

People v Warren

2009 NY Slip Op 31473(U)

March 27, 2009

Supreme Court, Kings County

Docket Number: 8748/1999

Judge: Patricia M. DiMango

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, CRIMINAL TERM: PART 30

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THE PEOPLE OF THE STATE OF NEW YORK	: By: DI MANGO, J.
	:
-against-	: Date: March 27, 2009
	:
	: DECISION & ORDER
	:
EDWARD WARREN,	: Indictment No. 8748/1999
	:
Defendant.	:
-----X	

The defendant, pro se, has filed two motions with this court: (1) to set aside his sentence, pursuant to CPL §440.20; and (2) to withdraw his guilty plea and have the underlying indictment reinstated in its entirety.

Specifically, the defendant takes issue with the post-release supervision (“PRS”) portion of the alternative sentence which was imposed upon him after he failed to successfully complete a drug treatment program following his entry of a plea of guilty, as he states that he was never advised about PRS upon his plea, and also, that it is disproportionate to his sentence of incarceration.

Additionally, the defendant asserts that his plea was not intelligently and knowingly given, and, in any event, the defendant believes that this particular plea was illegal as it resulted in him being impermissibly placed on interim probation. Since the plea was illegal, the defendant contends that he should have been afforded the opportunity to withdraw his plea, as opposed to the court’s automatically imposing the alternative,

increased sentence upon him when he failed to successfully complete his treatment program.

The People have opposed both applications in their entirety, and, despite having failed to give a notice of cross-motion, in their opposition papers they seek to cross-move for a re-sentencing herein. Upon such a re-sentencing, the People request that the defendant be properly sentenced to five years' PRS.

Factual and Procedural Background

Under Kings County Indictment No. 8748/1999 (filed on November 16, 1999), the defendant, Edward Warren, was charged with Burglary in the Second and Third Degrees, Grand Larceny, Criminal Mischief, Criminal Trespass, and Criminal Possession of Stolen Property. The charges arise from events which occurred on October 31, 1999 and November 4, 1999 whereby it was alleged that the defendant had burglarized a church rectory on the earlier date and was subsequently found to be in possession of stolen property which had been taken therefrom. By his own admission, the defendant had an on-going drug problem.

Upon the defendant's arraignment in Supreme Court, the People's plea offer was for the defendant to plead guilty to Burglary in the Second Degree in exchange for two years' incarceration. Meanwhile, the defense was seeking a "TASC plea" as the defendant requested (and required) drug treatment. TASC evaluated the defendant and found him eligible, and Daytop agreed to accept him for treatment. Thus, on March 3,

2000, before Justice Deborah Dowling, pursuant to a plea agreement, the defendant pled guilty to one count each of Burglary in the Second Degree (Penal Law § 140.25[2], a “C” felony) and Criminal Trespass in the Second Degree (Penal Law § 140.15, an “A” misdemeanor), with the understanding that, upon his successful completion of the program and residential drug treatment, the felony¹ count would be dismissed. Alternatively, if he were to fail, Mr. Warren was to be sentenced to four years’ incarceration upon the Burglary charge.

In allocuting to the plea, Mr. Warren admitted his guilt and acknowledged his understanding of the aforementioned terms and conditions. Additionally, the defendant relinquished his trial rights, waived his right to appeal, and indicated that he was doing this, and pleading guilty, freely and voluntarily, and that he understood what he was doing and what the alternative sentence was if he failed to complete the program. However, there was no mention, whatsoever, at any point during the plea proceedings, that the defendant would also be subject to a period of post-release supervision in the event he were to be sentenced to incarceration.

While he was doing well in the program upon the first “update” report, thereafter the defendant left the program, prior to its completion. However, he was eventually returned to court. TASC reassessed him and Warren was placed in another program.

¹ Further, the defendant was to receive a conditional discharge upon the misdemeanor count.

Again, after doing well initially for a period of several months, the defendant left his drug treatment program prematurely, without authorization.

In light of these events, on September 19, 2002, the defendant was sentenced to four years' incarceration upon his burglary² conviction. At sentencing, the court noted that the defendant had failed to successfully complete his residential drug treatment program, that he had admitted his guilt to the Department of Probation, and that, in accordance with his plea, the defendant was to receive the alternative sentence of four years. The court thereupon pronounced sentence as indicated. Having so imposed sentence, the court wished Mr. Warren good luck, stated that drug treatment would be made available to him through the Department of Probation, and further mentioned that there would "also [be] post-release supervision." However, no particular term of PRS was specified on the record. Nevertheless, in the "Remarks" section on the defendant's order of commitment, there was a notation for "5 YRS POST RELEASE SUP."

Having completed his imprisonment sentence, the defendant was placed on five years of post-release supervision by the Division of Parole, and has been held in violation of same at least once so far since his release from incarceration.

² He was also sentenced to a concurrent term of one year's imprisonment upon the criminal trespass count.

By his first motion³, the defendant sought to have his sentence set aside. In his supporting papers, the defendant asserts that he was never informed that if he did not complete the program he would be subject to a period of post-release supervision. He further contends that his sentence of 4 years and 5 years PRS is “an illegal sentence,” an excessive sentence, and he opines that the period of PRS, being greater than his sentence of incarceration, is inappropriately disproportionate. Upon this motion the defendant also complains that he was told at sentencing that he would not be subject to drug treatment following his release from incarceration, whereas, in fact, he was adjudicated a parole violator for failing to attend drug treatment (presumably a condition imposed upon him as part of his PRS), and the parole officer did not care what had or had not occurred at sentencing.

Upon his subsequent motion (made while awaiting the People’s response to his first motion, and still a detainee at the Riker’s Island facility), the pro se defendant also seeks to withdraw his original plea of guilty and to reinstate the original indictment.

In asking to have his plea withdrawn, the defendant asserts that he never fully understood all the consequences of his plea and all of the circumstances involved therein. The defendant further alludes to matters outside the court record which call into question

³ The court regrets that the determination of this motion was severely delayed. This, however, was due to inordinate difficulties encountered in attempting to obtain a transcription of necessary minutes of court proceedings, as well as delays by the People in answering. Since both motions concern the same conviction, this court will render a combined decision determining both motions together.

the nature of his guilty plea. Additionally, the defendant declares that he was unaware at the time that he possessed a meritorious defense to the indictment and that he was innocent of the charge to which he pled guilty and would like to have the opportunity to prove his innocence and to take back the plea which was not knowingly and intelligently given. The defendant's papers also raise a claim that his original plea agreement, with drug treatment and deferred sentencing, constituted illegal interim probation and that he should have been given the opportunity to withdraw his plea prior to being sentenced to incarceration after failing to complete his program.

The People have opposed all the relief requested by the defendant in both motions. Further, in the final substantive paragraph of the responding Assistant District Attorney's affirmation, the People indicate that they are also requesting that the court re-sentence the defendant to four years' incarceration and five years' post-release supervision.

In their memorandum of law, the People contend that the defendant's claims are procedurally barred and that he should have appealed from his conviction in order to attack his plea and sentence.

While acknowledging that the defendant was not properly advised on the record of the precise term of PRS to which he was being sentenced, the People nevertheless contend that the court may correct this sentencing error by re-sentencing the defendant to an explicit period of PRS, and that the defendant is not entitled to withdraw his plea. Thus, the People request that the matter be set down for a "resentencing hearing so that

the trial judge can make the required pronouncement.” Moreover, notwithstanding that the applicable period of PRS here may range from two and one-half years to five years, the People recommend that, upon re-sentencing, the court impose five years of PRS upon the defendant.

The People also reject as meritless the defendant’s arguments concerning the excessiveness of his PRS term and his claim that his drug treatment plea constituted impermissible interim probation.

Discussion

The top offense to which the defendant here pled guilty was a “C” violent felony (see, Penal Law §§ 140.25[2], 70.02[1][b]). Standing as a first time violent felony offender, the sentencing range for the instant plea was a determinate imprisonment sentence of at least three and one-half years and no more than 15 years (see, Penal Law § 70.02 [2][a], [3][b]). Additionally, pursuant to Penal Law §§ 70.00(6) and 70.45, such a sentence also required the imposition of post-release supervision.

The defendant’s sentence of 4 years’ imprisonment was, therefore, legal, and, indeed, the defendant does not take issue with the imposition of a four-year term of incarceration following his failure at his drug treatment program.

Rather, the defendant contests the imposition of 5 years’ PRS on top of his incarceration, with one of his arguments being that he was never told about PRS and never agreed to it being a part of his plea and sentence.

However, in addition to there being issues regarding the imposition of any PRS here upon the defendant, there is also a controversy as to the period of PRS which should be imposed, if any is to be imposed. Had the defendant been a second violent felony offender, there would have been no question as to the term of PRS to which the defendant would have been subject, namely, 5 years. However, given his status as a first time offender, the court had discretion to impose a term of less than five years. In fact, the period of PRS applicable to Mr. Warren ranged from two and one-half years to five years (see, former Penal Law § 70.45 [2]; see also, Penal Law § 70.45 [2][f]).

Thus, it was not simply a ministerial matter of imposing five years PRS upon the defendant, and certainly is not here, where PRS was not even a component of the original plea bargain alternative sentence.

The court commences its analysis by noting that it is indisputable that the defendant was not informed about post-release supervision, as he should have been, prior to entering his plea of guilty; and, further, that it was necessary for the exact term of PRS to have been placed upon the record at sentencing by the judge (see, People v Sparber, 10 NY3d 457, 469-471), but it was not here, and a clerk's notations on the commitment sheet will not stand as a judicially pronounced sentence (People v Sparber, supra, 10 NY3d at 470-471; compare, People v Garner, 10 NY3d 358, 362). However, while 5 years of PRS was not legally imposed upon the defendant in this manner, a determinate sentence

without PRS was also not legal at the time⁴. The court is, thus, presented with the question of how these omissions can be rectified, fairly and appropriately.

Mr. Warren, proceeding pro se, has indicated that one of the remedies he is seeking herein is the withdrawal of his plea of guilty and reinstatement of the indictment. The court observes, however, that for him to do so at this late date, after having already served the incarceration sentence, might not be in this uncounseled defendant's best interest and could have very severe consequences. In any event, such relief is requested in the alternative.

Indeed, it seems clear to this court that the defendant's primary complaint is with the imposition of the PRS term and the court agrees that there must be some sort of judicial intervention with regard thereto.

Since the defendant was never formally advised about PRS during plea negotiations and it was not part of his plea bargain, and, further, that PRS was only mentioned in passing after sentence had been imposed, with no specification of its duration or discussion of there being discretion in the amount of PRS to be imposed here, proceedings must be conducted with the parties to discuss the available options, and ultimately, to settle upon the appropriate course of action upon re-sentencing. Accordingly, the court concurs in the People's request for re-sentencing proceedings

⁴ The court would note that there has been ameliorative legislation promulgated which permits the court to re-sentence a defendant to no post-release supervision under certain circumstances (see, Penal Law § 70.85).

herein, although it does not necessarily agree with the prosecution as to what should be the outcome of such proceedings.

Therefore, the determination of the defendant's applications is held in abeyance, so that further proceedings may be conducted before this court in resolution of same. At such proceedings the defendant shall have the assistance of counsel, which counsel shall be appointed to him (unless he is able to retain his own attorney). Accordingly, the court hereby directs that counsel be so appointed or retained to represent the defendant for these proceedings, and further, the defendant is directed to appear before this court on

APRIL 28TH, 2009 for re-sentencing proceedings. If the defendant shall be in custody, it is hereby ORDERED that he be produced before this court for such proceedings on the aforementioned date.

This decision shall constitute the interim order of the court.

ENTER:


PATRICIA M. DI MANGO, J.S.C.

