At a Term of the County Court held in and for the County of Wayne at the Hall of Justice in the Town of Lyons, New York on the 25th day of April, 2016.

PRESENT: Honorable Daniel G. Barrett
County Court Judge

STATE OF NEW YORK
COUNTY COURT COUNTY OF WAYNE

PEOPLE OF THE STATE OF NEW YORK

-vs-

MICHAEL IRIZARRY,
Defendant

DECISION ON
SECOND FELONY
OFFENDER STATUS
Ind. No. 15-44

Appearances - People - ADA Christopher Bokelman, Esq.
Defendant - Robert A. DiNieri, Esq.

The Court conducted a hearing on the issue of whether the Defendant is considered a second felony offender for the purposes of sentencing. The Defendant was convicted on March 17, 2006 of three separate counts of Criminal Possession Controlled Substance 3rd, three separate counts of Criminal Sale Controlled Substance 3rd and Criminal Possession Controlled Substance 7th. The Court did receive an updated Pre-Sentence Investigation.

Investigator Kevin Kuntz of the Wayne County Sheriff's Department testified. He does fingerprint analysis for the Sheriff's Department. He has been working on latent fingerprints for approximately fourteen years. He compared the fingerprints to the three separate convictions of the Defendant in Florida to his fingerprints here in Wayne County pursuant to his most recent arrests and convictions and found the fingerprints to be a match. Admitted into evidence as Exhibit 4 is the Investigator's fingerprint comparison report. In addition Exhibit 5 was admitted into evidence which is a photograph of the Defendant upon his release from the Florida Department of Corrections.

Deputy Manzell of the Wayne County Sheriff's Department testified. One of his duties is to listen to phone calls from inmates at the jail to anyone outside the jail. He searched the phone calls for the Defendant. He found two claimed admissions by the Defendant as to his previous record of convictions in Florida. Those phone calls are digitally recorded. He transferred those phone calls to a disk and the disk was admitted into evidence as Exhibit 6. The two phone calls were identified and played in court. The first phone call being identified as 3Q010EU, the first 8 seconds of the phone call and then the phone call from 3 minutes and 17 seconds to 4 minutes. The second phone call being identified as 3Q0H10EV. That portion of the disk was from 3 minutes and 39 seconds to 4 minutes and 34 seconds.

Admitted into evidence are Exhibits 8, 9 and 10 which purports to be copies of the statutes that the Defendant was convicted of in Florida.

Exhibit 1 indicates the Defendant was convicted, the Circuit Court, 5th Judicial District, in and for Lake County, Florida on or about May 16, 2006 with Possession of Cocaine with Intent to Sell/Deliver within 1000 Feet of a Place of Worship, Section 893.13(1)(e)(1) and Sale of Cocaine within 1000 Feet of a Place of Worship pursuant to Section 893.13(1)(e)(1). Said convictions on or about May 16, 2006.

Exhibit 2 is a record of conviction in the Circuit Court, 5th Judicial District, Lake County, Florida for Possession of Cocaine with Intent to Sell or Deliver pursuant to Section 893.13(1)a)(1) and Possession of Cannabis, 20 grams or less, pursuant to Section 893.13(6)(b). The Possession of Cannabis charge being a misdemeanor. This conviction was on or about February 6, 2006.

Exhibit 3 is a Certificate of Conviction in the Circuit Court, 5th Judicial District in and for Marion County, Florida for Grand Theft pursuant to Chapter 812, Theft, Robbery and related crimes, Section 812.014(2)(c). This conviction was on or about February 4, 2010.

Firstly the Court does find sequentiality, that is each of the felony convictions in Florida is within the 10 year period.

At a hearing, the People must prove the prior conviction beyond a reasonable doubt. In addition in regard to an out of state felony conviction the prosecution must prove that the elements of the sister state crime are equivalent to an analogous crime defined in the Penal Law, People v Ramos, 19 N.Y. 3d 417 and People v Yancy, 86 N.Y. 2d 239.

The Defendant argues that one or more of the defendant's conviction is based upon a nolo contendere plea and therefore cannot be used in determining second felony offender status. However New York has determined that such a plea out of state or an alford plea in state do suffice as a prior felony conviction, People v Long, 207 A.D. 2d 988 and People v Geier, 144 A.D. 2d 1015.

The defense counsel also argues the Court find the Defendant's statement pursuant to Exhibit 6, that is he admits to a prior felony record and being a career criminal in and of itself cannot establish second felony offender status. The Defendant's statements have to be corroborated.

The defense counsel further argues that the Certifications as set forth in Exhibits 1, 2 and 3 are not adequate and that they do not meet the requirements of CPL 4540(c).

Such section provides that copies attested to by an officer of another jurisdiction shall be accompanied by a Certificate such officer has legal custody of the record, and his signature is believed to be genuine, which Certificate shall be made by a judge or any public officer having a seal of office having official duties in that district, with a seal of his office affixed.

Exhibits 1, 2 and 3 have a stamp of the deputy clerk of the Circuit Court of either Lake County or Marion County, Florida. Such Certificate providing that Exhibits 1, 2 and 3 are true copies of a document filed with the office of the clerk of Circuit Court the Certificate being signed by the deputy clerk.

New York Appellate Courts have strictly construed CPL 4540(c). McKinney's comments CPL 4540, section 4 provide that the prerequisites for self authentication under subdivision c are more demanding then in the case of New York Public Records. The signature and seal of attesting official, standing alone will not suffice. Attestation must be accompanied by a Certificate of some other authorized person, with an official seal affixed, stating that the attestor has legal custody of the records in question and the attestor's signature is believed to be genuine.

Case law has consistently held that Certificate of Convictions for out of state convictions must comply with CPL 4540(c). In People vs. Ricks, 90 A.D. 3d 1562, a fingerprint record from Colorado failed to comply with the technical requirements in that even though the record was properly authenticated by an agent in charge of identification, the document was certified by the agent in charge who had legal custody of the fingerprint records was also signed by that agent in charge, rather than by a Certificate of a second authority. In People vs. Redmond, 41 A.D. 3d 514 a certificate of a defendant's conviction was inadmissible as the certificate was not accompanied by required certification. In People vs. James, 4 A.D. 3d 774, the Florida accusatory instrument which was the basis of a second felony finding, was inadmissible without certification. Finally in People vs. Acevedo, 156 A.D. 2d 369, the Appellate Court found that the sentencing court erred at the second felony hearing, when, over the defendant's objection admitted into evidence certificates of conviction from Florida which were not accompanied by the required certification.

The Court finds that Exhibits 1, 2 and 3 do not have the required certification and therefore are not admissible.

In addition Exhibit 3 purports to show the Defendant's conviction of Grand Theft pursuant to Section 812.014(2)(c) that does not relate to an actual statute as shown by Exhibit 10. There is actually no subdivision 2c. The Court believes the number and letter were transposed.

And although the Defendant may have made admissions as shown by his recorded phone calls in Exhibit 6, those admissions in and of themselves are not sufficient to establish second felony offender status. In addition the Defendant did not admit to any particular conviction.

The Court's research indicates the Appellate cases that have found a technical defect at the second felony offender hearing regarding certifications, remit those cases back to the County Court for a new hearing on second felony offender status and re-sentencing. Therefore the Court will allow the hearing to be opened to allow the District Attorney's Office to cure, if it can, the technical defects of the certifications as shown in Exhibits 1, 2 and 3.

Therefore the Court finds at this time that the People have not established second felony offender status.

This constitutes the Decision of the Court.

Dated: April 27, 2016
Lyons, New York

Daniel G. Barrett
County Court Judge