SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 22

THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER

- vs -

HON. JOEL M. GOLDBERG

IND. NO. 3025/04

SEPTEMBER 29, 2014

ANDRES GONZALEZ,

DEFENDANT.

The Court is in receipt of the defendant's Reply, dated September 14, 2014, to the People's Answer, dated September 4, 2014.

The Court adheres to its September 9, 2014 Decision denying the defendant's Motion to set aside the sentence pursuant to CPL 440.20.

SO ORDERED

JOEL M. GOLDBERG
JUDGE

SUPREME COURT OF THE STATE OF NEW YORK
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- vs -

HON. JOEL M. GOLDBERG

IND. NO. 3025/04

SEPTEMBER 9, 2014

ANDRES GONZALEZ,

DEFENDANT.

The defendant's *pro se* Motion to set aside the sentence imposed in this case, dated July 18, 2014, upon consideration of the People's Answer, dated September 4, 2014, is denied.

The history of this case is set forth in this Court's decision dated October 10, 2007, a copy of which is attached. That decision denied a prior motion by the defendant to set aside this sentence. By a decision dated June 6, 2008, the Court denied the defendant's motion, dated March 28, 2008, to reargue the October 10, 2007 decision.

On this motion the defendant claims he was improperly adjudicated a persistent violent felony offender, because his June 14, 1995 and August 18, 1995 convictions for Robbery in the First Degree were both committed in 1994 before he was sentenced on either one of them. Therefore, they cannot be counted as two separate predicate violent felony convictions. *See* PL 70.08; *People v. Morse,* 62 NY2d 205, 213-225 (1984).

However, even though those two convictions may only be counted as a single conviction for purposes of adjudicating the defendant a persistent violent felony offender, the defendant, nevertheless, has an additional predicate violent felony conviction which was in May 8, 1990 for Attempted Robbery in the Second Degree. Thus, the defendant had two predicate violent felony convictions at the time of his commission of the violent

this case on May 11, 2004, to wit: the May 8, 1990 conviction for Attempted Robbery in the Second Degree and the two 1995 convictions for Robbery in the First degree (which count as a single predicate violent felony conviction for determining whether the defendant is a persistent violent felony offender in this case). This issue was discussed at page 4 of this Court's October 10, 2007 decision.

The defendant's second point on this motion (not addressed in the People's Answer) is that his conviction in this case for the violent felony offense of Attempted Criminal Possession of a Weapon in the Third Degree, which was a Class E violent felony offense at the time of the May 11, 2004 incident, and on which the defendant received a sentence as a persistent violent felony offender of two years to life, was illegally imposed because that crime was not "a lesser included offense" of a charge in the indictment and was never properly "added" to the indictment.

In this regard, the defendant is simply factually wrong and, further, the defendant provides no legal argument to support this claim.

The defendant pleaded guilty to consolidated Indictment No. 3025/04 charging a May 5, 2004 robbery of a store and Indictment No. 3026/04 charging a May 11, 2004 attempted robbery of a second store. That indictment contained a charge of Criminal Possession of a Weapon in the Third Degree (P.L. 265.02 [4] which has since been repealed).

In satisfaction of these charges, on September 23, 2005, the defendant pleaded guilty to Robbery in the Third Degree with regard to the May 5, 2004 incident and Attempted Robbery in the Third Degree and Criminal Possession of a Weapon in the Third Degree with regard to the May 11, 2004 incident. At that time the defendant was adjudicated a persistent violent felony offender.

On October 7, 2005, the Court sentenced the defendant as promised at the time of the guilty plea to consecutive prison terms of three and one-half to seven years on the conviction for Robbery in the Third Degree, two to four years on the conviction for

Attempted Robbery in the Third Degree, and two years to life in the conviction for Criminal Possession of a Weapon in the Third Degree.

On January 12, 2006, the Court vacated the defendant's conviction for Criminal Possession of a Weapon in the Third Degree, because that conviction carried a minimum sentence of 12 years to life for a persistent violent felony offender and reduced the conviction to Attempted Criminal Possession of a Weapon in the Third Degree in order to effectuate the promised sentence of two years to life on that count. The two year to life sentence was then imposed *nunc pro tunc* to the original sentence date of October 7, 2005, and an amended commitment order was submitted (See this Court's decision of October 10, 2007 at 2).

Pursuant to CPL 1.20 (37) which defines "lesser included offense," in any case where it is legally possible to attempt to commit a crime, an attempt to commit such crime constitutes a lesser included offense with respect thereto.

Because the defendant was indicted for Criminal Possession of a Weapon in the Third Degree, the conviction for Attempted Criminal Possession of a Weapon in the Third Degree was, in fact, "a lesser included offense" of that charge.

Although the defendant, in fact, pleaded guilty to the greater charge, the Court subsequently reduced the charge to a lesser included offense so that the defendant could receive exactly the sentence that was promised at the time of the defendant's guilty plea. The defendant now cannot be heard to complain, merely because the Court reduced the conviction from a Class D violent felony offense to a Class E violent felony offense so that the sentence the defendant agreed to accept could be imposed.

The defendant's reliance on *People v. Dickerson,* 85 NY2d 870 (1995) is misplaced. In *Dickerson,* the defendant's guilty plea to Attempted Criminal Possession of a Weapon in the Third Degree as a Class E violent felony offense was vacated, because that charge was contained in a superior court information. The Court in *Dickerson,* at 871, held that according to CPL 220.20 (1), P.L. 70.02 (1) (d), and P.L. 70.08 (1) (a), "a Class E violent felony offense is reserved for accuseds who plead guilty to Attempted Criminal Possession of a Weapon in the Third Degree as a lesser included offense under

indictment charging a greater offense (emphasis supplied)." Therefore, the Class E violent felony plea in *Dickerson* could not be accepted in satisfaction of a superior court information.

In this case, the defendant was indicted for Criminal Possession of a Weapon in the Third Degree, a prerequisite under *Dickerson* for a conviction for the lesser included Class E violent felony offense of Attempted Criminal Possession of a Weapon in the Third Degree. The defendant in this case pleaded guilty under that indictment to Criminal Possession of a Weapon in the Third Degree, a Class D violent felony offense, but was promised a sentence that could only be lawfully imposed if the plea was to the lesser included offense of an attempt to commit that crime as a Class E violent felony.

Because in this case there was a guilty plea to Criminal Possession of a Weapon in the Third Degree charged in an indictment rather than in a superior court information, the principles of *Dickerson* were not violated by the Court's subsequent reduction of the conviction to an attempt to commit that crime so as to effectuate the promised Class E persistent violent felony sentence of two years to life that the defendant had agreed to accept.

Accordingly, the defendant's motion is denied.

SO ORDERED

JOEL M. GOLDBERG
JUDGE

ENTERED
SEP 0 9 2014
NANCY T. SUNSHINE
COUNTY CLERK