SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, CRIMINAL TERM: PART PD 85

THE PEOPLE OF THE STATE OF NEW YORK	:	
	:	
	:	DECISION AND ORDER
	:	
-against-	:	Indictment No. 12075/2008
	:	
LARRY MILLER,	:	
	:	
Defendant.	:	

HON. PATRICIA M. Di MANGO:

The defendant has moved for an order (1) to withdraw his plea of guilty under the captioned indictment and (2) granting him a hearing to inquire into whether his prior conviction was constitutionally obtained and if it may be considered in determining whether the defendant may be found to be a predicate felony offender. The People are opposing the motion in all respects.

In determining this motion, the court has read the papers submitted by each side in support of and in opposition to the motion, together with annexed exhibits (which include the transcribed minutes for court proceedings which took place on October 7, 2004 and November 1, 2004 under Indictment No. 3932/2004; additionally, the court has reviewed the official court file for both of these matters. As discussed below, the court determines that the motion is denied, without an evidentiary hearing.

The defendant had been charged under the instant indictment with Attempted Burglary in the Second Degree and related offenses in connection with an incident which occurred on December 2, 2008, whereby it is alleged that the defendant and another individual had attempted to burglarize a residence located at 2311 Avenue Y in Brooklyn, Kings County.

Having been so charged (along with his co-defendant) with attempted burglary under the instant indictment, on January 22, 2009 the defendant entered into a plea agreement, whereby he agreed to plead guilty to Attempted Burglary in the Third Degree in full satisfaction of the instant indictment, in exchange for a promised sentence of one and one-half to three years' incarceration (the plea minutes have not been provided to the court by either party). Underlying this plea offer was the belief that, upon the instant conviction, the defendant stood as a second felony offender. (It is this which the defendant herein now wishes to contest and with which he takes issue.)

The defendant has now brought the within motion prior to being sentenced upon the above plea and is seeking to withdraw that plea on the ground that he agreed to accept the plea offer because he believed that his prior (2004) plea constituted a predicate felony conviction and that it was in reliance on his being a predicate felon that he accepted this plea. However, he now believes that conviction to be infirm, and therefore his instant plea was entered into upon a false premise, namely, that he stood in the shoes of a predicate felon, where such cannot be the case.

Upon this motion the defendant alleges, by new counsel, that his 2004 conviction is unconstitutional because it carried with it a mandatory period of post-release supervision ("PRS"), but the defendant was not advised thereof upon the plea or at sentencing, and that the sentence as imposed (without PRS) was illegal. Moreover, if the defendant is to be re-sentenced thereon (for the sentence to now include PRS), then, counsel opines, such re-sentence would post-date the conviction by plea herein and therefore cannot provide the predicate conviction which originally caused the defendant to be treated as a predicate felon for purposes of the instant sentence.

In their opposition, the People maintain that the 2004 conviction may properly serve as the predicate felony for the defendant to be adjudicated (at least) a second felony offender upon this plea and sentence and that there is no basis for permitting the defendant to withdraw his plea.

Discussion

The court commences its discussion by observing that the defendant has not otherwise attacked the knowing and voluntary nature of his plea, and, indeed, as noted above, has not even provided the minutes of the underlying plea proceedings. Nevertheless, the defendant here maintains that he entered into this plea on the understanding that he was a predicate felon. However, if the predicate conviction is infirm, then he should be given back his plea, he asserts.

The court will assume as true that the defendant only agreed to accept this plea and sentence offer because he believed that he would be a predicate felon upon this conviction, but will not otherwise address the plea proceedings (neither as to the substance of the plea nor as to the circumstances surrounding the plea) as the defendant has raised no other claims attacking his plea nor provided any minutes to permit review thereof.

Further, insofar as the prior plea proceedings are in issue, the court will summarize same immediately below, based upon the plea and sentencing minutes which have been provided to the court.

On October 7, 2004[1], the defendant was before the court with regard to Indictment No. 3932/2004, under which he was charged with two counts of Burglary in the Second Degree and related offenses, pertaining to two separate incidents which had taken place in Kings County. On that date, the defendant, Larry Miller, represented by counsel, withdrew his plea of not guilty and entered a plea of guilty to the offense of Attempted Burglary in the Second Degree as a lesser-included offense of count one of the indictment (respecting an incident which occurred on or about and between June 16, 2004 and June 17, 2004 in Kings County) for a promised determinate sentence of three and one-half years' imprisonment. Under oath, the defendant acknowledged his understanding of the rights he would be waiving by pleading guilty rather than proceeding to trial and indicated that he wished to so plead guilty.

After allocuting to the plea and answering the court's questions, the defendant was thereupon advised by the court that his sentence carried with it a five-year term of PRS. When the defendant indicated that he did not understand about the post-release supervision, the court proceeded to explain to the defendant that it was similar to parole supervision and that he would be subject to this for five years after release (from incarceration). The defendant then acknowledged his understanding of this. The court further advised the defendant that with this conviction, the defendant would have a violent felony conviction and thus, upon a future conviction, could be a violent predicate felon or even a persistent felony offender. Again, the defendant indicated his understanding.

On November 1, 2004, the defendant was adjudicated a second felony offender and was then sentenced to imprisonment in accordance with the plea promise. However, the court neglected to mention at that time the PRS component of the sentence. Significantly, prior to the court's imposing sentence, defense counsel did not seek to withdraw the defendant's plea, nor did she otherwise raise any claims that sentence should not be imposed. Also, the defendant made no statement prior to sentencing. (The defendant was then sentenced and subsequently committed to the custody of the Department of Corrections.)

Furthermore, according to the People, the defendant never took an appeal from the 2004 plea and sentence and did not challenge the imposition of PRS in that case prior to taking the plea under Indictment No. 12075/2008.

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[1] The People had appended the plea minutes to their opposition papers. Apparently Mr. Miller's new attorney had not seen same prior to making the instant motion.

With regard to the 2004 plea, given all of the above, this court finds that there is nothing in the plea minutes which either casts significant doubt upon the then approximately 42-year-old defendant's guilt or calls into question the voluntariness of that plea taken by Mr. Miller (cf., People v Lopez, 71 NY2d 662, 666-668). Indeed, this court finds that, with respect to that plea, the defendant's plea of guilty was knowingly, voluntarily, and intelligently entered and that the defendant fully understood the implications and consequences of his plea (see, People v Harris, 61 NY2d 9, 16-20). Specifically, given the colloquy which took place between the court and the defendant, in the presence of counsel, this court further finds that the defendant understood that PRS was a component of his sentence and he accepted this, which conclusion is further supported by the fact that there was no motion made to withdraw the plea prior to the imposition of sentence.

Since the defendant was advised during the plea proceedings, and correctly so, that PRS was a component of his sentence, this court concludes that the defendant's 2004 plea and sentence are both constitutional and valid, notwithstanding the court's oversight in failing to pronounce PRS upon sentencing. That latter omission is a mere defect in the sentence which can be remedied by the court's re-sentencing the defendant appropriately (see, People v Sparber, 10 NY3d 457, 467, 469-473; see also, People v Rodriguez, 60 AD3d 452), which re-sentencing has been scheduled. Had the defendant never been informed about PRS upon his plea, such would have undermined the otherwise knowing and voluntary nature of his plea. But, that was not the case here.

However, to the extent that a re-sentencing proceeding must be held in order to address the improper administrative imposition of PRS here (upon his 2004 conviction) by the Department of Corrections, as is alleged by the defendant, and which took place in the absence of a pronouncement of same by the sentencing court, this court finds it necessary to discuss the defendant's claim that this sentencing defect cannot be retroactively cured. The defendant opines that while the "unlawful" sentence may be corrected through a re-sentencing, the date of the re-sentencing would become the controlling date for purposes of predicate status and thus the 2004 case could no longer serve as a prior felony conviction.

In the court's view, this argument is fallacious as it ignores the fact that the court's re-sentence may be imposed nunc pro tunc and would then relate back to the original sentencing date and not undermine the defendant's predicate status. Indeed, the re-sentence must be made retroactively operative in order for the defendant to be credited with the time already served upon the subject conviction. Furthermore, the re-sentencing here, if it were to take place, would be to correct a mistake in the November 1, 2004 sentencing

proceedings[2], not to redress a fatal invalidity in the original sentence (see, People v Nieves, 159 Misc2d 720, 722), a critical difference which should not preclude the use of the 2004 conviction to serve as the predicate for multiple felony offender status. This court finds that whatever omissions or defects lie in the manner in which PRS was or was not imposed, such is only one aspect of and severable from an otherwise lawful sentence and will not invalidate the predicate conviction (see, People v Green, 114 Misc2d 339, 343-345). Indeed, under the remedial legislation, a court need not even re-sentence a defendant at all, and may decline to do so and permit the sentence to remain in place without PRS (see, Correction Law § 601-d [5][b], [6]) . Also, with respect to"designated persons" (see, Correction Law § 601-d [1]) and similarly situated inmates and releasees brought back before the sentencing court, the People can consent to the omission of any term of PRS from a sentence, and such will constitute a valid, lawful sentence (see, Penal Law § 70.85). Accordingly, it must be concluded that whatever action the court takes (or even does not take upon re-sentencing), the validity of the underlying 2004 conviction is not affected and thus there is no reason not to permit its use as a predicate felony.

Accordingly, as this court finds the underlying, predicate conviction to be valid, notwithstanding the PRS irregularity (which matter will, in any event, be remedied upon re-sentencing), the 2004 conviction may properly constitute the basis for the defendant being adjudicated a second felony offender in conjunction with his impending sentencing under the instant indictment. Therefore, the court declines to permit him to withdraw his plea.

Furthermore, given that the 2004 plea minutes exist and reflect that the defendant was advised of the PRS, there is no need to hold any hearing in order to render a determination upon the defendant's applications (cf., People v Bangert, 107 AD2d 752). In any event, to the extent the defendant has requested a hearing pursuant to CPL 400.15[3], such request is inapt as such a hearing is held to determine whether a defendant is a second violent felony offender. The defendant here is expected to be adjudicated a second felony offender upon his sentencing under the captioned indictment. Since the instant conviction

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[2] As the Sparber court held under circumstances comparable to those presented at bar, "there exists no procedural bar to allowing the sentencing court to correct its PRS error . . . [and] the failure to pronounce the required sentence amounts only to a procedural error, akin to a misstatement or clerical error, which the sentencing court could easily remedy [citations omitted]" (id., at 472).

[3] Of course, the court hastens to note that the CPL does also provide for hearings to determine whether a defendant is a second felony offender or a persistent felony offender, etc., under CPL 400.21 and CPL 400.20, respectively, and related provisions.

for Attempted Burglary in the Third Degree is not a violent felony, the defendant would not be sentenced as a second violent felony offender, but rather simply as a predicate felony offender. Nor is any evidentiary hearing required in order to resolve any issues raised upon this motion.

In light of all of the above, the defendant's motion is, respectfully, denied in its entirety, without a hearing.

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York
June 29, 2009

J.S.C.