

<b>People v Zahiruddin</b>
2012 NY Slip Op 33673(U)
March 28, 2012
Supreme Court, Bronx County
Docket Number: 2438/06
Judge: James M. Kindler
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SUPREME COURT OF THE STATE OF NEW YORK  
BRONX COUNTY CRIMINAL DIVISION: PART T-21

-----X  
THE PEOPLE OF THE STATE OF NEW YORK

-against-

Indictment No. 2438/06

HAFIZ ZAHIRUDDIN,

Defendant.

-----X  
James M. Kindler, J.

**DECISION AND ORDER**

Defendant moves pursuant to CPL § 440.20 for an Order setting aside the sentence imposed under the instant indictment, which was based on his adjudication as a second violent felony offender, and resentencing him as a first violent felony offender.

Procedural History

On December 8, 2000, under Indictment Number 48/00, defendant pled guilty in Supreme Court, Bronx County, to Robbery in the First Degree (Penal Law § 160.10[1]), and, on January 26, 2001, was sentenced to a determinate four year term of imprisonment (Moore, J.). Defendant was not advised that he would be subject to post-release supervision ("PRS") at the plea proceeding and no PRS was imposed at the sentence.

On April 26, 2006, under the instant indictment, defendant pled guilty in Supreme Court, Bronx County, to Attempted Criminal Possession of a Weapon in the Third Degree (Penal Law § 110/265.02[4]), and, on September 11, 2006, was sentenced, as a second violent felony offender, to a determinate four year term of imprisonment and five years PRS.

By letter dated November 20, 2009, the Department of Correctional Services alerted the

Court of defendant's status as a "designated person," pursuant to Correction Law § 601-d(1), since defendant received a determinate sentence under Indictment Number 48/00 without an accompanying period of PRS.

On February 8, 2010, at a proceeding held pursuant to Correction Law § 601-d(1) before JHO Eileen Koretz, the Court determined that defendant had not been advised of PRS and that no PRS had been imposed. In accordance with § 601-d(1), the People stated that if they did not notify the Court "within the time schedule set by the Court," that they were not "seeking resentencing or further adjournment," "[t]he Court may presume" that the People were "consenting to a sentence that [did] not include a term of [PRS]."

On March 15, 2010, the People informed the Court that they had no further submissions and JHO Koretz referred the matter to Judge Moore and issued a Recommendation for Determination and Order, which noted that the People consented to a sentence that did not include PRS and recommended that the originally imposed sentence remain unaltered. In a Determination and Order, Judge Moore ordered that the original sentence imposed shall be unaltered and shall remain the sentence of the Court.

Now, in motion papers dated November 28, 2011, defendant, through counsel, moves for an Order setting aside the sentence pursuant to CPL § 440.20 and resentencing him as a first violent felony offender, arguing that, pursuant to People v. Acevedo, 17 N.Y.3d 297 (2011) and People v. Butler, 88 A.D.3d 470 (1st Dept. 2011), the date of resentencing in 2010 controls for purposes of determining defendant's predicate felony status and that because defendant was resentenced subsequent to his September 2006 sentence, the sentence imposed for the 2000 conviction cannot constitute a predicate felony. Thus, he contends, he must be resentenced under the instant indictment

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as a first violent felony offender.

In response, the People ask this Court to hold defendant's motion in abeyance pending direction from the appellate courts in order to avoid future litigation should Butler be reversed. The People base their request on the representation of a New York County Assistant District Attorney that the People's application for leave to appeal the Butler decision is pending before the Honorable Theodore T. Jones and also because they have filed an appellant's brief in the case of People v. Equan Sanders, in the First Department, in which they contend that Butler was incorrectly decided.

Defendant submitted a Reply and, on March 2, 2012, a letter alerting this Court to the recent decision in People v. Frank Ruiz, a case with a similar procedural history, in which Supreme Court, Bronx County (Mogulescu, J., Feb. 23, 2012) granted the defendant's motion, based on Butler.

In a letter dated March 8, 2012, the People informed the Court that they had filed a notice of appeal in Ruiz, noted that a court of concurrent jurisdiction is not binding on this Court, and reasserted their position that defendant's motion should be held in abeyance to avoid ongoing litigation in this case.

#### Legal Discussion

In Accevedo, the Court of Appeals determined that the defendants, who had received enhanced sentences based on prior convictions, were not entitled to have their enhanced sentences set aside where they moved for resentencing on their predicate crimes to correct the original sentences, which were erroneously missing statutorily mandated periods of PRS, and were resentenced to fix the omission of PRS after the convictions in question. The Court concluded that "[t]he decisive feature of these cases [was] [] that the sentencing errors [the] defendants sought to correct by resentencing were errors in their favor: PRS was illegally omitted from their original sentences. The only practical

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benefit defendants could possibly gain from the resentencings was to move their sentences to a later date, thus eliminating their prior crimes as predicates in their later cases." Acevedo, 17 N.Y.3d at 302. In rejecting that tactic, the Court found that, under those circumstances, "the original sentencing date should be the one to be considered for predicate felony purposes." Id.

In Butler, the First Department concluded that the Court in Acevedo "specifically narrowed its decision to instances in which the defendant requested PRS resentencing as a tactical measure to avoid predicate status" and "implicitly rejected the broader holding of the concurring opinion, which would have found that predicate status cannot be affected by any PRS resentencing." Butler, 88 A.D.3d at 473. Thus, the court held that, "where, in the normal course, the government seeks resentencing of a prior conviction and the sentence is vacated for failure to pronounce a term of PRS the resentencing date should be considered in determining whether the prior conviction meets the sequentiality requirement of the predicate felony offender statutes." Id. at 473. The court went on to note that, under Penal Law § 70.85, a court must impose a new sentence even if the District Attorney consents to the reimposition of the original sentence without the addition of PRS.

This Court declines the People's request to hold defendant's motion in abeyance pending a potential future reversal of Butler. As defendant argues, the facts of the instant case are indistinguishable from the facts of Butler. In both cases, a government agency sought resentencing from the erroneous original sentences, and the court, with the District Attorneys' consent, declined to resentence the defendants. The People have not offered any compelling reason to warrant this Court's holding defendant's motion in abeyance. There is no indication at this time whether leave to appeal will be granted, let alone that Butler will be reversed. Nor is it clear that, if Butler is reversed, double jeopardy would prevent defendant from being treated as a second felony offender.

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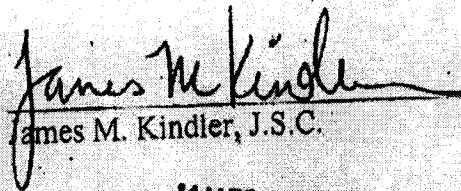
In Acevedo, the Court of Appeals explicitly left open the question of the effect of a resentencing, under the circumstances here presented, on a defendant's predicate felony status. See Acevedo, 17 N.Y.3d at 303 (opinion of Lippman, J.), see also People v. Naughton, 2012 WL 933713, 2012.N.Y. Slip Op. 02118 (2d Dept. March 20, 2012); People v. Boyer, 91 A.D.3d 1183 (3d Dept. 2012).

Accordingly, the Court will promptly decide the motion based on the First Department's binding precedent.

#### Conclusion

Defendant's motion for an Order setting aside the sentence pursuant to CPL § 440.20 is GRANTED. Defendant is to be resentenced as a first violent felony offender, at a date to be determined.

Dated: Bronx, New York  
March 28, 2012

  
James M. Kindler, J.S.C.

**JAMES M. KINDLER, J.S.C.**