MOTION

SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM: PART K-2

P R E S E N T: HON. BARRY KRON,
Judge.

----------X

THE PEOPLE OF THE STATE OF NEW YORK

- against-

Indictment Nos.: 1575-05
2091/05

JOSEPH ODOM,

Motion: To Vacate Sentence pursuant to CPL 440.20

Defendant.

----------X

HAROLD V. FERGUSON, ESQ.
For the Motion

RICHARD A. BROWN, D.A.

BY: A.D.A DANIEL BRESNAHAN
Opposed

Upon the foregoing papers, the motion is denied. See the accompanying memorandum.

Kew Gardens, New York
Dated: July 1, 2008

Barry Kron

BARRY KRON
A.J.S.C

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART K-2
----------X
THE PEOPLE OF THE STATE OF NEW YORK

- against-

Indictment Nos.: 1575/05, 2091/05

BY: BARRY KRON, A.J.S.C.

JOSEPH ODOM,

Defendant.
----------X

Defendant seeks an order of the Court to vacate his sentence pursuant to CPL § 440.20 upon the ground that he received ineffective assistance of counsel because his counsel did not challenge the prior felony upon which he was adjudicated a predicate felon pursuant to CPL § 400.21.

In response, the People have filed an affirmation in opposition, dated June 17, 2008. They argue that defendant's motion should be denied because defendant's application is facially insufficient, subject to procedural bars, and meritless.

For the reasons stated herein, defendant's motion is denied.

FACTS

On July 12, 2005, an indictment was filed against defendant charging him with Robbery in the First Degree and Criminal Possession of a Weapon in the Fourth Degree for an incident that occurred on April 20, 2005 in Queens County (Indictment 1575-05).

Thereafter, a second indictment was filed against defendant charging him with Attempted Robbery in the Second Degree and Endangering the Welfare of a Child (Two Counts) for an incident that occurred on May 5, 2005 in Queens County (Indictment 2091-05).

On July 6, 2006, defendant pled guilty to Attempted Robbery in the First Degree (P.L. §110/160.15 [4]) under Indictment 1575-05 and Attempted Robbery in the Second Degree (P.L. §110/160.10[2][b]) under Indictment 2091-05. Defendant was promised concurrent determinate sentences of seven years with five years post release supervision as a second violent felony offender. The Court also indicated that the sentences would run concurrent with any sentence that he received

on his pending New York County felony matter (see Plea Minutes pp. 10-12).

Defendant's attorney indicated that defendant's outstanding New York County matter had been awaiting a decision on a CPL § 440.10 motion filed in relation to defendant's prior felony conviction in 2000. He stated that the motion had been denied in June and that he anticipated that the pending case would be resolved (see Plea Minutes pp. 2-3,5; Defendant's Exhibit "G", Copy of the Decision and Order denying Defendant's Motion)[1].

Defendant was then arraigned as a predicate felon under New York County indictment 2705/2000. He admitted to being the person convicted and that the conviction was constitutionally obtained. Counsel indicated that although the CPL § 440.10 motion had been denied, defendant's counsel on that case intended to appeal the decision (Plea Minutes p. 12-13)[2].

Defendant executed waivers of appeal for each indictment (see waivers annexed as part of the Court file).

On September 20, 2006, defendant was sentenced to two concurrent determinate terms of seven years and five years of post-release supervision. Because defendant had not yet resolved the pending Manhattan case, the Court imposed the two sentences concurrent to one another. The Court indicated that if the sentence on the Manhattan case was not ultimately imposed to run concurrent to these matters, he would sentence defendant *nunc pro tunc* so that the sentences would run concurrently (see Sentence Minutes p. 2-3)[3].

---

[1]The CPL § 440.10 motion was based upon a claim that defendant was not informed of the post-release supervision component of his sentence at the time of the plea.

[2]The Court denied defendant's motion to vacate judgment on procedural grounds(See, Defendant's Exhibit G Decision and Order, Solomon,J.). The Appellate Division, First Department denied defendant's application for leave to appeal the denial of the CPL § 440.10 motion.

[3]On October 4, 2006, defendant pled guilty in New York County to Burglary in the Second Degree (see Defendant's Exhibit "J", Plea Minutes). On March 14, 2007, defendant was sentenced as a second violent felony offender to an indeterminate term of imprisonment of ten years to run concurrently with his Queens sentences (see Defendant's Exhibit "K", Sentence Minutes).

DECISION

A motion to set aside a sentence pursuant to CPL § 440.20 is applicable only to a sentence which is "unauthorized, illegally imposed, or otherwise invalid as a matter of law" (see People v. Minaya, 54 NY2d 360, cert. denied, 455 US 1024). In the instant case, the defendant's sentences are none of these things. The sentences defendant received are authorized for a second violent felony offender convicted of C and D violent felonies, respectively. Although collaterally attacked by way of a motion to vacate judgment, defendant's prior felony conviction in New York County was sustained and can serve as a basis for a predicate felony determination. Defendant's moving papers do not allege any ground constituting a legal basis to set the sentence aside. The court is "expressly prohibited by CPL § 430.10" from altering a lawful sentence once it has commenced (see People v Minaya, *supra*).

Defendant has failed to demonstrate that his counsel was ineffective. To sustain such a claim under the Federal Constitution, a defendant must satisfy the two-prong test enunciated in Strickland v Washington, 466 US 668: first, he must demonstrate that counsel's performance fell below prevailing norms (see Hill v Lockhart, 474 US 52); second, he must have sustained prejudice by reason of such deficient performance (*i*, at 59). Defendant has failed to meet either of these prongs.

Under the slightly different standard of New York State constitutional law, defendant's assertions that counsel was ineffective based upon his alleged failure to challenge the prior New York County felony conviction which served as a basis for determining that he was a predicate felon is without merit. Under that standard, the constitutional requirement of effective assistance of counsel will have been met "[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of representation, reveal that the attorney provided meaningful representation "(People v Benevento, 91 NY2d 708, 712, quoting People v Baldi, 54 NY2d 137, 147; see also, People v Berroa, 99 NY2d 134, 138; People v Henry, 95 NY2d 563, 565).

In this case, counsel negotiated an extremely favorable plea that substantially reduced his exposure to a more lengthy prison term. Under Indictment 1575-05 defendant faced a maximum sentence of twenty-five years incarceration for a B violent felony. Under Indictment 2091-05, he

faced a maximum sentence of up to seven years imprisonment for a D violent felony.[4]

Furthermore, had defendant been convicted, he could have been sentenced to consecutive terms of incarceration since the indictments involve two separate incidents. Additionally, defendant could have faced an additional consecutive term for his pending burglary case in New York County, but counsel negotiated, as part of these pleas, that the Queens County matters would run concurrent to any sentence he received on that case. Nevertheless, by negotiating a plea deal which defendant accepted, counsel was able to secure a jail term substantially less than the maximum terms defendant could have received if convicted after trial. As previously noted, defendant was sentenced to concurrent jail time consisting of seven years and five years post release supervision as a result of the plea negotiations.

Under these circumstances, defense counsel's failure to challenge the prior felony conviction does not establish that counsel was ineffective (People v. Bassett, 36 A.D.3d 698[3d Dept. 2007]; People v. Ochs, 16 A.D.3d 971 [3d Dept. 2005]; People v. Ennis,261 A.D.2d 332 [1st Dept. 1999]; People v. Crippa, 245 A.D.2d 811 [3d Dept. 1997]).

Accordingly, defendant's motion is denied in its entirety.

The Clerk of the Court shall distribute copies of this order to defendant at his place of detention and to the District Attorney.

Kew Gardens, New York
Dated: July 1, 2008

BARRY KRON
A.J.S.C

[4]Even if defendant was not adjudicated a second violent felony offender, the maximum term for a B violent felony and for the D violent felony would have been 25 years and 7 years, respectively.