

**People v Griggs**

2013 NY Slip Op 33901(U)

December 10, 2013

Supreme Court, Erie County

Docket Number: 2010/01397

Judge: Penny M. Wolfgang

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This opinion is uncorrected and not selected for official publication.

At a Criminal Special Term of Supreme Court, Part 24, held in and for the County of Erie and the State of New York at the Erie County Courthouse in the City of Buffalo on the 10 day of December 2013.

STATE OF NEW YORK  
SUPREME COURT: COUNTY OF ERIE

**THE PEOPLE OF THE STATE OF NEW YORK**

vs.

Indictment No. 2010-01397

**PERRY C. GRIGGS,**

Defendant.

**HON. FRANK A. SEDITA, III,**  
Erie County District Attorney  
By: **David R. Panepinto, Esq.,**  
Assistant District Attorney,  
Appearing for the People,

**Perry C. Griggs,**  
Defendant, *pro se.*

FILED  
2013 DE 11 PM 4:32  
ERIE COUNTY  
CLERK'S OFFICE

**MEMORANDUM AND ORDER**

**WOLFGANG, J.**

The defendant moves pursuant to section 440.20 of the Criminal Procedure Law for an order setting aside his sentence imposed in the above-captioned

case. He alleges that he was improperly sentenced as a second violent felony offender.

A review of the court record on file in the Erie County Clerk's Office reveals that defendant was indicted on one count of Robbery in the First Degree (Penal Law, §160.15[4]). The crime occurred in the City of Buffalo on May 17, 2010 when the defendant allegedly stole a sum of money from a Christopher Hulett, a taxi driver, and displayed a handgun during the crime. Trial by jury commenced on September 26, 2011 and the defendant, with stand-by counsel, represented himself.

On October 3, 2011, following the completion of the trial, the defendant was convicted as charged. He was sentenced on November 15, 2011, as a second violent felony offender, to a determinate term of twenty (20) years imprisonment, to be followed by a five-year period of post-release supervision. This sentence was set to run concurrently with the sentence imposed under Indictment No. 2009-01804.

A notice of appeal was timely filed. However, the appeal has not yet been perfected.

Having examined the defendant's statement in support of the instant motion and the answering affidavit of the People, this court finds and concludes that the defendant's motion is without merit and accordingly is denied.

In support of the People's contention that the defendant is a second violent felony offender, the prosecution submitted a statement pursuant to CPL §400.15, alleging that the defendant was convicted on March 9, 2007 in Erie County Court of one count of

Criminal Possession of a Weapon in the Third Degree, in violation of P.L. §265.02[4], a class D violent felony (McKinney's Penal Law [2006]). Although subdivision four of P.L. §265.02 was repealed effective November 1, 2006, said statutory provision was in full force and effect at the time of his arrest on April 26, 2006.

At the time of his sentencing in the instant case, the defendant did not controvert the allegation that he was a second violent felony offender. The statutorily authorized sentence for first degree robbery, a class B violent felony, is a determinate sentence (P.L. §60.05[3]). Pursuant to P.L. §70.04[3][a], the statutorily authorized term of a sentence for a second violent felony offender convicted of a class B violent felony is a determinate term of imprisonment of at least ten (10) years, but not exceeding twenty-five (25) years. Any determinate sentence imposed pursuant to P.L. §70.04 must be followed by a five-year period of post-release supervision (P.L. §70.45[2]).

Based on the foregoing, this court imposed the correct, valid and legal sentence that is not excessive. Furthermore, the defendant's sentence, including the PRS, was imposed in accordance with the court's analysis of the nature, facts and circumstances of the case.

**NOW, THEREFORE**, upon reading and filing the notice of motion dated July 24, 2013, and the supporting statement of the defendant, unsworn and undated, and the opposing affidavit of the District Attorney of Erie County by David R. Panepinto,

Assistant District Attorney, sworn to on the 20<sup>th</sup> day of September 2013, and due deliberation having been had thereon, it is

**ORDERED, ADJUDGED AND DECREED** that said motion be and is hereby denied in all respects without a hearing.

This decision shall constitute the order in this matter for appeal purposes and no other or further order shall be required. Pursuant to CPL §§ 450.15 and 460.15, the defendant may appeal from this order denying his post conviction motion to set aside his sentence only if a certificate is obtained granting him leave to appeal (see *People v. Serio*, 87 AD2d 978 [4<sup>th</sup> Dept.]). If he wishes to appeal, the defendant must make an application to the Appellate Division of Supreme Court, Fourth Department, for such a certificate within 30 days of service upon him of this Memorandum and Order (CPL §460.10[4][a]). If he is unable to pay the cost of such an appeal, the defendant may apply to the Appellate Division for leave to appeal as a poor person.

**DATED:** Buffalo, New York  
December 10, 2013

**GRANTED**

DEC 10 2013  
BY *Lynn M. Zagst*  
LYNN M. ZAGST  
COURT CLERK

*Penny M. Wolfgang*  
HON. PENNY M. WOLFGANG  
Justice of the Supreme Court