SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 40

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THE PEOPLE OF THE STATE OF NEW YORK

Decision and Order
CPL 440.20

-against-

Indictments *03943/06*,
09454/06,
03692/07

CORY CALDWELL

Defendant

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Defendant moves, *pro se*, to vacate his sentence pursuant to *CPL 440.20.* Specifically, defendant seeks to strike the term of post-release supervision, hereinafter *"PRS"* that was imposed as part of his sentence on the grounds that it violates his constitutional rights in multiple respects. *Defendant* further argues that he did not understand when he pleaded guilty that he could be re-incarcerated for violating the terms of his *PRS.*

On *April 4, 2006*, *defendant* and *Gladimir Thomas* engaged in a fight with *Ephram Moses. Moses'* brother, *Wendell Moses*, entered the fray and *defendant* shot him in the face with a gun that *Thomas* had been using. *Wendell Moses* survived his wounds but lost a tooth and sustained a permanent scar on his lip.

Defendant was charged under Indictment *03943/2006* with two counts each of attempted murder in the second degree; assault in the first degree; criminal possession of a weapon in the second, third and fourth degrees; assault in the third degree ; and attempted assault in the first and second degrees.

Defendant was thereafter charged under two additional indictments, *09454/2006* and *03692/2007*, for various crimes involving the criminal sale and possession of controlled

substances. On *October 30, 2007*, *defendant* pleaded guilty under all three indictments to one count of assault in the first degree; one count of criminal possession of a controlled substance in the third degree and one count of criminal sale of a controlled substance in the third degree .

During the plea proceedings, this court informed defendant:

> The promise is that you're going to be sentenced on each indictment - on the assault indictment, that's *3943* of *2006*, your promised sentence is going to be five years in state prison, followed by five years of post-release supervision. On the other two indictments, the drug possession and the drug sale, the sentence is going to be a definite terms of one year. Each of these three sentences will run concurrent, so you will do five years in state prison with five years of post-release. That's your highest sentence.

Defendant asked, "so, basically, you're telling me I'm going to do five years and then I'm going to have five years parole or five years probation?" The court replied, "five years post-release supervision. That's exactly right. That's what the law says, sir."

On *November 19, 2007*, *defendant* was sentenced to concurrent terms of one year imprisonment plus one year post-release supervision on each of the drug convictions and five years imprisonment plus five years post-release supervision on the assault conviction.

Defendant did not appeal from his judgment of conviction. He was released to the *Division of Parole* on *April 6, 2012.*

Defendant now argues that his sentences should be set aside on the following grounds:

1) his guilty plea was not knowing, voluntary and intelligent because the court did not inform him of the consequences of violating the conditions of post-release supervision;

2) the imposition of post-release supervision in addition to a term of imprisonment constituted an improper imposition of consecutive sentences;

3) the imposition of post-release supervision violates *defendant's* constitutional rights against

double jeopardy and unreasonable search and seizure, and his rights to prosecution by indictment, to have his guilt proven beyond a reasonable doubt, and to equal protection of the law. Each of these claims are either procedurally barred or without merit.

Defendant's first claim, which is a challenge to his judgment of conviction, is not cognizable under *CPL 440.20* because it does not relate to the validity of his sentence. Even when reviewed under *CPL 440.10 ,defendant's* challenge to the voluntariness of his plea is procedurally barred because *defendant* could have raised it on appeal. Here, the court's explanation of *defendant's* sentence appears entirely on the record of the plea and sentencing. Accordingly, where *defendant* failed to raise his claim on appeal he is now barred from doing so on a collateral motion .*CPL 440.10[2][c*]; *see People v Cooks*, 67 NY2d 100 [1986] [CPL 440.10 should not be employed as a substitute for direct appeal when defendant was in a position to raise an issue but failed to do so] ; *see also People v Cuadrado*, 9 NY3d 362[2007]).

Moreover, where the court properly informed *defendant* that his sentence included a term of post-release supervision, there was no need to explain to him the specific consequences that might be imposed by the *Board of Parole* in the event of a violation. For a guilty plea to be knowing, voluntary and intelligent, "a defendant must be informed of the direct consequences of the plea". *People v Hill*, 9 NY3d 189 [2007]. Post-release supervision, governed by *PL 70.45*, is a direct consequence of many criminal convictions and the failure of a court to advise of post-release supervision requires reversal of the conviction. *People v Catu*, 4 NY3d 242 [2005]. Here, however. *defendant* concedes that the court informed him that a five-year term of post-release supervision was a component of his sentence.

Moreover, a court need not provide advice about collateral consequences that are

"peculiar to the individual and generally result from the actions taken by agencies the court does not control" .*People v Ford*, 86 NY2d 397 [1995]. The Court of Appeals recently held that "the ramifications of a *defendant's* violation of the conditions of post-release supervision are classic collateral consequences of a criminal conviction" . *People v Monk*, 21 NY3d 27 [2013]. The Court noted, "the consequences of violating post-release supervision are uncertain at the time of the plea, depending, as they do, upon how a defendant acts in relation to a condition tailored to his circumstances and imposed in the future" [*id.*]. In addition, the *Board of Parole*, not the court, is responsible for establishing the conditions of a *defendant's* post-release supervision. S*ee PL 70.45[3]*; *Executive Law 259–c [2], 259–i[3], [4]*. Accordingly, the court's failure to advise *defendant* about the consequences of violating the terms of his post-release supervision does not prevent *defendant's* plea from being knowing, voluntary and intelligent.

Defendant mistakenly contends that the imposition of post-release supervision in addition to his term of imprisonment constitutes an improper imposition of consecutive sentences. *Defendant's* term of post-release supervision was not a second term of imprisonment, but rather a component of his sentence that the court pronounced on the record. *See PL 70.45*; *People ex rel. Gill v Greene*, 875 NYS2d 826 [2009] [sentencing court's failure to pronounce post-release supervision was a failure to pronounce "a part of the sentence"]. In this instance, post-release supervision was properly imposed as a part of *defendant's* sentence.

Defendant's list of constitutional claims also appears to be based upon a misapprehension of the law. As discussed above, the court properly imposed a term of post-release supervision as part of *defendant's* sentence, as required by *PL 70.45*. As a result, this sentence does not constitute double jeopardy.

Moreover, the possibility of re-incarceration following a violation of the conditions of post-release supervision does not violate *defendant's* right to prosecution by indictment and the right to have his charges proven beyond a reasonable doubt. As the United States Supreme Court has made clear:

> The revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations. Parole arises after the end of the criminal prosecution, including imposition of sentence. Supervision is not directly by the court but by an administrative agency, which is sometimes an arm of the court and sometimes of the executive. Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions" *Morrissey v Brewer*, 408 US 471, 480 [1972].

Similarly, the revocation of post-release supervision is not part of the criminal prosecution but rather is a separate action taken after sentencing by the parole board. *See Exec. Law 259-i.* Thus, the same constitutional rights afforded to a defendant in a criminal proceeding are not necessarily applicable to a non-judicial proceeding to revoke post-release supervision.

Nor does the imposition of post-release supervision violate *defendant's Fourth Amendment* right against unreasonable search and seizure. Where a *defendant* is subject to the conditions of post-release supervision, a parole *officer's* search of the *defendant's* home is rationally and reasonably related to the officer's duties to prevent violations of parole .*People v Vann*, 92 AD3d 702, 703 [2d Dept 2012], *see People v Huntley*, 43 NY2d 175, [1977]. Indeed, the parole board may require a parolee to sign a certificate of release authorizing such a search of the *defendant's* person, home and property. *See People v Johnson*, 54 AD3d 969 [2d Dept 2008].

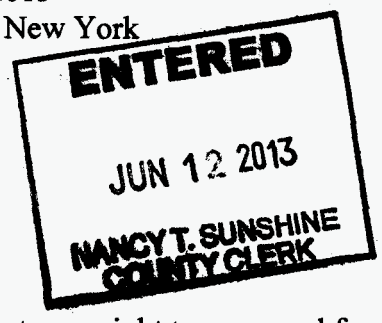
Finally, there is no merit to *defendant's* claim that post-release supervision violates his

right to equal protection of the law. *Defendant* argues that if he is re-incarcerated for violating the terms of his post-release supervision, he will serve more than the term of his determinate prison sentence while persons serving an indeterminate sentence who violate parole cannot be imprisoned beyond the maximum term of such sentence. *Defendant* has overlooked the fact that only violent felony offenders receive determinate sentences *.PL 70.00[1], [5], [6]*. Thus, a valid state interest exists to rationally justify sentencing violent felons differently from nonviolent felons. *See People v Drayton*, 39 NY2d 580 [1976]; *also People v Geisel*, 19 A.D.3d 812 [3d Dept 2005]).

Accordingly, *defendant's* motion is *DENIED* in its entirety.

This *decision* shall constitute the *order* of the court.

Dated: June 11, 2013
Brooklyn, New York



MARTIN P. MURPHY, A.J.S.C.

You are advised that your right to an appeal from the order determining your motion is not automatic except in the single instance where the motion was made under CPL 440.30(1-a) for forensic DNA testing of evidence. For all other motions under Article 440, you must apply to a