At an Criminal term, Part 1CL of the Supreme Court of the state of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of March 2013

PRESENT:

HON. YVONNE LEWIS,

Justice,

The People of the State of New York,

-against-

Lynval Anderson,

Defendant.

Indictment No. 2307/1992

Mr. Lynval Alexander has moved this Court for an Order granting a dismissal of all charges pending against him since the Court failed to give him the promised sentence. He also asserts, by his attorney, that the Court should grant said relief in the interest of justice pursuant to the Criminal Procedure Law §210.40, commonly known as a Clayton Motion. The defendant is a 40 year old man with five children; he is presently serving a sentence of 40 years in federal confinement.

The underlying facts attend the conviction of which these motions seek

dismissal. Mr. Anderson was incarcerated on pending homicide charges; he had been produced to Part 38 of the Brooklyn Supreme Court and was on trial before the late Justice Thaddeus Owen. On February 4, 1992, Mr. Anderson was acquitted on charges consisting of two counts of second-degree murder, second degree and third degree criminal possession of a weapon and first-degree

robbery.

While he was being tried on the homicide charges, on January 28, 1992, at approximately 3:05 P.M., in the third floor holding pins, of the Brooklyn Supreme Court, then, Court Officer Michael Bleiberg performed a routine body search of Mr. Anderson and discovered a single-edge razor inserted in a plastic tube in the left front pocket of the defendant's coat. The evidence was vouchered and a felony complaint was filed on January 29, 1992. Following his acquittal of the aforementioned charges pending when he was arrested on the instant charge, the defendant pled guilty to promoting prison contraband in the first degree, a class D felony, on June 3, 1992. Mr. Anderson indicates that it was his understanding that he would be sentenced to a conditional discharge and that "if he was to remain out of trouble for a period of one year that the charge would then be reduced from a felony to a misdemeanor...."

The court file revels that in exchange for his plea of guilty the defendant was promised a conditional discharge. The promise is handwritten; the handwriting is mine. The minutes of the plea bargain, taken on 3 June 1992 ("the plea minutes") indicate what the assistant District Attorney, Melissa Gorman and the defendant's attorney, Stuart Rubin had to say about the plea at the time. Ms. Gorman stated that "the People would just like to put on the record that they are requesting that this defendant be sentenced to two to six." Mr. Rubin stated, *inter alia*, "...I would like to state very briefly it's my position that the

recommendation for such plea offer, the recommendation of the People of the two to six is completely unreasonable. My client has no criminal record. He did go to trial twice against this D.A.'s office and was acquitted very promptly by two Kings County juries. Someone with no criminal record on a D felony the first time out in my experience might very well get a reduction to a misdemeanor. . . .the Court has total discretion to do this. . .We are very satisfied with the sentencing now as his first criminal record." There is no other reference to a reduction of the felony charge to a misdemeanor charge in the plea minutes.

The case was adjourned to August 5, 1992, at which time Mr. Anderson was sentenced. The sentencing minutes for that court date appear to have been lost or destroyed. Keith Olarnick, an Official Court Reporter affirmed that the sentencing minutes could not be found during a search of the facility in Rochester, New York which is used to house archived minutes. The court file evinces four appearances from arraignment, 7 April 1992, to sentencing, 5 August 1992. There is no appearance record for the vacatur of the felony plea. There were no further appearances on the case until 13 March 2012 at which time the instant motions came on before this court. The file is also absent any indicia of a plea to a misdemeanor.

In 1992, when the sentence now under consideration was imposed, it would have been within the power of the court to give a defendant who was guilty of a class D felony a period of probation. The Criminal Procedure Law (CPL) §65.05(1) states,

inter alia,"1. Criteria. (A) Except as otherwise required by section 60.05 the court may impose a sentence of conditional discharge for an offense if the court, having regard to the nature and circumstances of the offense and to the history, character and condition of the defendant, is of the opinion that neither the public interest nor the ends of justice would be served by a sentence of imprisonment and that probation supervision is not appropriate...3. ... (a) Three years in the case of a felony; and (b) One year in the case of a misdemeanor or a violation." CPL §60.05, is not relevant to these motions as it deals with "[c]ertain class D felonies." The instantly concerned D felony is not referenced therein. So, while it is clear that this court would have had the authority to sentence Mr. Anderson to a conditional discharge, it is not clear that the court had the authority to allow him to withdraw the felony plea and enter a misdemeanor plea without the consent of the district attorney's office.

A conditional discharge, sets in motion a process intended to end a defendant's involvement with the criminal justice system as it relates to the crime for which the defendant received the conditional discharge. If the condition is that the defendant remain out of trouble for a period of one year with a promise of a reduction of the felony to a misdemeanor, the defendant would be released with a return date. On the return date, the condition having been met, the defendant would withdraw the felony plea and plead guilty to a misdemeanor.

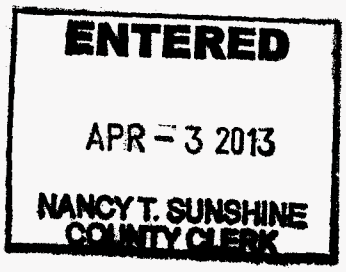
Mr. Anderson's sentencing minutes are, as aforementioned, missing. His file has no indication that there was a scheduled date for a re-sentencing of the felony. His attorney's statement, "[s]omeone with no criminal record on a D felony the first time out in my experience might very well get a reduction to a misdemeanor[,]" together with the fact there was no discussion of a reduction of the felony plea to a misdemeanor plea at the time the plea was taken suggests that no promise was made to do so. Notwithstanding the fact that this court believes that given the circumstances at the time of the taking of the plea I might have made such a promise if I believed I could have done so legally, I have found no legal authorization to do so and the record does not support Mr. Anderson's recollection that the Court made a promise to allow Mr. Anderson to withdraw his felony plea. The motion to dismiss is denied.

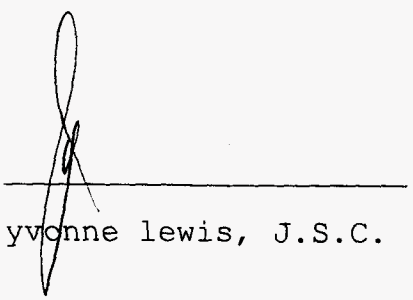
A dismissal in the interest of justice is an extraordinary measure to be sparingly used in that rare and unusual case where it cries out for fundamental justice beyond the confines of conventional considerations (*See Peo. v. Oster*, 258 AD2d 264; *Peo. v. Bebee*, 175 AD2d 250; *Peo. v. Rucker*, 114 AD2d 994; *Peo. v. Insignares*, 109 AD2d 221; *Peo. v. Belkota*, 50 AD2d 118). CPL 210.40 and *Peo. v. Clayton*, 41 AD2d 204, the seminal case in this area, set forth the factors to be addressed in considering such relief; namely, the seriousness and circumstances of the offense; the extent of harm caused by the offense; the evidence of guilt, whether admissible or inadmissible at trial; the

history, character and condition of the defendant; any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant; the purpose and effect of imposing upon the defendant a sentence authorized for the offense; the impact of a dismissal upon the confidence of the public in the criminal justice system; where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion; any other relevant fact indicating that a judgment of conviction would serve no useful purpose.

CPL 210.40 provides that a court may dismiss an indictment in the interest of justice when it determines, after taking into account certain factors, that "such dismissal is required as a matter of judicial discretion by the existence of some *compelling factor, consideration or circumstance* clearly demonstrating that conviction or prosecution of the defendant upon such indictment or count would constitute or result in injustice" emphasis added. (CPL 210.40[1]). The Court finds no compelling factor which clearly demonstrates that Mr. Anderson's conviction or prosecution would constitute or result in injustice. CPL 170.40. The Clayton motion is denied.

This constitutes the decision and order of the Court.





yvonne lewis, J.S.C.