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DECISION AND ORDER

SUPREME COURT KINGS COUNTY (CRIMINAL TERM, PART 2)

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THE PEOPLE OF THE STATE OF NEW YORK BY: TOMEI, J.

v. DATED: JUNE 28, 2012

BENNETT ESQUILED, INDICTMENT No. 8693-97

Defendant.

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Under Kings County Indictment Number 8693/1997, the defendant was convicted after trial of robbery in the first degree, reckless endangerment in the first degree, and menacing in the second degree. On July 27, 1998, he was sentenced, as a second violent felony offender, to concurrent terms of imprisonment of 25 years for robbery, 3½ to 7 years for reckless endangerment, and 1 year for menacing. (Tomei, J., at trial and sentence). At sentencing, the People moved to have the defendant adjudicated a persistent violent felony offender, but the court determined that the defendants 1991 conviction of attempted robbery in the second degree under Kings County Indictment Number 14825/1990 could not serve as a sentencing predicate because the defendant was less than sixteen years of age in 1991 when he committed that crime. Due to his age, the defendant should have been sentenced on that case as a juvenile offender in Family Court, an adjudication which cannot serve as predicate felony conviction.[1] *See* CPL§ 30.00. The court adjudicated the defendant a second violent felony offender based on his 1993 conviction for attempted robbery in the second degree, under Kings County Indictment 438/1993. On direct appeal from his judgment of conviction in the instant case, the defendant asserted, *inter alia*, that the sentence was excessive. The conviction and sentence were affirmed on appeal and leave to appeal to the Court of Appeals was denied. *People v. Esquiled*, 297 A.D.2d 687 (2d Dept.), *lve. den.*, 99 N.Y.2d 558 (2002).

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[1]The defendant apparently lied about his date of birth at the time of his arrest in 1990. The defendant's NYSIS records have shown five different dates of birth ranging from 1972 to 1976 and both of his prior convictions were under a different name.

In October, 2000, the defendant filed a motion to vacate judgment pursuant to CPL § 440.10, on the ground that he had received ineffective assistance of counsel during the plea bargaining phase of this case because counsel had failed to ascertain that the defendant was not facing sentence as a persistent felony offender, but only as a second violent felony offender and had, therefore, failed to negotiate a proper plea offer. After a hearing, the motion was denied. (Tomei, J. on motion and hearing). *People v. Esquiled*, 2001 N.Y. Slip Op. 40197U, 2001 N.Y. Misc. LEXIS 424 (Sup. Ct. Kings Cty., Aug. 17, 2001). Leave to appeal to the Appellate Division was denied on November 21, 2001.

Two years after sentence on the instant case, and one day after the expiration of the maximum term of his sentence on the 1993 case, the defendant moved to set aside that sentence pursuant to CPL §440.20, on the ground that the 1991 conviction could not lawfully serve as a predicate felony conviction. The motion was granted and the defendant was resentenced, on September 27, 2000, as a first violent felony offender. The court reimposed the same maximum sentence of seven years but reduced the minimum term from three and one-half to two and one-third years in prison. (Cataldo, J., on motion and resentence). The defendant now moves, pursuant to C.P.L. Section 440.20, to set aside his sentence under Kings County Indictment Number 8693-97, to vacate the second violent felony offender adjudication, and for resentence as a first violent felony offender, asserting that the resentence on the 1993 case to a date after the sentence in the instant case renders it no longer a prior conviction for sentencing purposes.

In this case, the defendant seeks to utilize resentencing to "leapfrog a sentence forward so as to vitiate its utility as a sentencing predicate," a practice ruled impermissible by the Court of Appeals in *People v. Acevedo*, 17 N.Y.3d 297 (2011), which held that "[r]esentence is not

a device appropriately employed simply to alter a sentencing date and thereby affect the utility of a conviction as a predicate for the imposition of enhanced punishment." Although *Acevedo* involved a case where the illegality of the prior conviction was the failure of the court to impose a period of post release supervision (PSR), and the court expressly left open its applicability to cases where the illegality in the prior sentence stems from any other reason, this court can conceive of no reason why the rationale of *Acevedo* should not apply here, in a case which is otherwise factually similar.

Here, as in *Acevedo*, the defendant did not move for resentence on his prior conviction until after the sentence in the instant case, although he was clearly aware of the infirmity in that prior sentence before the sentence date in the instant case. Here, also, the defendant waited until he had fully served his sentence on the prior case before moving to be resentended thereon. Indeed the defendant filed his motion to set aside sentence in the prior case one day after the expiration of the maximum sentences on that case. The timing of the motion, therefore, ensured that the defendant could obtain no meaningful relief on the sentence he was challenging. As in *Acevedo* the only benefit which could ensue from the resentence in the prior case was the chance to vacate his sentence on the instant case and to be resentenced herein as a first violent felony offender. That tactic was not permitted in *Acevedo* and should similarly be rejected here. Here, as in *Acevedo*: the resentence relief ths defendant obtained cannot be effective to avoid the penal consequences of reoffending.

In light of the strong policy statement in *Acevedo*, the court declines to follow *People v. Butler*, 24 Misc.3d 1225(a) (Sup. Ct. N.Y. Cty., 2009), *aff'd* , 88 A.D.3d 470 (1st Dept.), *lve. den.*,16 N.Y.3d 893 (2011) ; *People v. Boyer*, 19 A.D.3d 804 (3d Dept., 2005): *People v. Wright*, 270 A.D.2d 213, 215 (1st Dept., 200); and *People v. Robles*, 251 A.D.2d 20 (1st Dept., 1998), cited by the

People. Each case was decided prior to and each relied on the rule of *People v. Bell*, 73 N.Y.2d 153, 165 (1989), in which the Court of Appeals ruled that where a conviction is vacated on a felony, the original sentence is also vacated. In that situation, if the defendant is reconvicted for the underlying crimes the sentence date of the new conviction is the date which controls whether or not the case can be utilized as a predicate felony. Here, where only the sentence and not the conviction was set aside, the ruling in *Bell* is not controlling and should no longer be followed. *See People v. Davis*, 93 A.D.3d 524 (1st Dept., 2012) (predicate felony statues have been interpreted to mean that invalidation of a judgment of conviction may affect sequentiality; resentence based on a violation of probation neither invalidates the underlying conviction nor alters the sequence of convictions); *People v. Newton*, 91 A.D.3d 1281 (4th Dept., 2012) (same).

The People's reliance upon *People v. Butler*, is also misplaced because the motion to vacate the prior sentence in that case was made by the Department of Corrections and not, as here, by the defendant. Moreover, *Butler* is not controlling on this court as the Second Department expressly rejected the *Butler* court's interpretation of the law and ruled that even where a resentence motion is made by the government, when the insufficiency in the prior case is the failure to impose a period of PSR, the sequentiality of the two convictions are not altered and the original sentence date is the date which determines the conviction's utility as a sentencing predicate. *People v. Naughton*, 93 A.D.3d 809 (2d Dept.), *lve. den.*, _ N.Y.3d _ (2012); *accord*, *People v. Boyer* 91 A.D.3d 1183 (3d Dept.), *lve. den,*. _ N.Y.3d _ (2012).

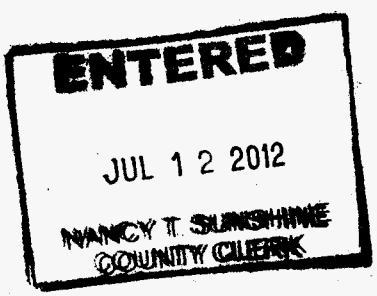
Here, the defendant moved for the resentence on the prior case and did so solely for the purpose of obtaining a lesser sentence in this case. A practice which negates the intent of the legislature that a person who has been convicted and sentenced for a violent felony offense, as the

defendant was in 1993, should receive an enhanced sentence if he continues to commit violent felony offenses, as the defendant did in 1997. The sentence in this case was legally imposed in 1998 and remains legal today. The court imposed that sentence based on its own ruling that the defendant's 1993 conviction was his first violent felony conviction and that sentence should not now be undermined merely because the defendant sought and obtained resentence on that case as a first violent felony offender. By timing his motion for resentence as he did, no actual relief was obtained by the resentence and no relief can be obtained unless he is permitted to utilize this procedure to set aside the instant sentence. For the sound public policy reasons enunciated in *Acevedo*, this practice cannot be allowed.

Therefore, and for the foregoing reasons, the motion is denied.

This constitutes the decision and order of the court.

HON. ALBERT TOMEI, J.S.C.



Right to appeal:

You are advised that your right to an appeal from the order determining your motion is not automatic except in the single instance where the motion was made under CPL §440.30(1-a) for forensic DNA testing of evidence. For all other motions under Article 440, you must apply to a Justice of the Appellate Division for a certificate granting leave to appeal. THE APPLICATION MUST BE SENT TO THE APPELLATE DIVISION, SECOND DEPARTMENT, 45 MONROE PLACE, BROOKLYN, NY 11201.

This application must be filed within 30 days after your being served by the District Attorney or the court with the court order denying your motion. The application must contain your name and address, indictment number, the questions of law or fact which you believe ought to be reviewed and a statement that no prior application for such certificate has been made. You must include a copy of the court order and a copy of any opinion of the court. In addition, you must serve a copy of your application on the District Attorney. Do NOT send notice of appeal to the Supreme Court Justice who decided this motion.