. The People followed the statutory filing and service procedures of C.P.L. §§ 400.15 and 400.16; defendant, advised by counsel, admitted he was the person who had been convicted of the prior violent felony offenses mentioned in the statement and that the convictions were constitutionally obtained; and this court, having uncontroverted evidence before it that defendant had

three times previously been convicted of predicate violent felony offenses, followed the dictate of the statute and determined that defendant was subject to sentencing as a mandatory persistent violent felony offender. (Plea Mins. Tr. 17-19, lines 20-10, May 19, 1999). Based on those facts, this court finds there was no procedural defect in Mr. Vasquez's adjudication as a mandatory persistent violent felony offender.

Turning to the defendant's second argument, defendant asserts that the enhancement of his sentence was illegal under *Apprendi* and in violation of defendant's Sixth Amendment rights. In that case, the Supreme Court held that the Sixth Amendment and due process requires that a factual determination authorizing an increase in the maximum prison sentence must be made by the jury, not the sentencing court. *Apprendi*, 530 U.S. at 482-485, 492-497. However, the Court in *Apprendi* also clearly noted that a jury did not have to be involved if the sentence were increased solely as a result of prior convictions, a legal principle first established by the Court in *Almendarez-Torres*. *Apprendi*, 530 U.S. at 489. Since that time the Court has never overturned, and has repeatedly reaffirmed *Apprendi*'s recidivism exception. See *Cunningham v. California*, 549 U.S. 270 (2007); *Blakely v. Washington*, 542 U.S. 296 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002).

Moreover, the New York Court of Appeals has consistently recognized the continued vitality of the *Almendarez-Torres* principle as reaffirmed by *Apprendi* and its progeny. In *People v Rivera*, 5 N.Y.3d 61 (2005), the Court of Appeals stated "the

Supreme Court has held that a judge (as opposed to a jury) may find the fact of a defendant's prior conviction without violating the Sixth Amendment. *Id.* at 67 (citing *Almendarez-Torres*); see also *People v. Rosen*, 96 N.Y.2d 329 (2001)(Sixth Amendment affords no constitutional right to a jury trial to establish fact of a prior conviction in challenges to persistent felony offender laws). Lastly, New York's appellate courts have specifically upheld the constitutionality of New York's mandatory persistent violent felony offender sentencing scheme of P.L. § 70.08 against Sixth Amendment challenges under *Apprendi*. See *People v. Boyer*, 6 N.Y.3d 427 (2006)(rejecting appellant's contention that persistent violent felony offender statute is unconstitutional under *Apprendi* principles); *People v. Leon*, 10 N.Y.3d 122 (2008)(the finding that the defendant was convicted of prior violent felonies and therefore subject to sentencing as persistent violent felony offender not impermissible finding of fact under *Apprendi*); *People v. Licea*, 44 A.D.3d 690 (2d Dept. 2007)("Defendant's contention that his resentencing as a PVFO violated his constitutional rights pursuant to *Apprendi* is without merit"). Because defendant's enhanced sentence was solely the result of the defendant being adjudicated a mandatory persistent violent felony offender, the enhanced sentence in no way violates defendant's Sixth Amendment rights and comports with the holding of *Apprendi* and its progeny.


***Conclusion***

For all of the foregoing reasons, defendant's motion to set aside his sentences is denied pursuant to C.P.L. § 440.30(4)(a).

This constitutes the decision and order of this court.

The defendant is hereby advised of his right to appeal to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York, 11201.

ENTER:

  
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J.S.C.

Date: October 28, 2008

**ENTERED**  
**OCT 28 2008**  
**NANCY T. SUNSHINE**  
**COUNTY CLERK**