

**People v Smalls**

2011 NY Slip Op 30910(U)

February 23, 2011

Supreme Court, Kings County

Docket Number: 50-2005

Judge: Joseph Kevin McKay

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SUPREME COURT - STATE OF NEW YORK  
COUNTY OF KINGS - CRIMINAL TERM : PART 33  
-----X  
THE PEOPLE OF THE STATE OF NEW YORK

BY: McKay, J.

v

DATE: FEBRUARY 23, 2011

IND. NO.: 50-2005

CALVIN SMALLS,

DECISION AND ORDER

DEFENDANT

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Defendant Calvin Smalls has submitted a pro se motion dated December 29, 2010 seeking to set aside his sentence in the above-captioned case pursuant to CPL 440.20 on the ground that he was improperly sentenced as a mandatory persistent violent felony offender. The People have submitted a February 16, 2011 Affirmation in Opposition to defendant's motion as well as a Memorandum of Law.

Defendant was convicted on November 16, 2005 of criminal possession of a weapon in the third degree (under former Penal Law § 265.02-4) after a jury trial conducted by this Court. He was sentenced on January 18, 2006<sup>1</sup> to an indeterminate term of imprisonment of 15 years to life as a mandatory persistent violent felony offender. The Appellate Division - Second Department denied his direct appeal on February 5, 2008. See People v Smalls, 48 AD3d 488 (2d Dept 2008). On appeal defendant raised issues relating to this Court's suppression rulings, as well as the Court's response to the jury's request for a read-back of defense counsel's trial summation. Defendant's application for leave to appeal to the Court of Appeals was denied on April 16, 2008. See People

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<sup>1</sup> The People's answer at one point erroneously refers to the sentencing date as January 19, 2006.

v Smalls, 10 NY3d 844 (2008).

On October 29, 2009 this Court, in a written decision, summarily denied defendant's pro se CPL 440.10 motion to vacate his judgment of conviction on the ground of ineffective assistance of counsel in that defense counsel allegedly did not inform him of a plea offer. Defendant also claimed that the prospective jury panel was not sworn in accordance with CPL 270.15(1)(a) and that trial counsel failed to object to that alleged omission. This Court found defendant's contentions to be entirely without merit. On January 21, 2010 Justice John Leventhal of the Appellate Division - Second Department denied defendant's application for leave to appeal the Court's 440 Decision and Order.

In the instant motion defendant now seeks to vacate his sentence on the grounds that 1) his mandatory persistent felon adjudication was improper because this Court, in tolling the time to determine if each of his two prior violent felonies were within the statutory limitations of ten years, included the periods of defendant's pre-trial incarceration; 2) that defendant's instant criminal possession of a weapon in the third degree conviction should not have been treated as a violent felony, and 3) that a jury should have made the determination regarding defendant's mandatory persistent violent felon status rather than the sentencing court. For reasons addressed below I find all of these contentions to be without merit.

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." An order setting aside a sentence pursuant to 440.20 does not, however, affect the validity of the status of the underlying conviction. See CPL 440.20(4). In addition, Penal Law § 70.08 provides that a

mandatory persistent violent felony offender is a person who stands convicted of a violent felony offense after having previously been subjected to two or more predicate violent felony convictions. For the purpose of determining whether a person has two or more predicate violent felony convictions the criteria set forth in Penal Law § 70.04(1)(b) shall apply. See Penal Law § 70.08(1)(b).

Defendant now claims that his adjudication as a mandatory persistent violent felony offender was erroneous because this Court erred in its calculation that defendant's two prior violent felonies fell within the ten year statutory time limit. See Penal Law § 70.08(1)(a) and 70.04(b)(iv). Specifically, defendant maintains that this Court erred in tolling those periods of defendant's pre-trial incarceration in calculating the requisite ten year time period. Penal Law § 70.04(1)(b)(v), however, expressly states: "In calculating the ten year period under subparagraph (iv), any period of time during which the person was incarcerated for any reason between the time of the commission of the previous felony and the time of the commission of the present felony shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration." It has been repeatedly held that for purposes of measuring the ten year limitation period the plain language of the statute requires a court to exclude any period of incarceration served by a defendant after commission of the prior felony, including time served while awaiting trial and sentencing on the prior felony. See People v Holman, 53 AD3d 775 (3d Dept 2008); People v McEachern, 275 AD2d 330 (2d Dept 2000), lv denied 95 NY2d 966 (2000); People v Cortez, 231 Ad2d 450 (1<sup>st</sup> Dept 1996), lv denied 89 NY2d 863 (1996). Accordingly, this portion of defendant's 440.20 claim is summarily DENIED. See CPL 440.30(4)(a).

Secondly, defendant argues that his current conviction of criminal possession of a weapon in the third degree should not be treated as a violent felony. Despite defendant's contention that his possession of a weapon did not constitute a crime of violence it is clear that pursuant to Penal Law §§ 70.02(1)(c) and 265.02(4), which were in effect at the time of defendant's January 18, 2006 sentencing, criminal possession of a weapon in the third degree was in fact classified as a D violent felony. As the People correctly note, even under the current law which raised the crime of possession of a loaded weapon not in one's home or place of business, from criminal possession of a weapon in the third degree to criminal possession of a weapon in the second degree [Penal Law § 265.03(1)(b)], the crime is classified as a C violent felony offense. See Penal Law § 70.02(1)(b). Accordingly, this second claim made by defendant is summarily DENIED.

Finally, defendant, without citing to but presumably in reliance upon Apprendi v New Jersey, 530 US 46 (2000), argues that this Court's adjudication of him as a mandatory persistent violent felon denied him his constitutional right to a jury trial. This challenge to the statute has been specifically rejected by the Court of Appeals in the recent decision of People v Porto, 16 NY3d 93 (December 21, 2010). Thus, this portion of defendant's claim is also summarily DENIED.

Accordingly for reasons addressed herein defendant's motion is DENIED in all respects.

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York 11201 for a certificate granting leave to appeal the denial of defendant's CPL 440.20 motion. This application must be made within 30 days of service of this Decision and Order. Upon proof of financial inability to retain counsel and to pay the costs and expenses of the appeal, the defendant may apply as a poor person and to


dispense with printing. Application for poor person relief will be entertained only if and when permission to appeal or a certificate granting leave to appeal is granted (22 NYCRR 671.5).

The Clerk is directed to mail a copy of this Decision and Order to defendant Calvin Smalls, DIN # 06-A-0573, Sing Sing Correctional Facility, 354 Hunter Street, Ossining, New York 10562 and to Assistant District Attorney Sholom J. Twersky, Kings County District Attorney's Office, 350 Jay Street, Brooklyn, New York 11201.

IT IS SO ORDERED.

ENTER,

**ENTERED**  
FEB 25 2011  
NANCY T. SUNSHINE  
COUNTY CLERK

  
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J.S.C.  
**HON. JOSEPH KEVIN McKAY**  
J.S.C.