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KSUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 72

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

Ind. No. 2601/15

DECISION AND ORDER

BRANDON SIMMONS,

Defendant.

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ROBERT M. STOLZ, J.,

The Defendant, Brandon Simmons, was convicted, following a guilty plea, of Assault in the First Degree, in violation of PL §120.10(1). The plea arose out of defendant's shooting of the victim on May 21, 2015. On September 20, 2016, he was sentenced, as a second felony offender, to a term of imprisonment of twelve years with five years of post-release supervision.

Prior to defendant's plea, the People filed a predicate felony statement alleging that on August 4, 2011, defendant was convicted in Pennsylvania of the felony of Possession with Intent to Manufacture or Deliver, in violation of 35 Pa. Stat §780-113(a)(30). In response, defendant's then attorney filed a motion challenging the predicate statement on the ground that it was not the "strict equivalent" of New York's corresponding statutes, Criminal Possession of a Controlled Substance in the Third and Fifth Degrees. More specifically, defendant argued that, unlike its New York counterparts, the Pennsylvania statute did not require that the accused acted "knowingly and unlawfully" in order to violate it. The People opposed the motion.

On June 29, 2016, I ruled orally that defendant was in fact a second felony offender, citing *People v. Mulero*, 251 AD2d 252 (1st Dept), *lv. den.* 92 NY2d 928 (1998) (holding that 35 Pa. Stat §780-113(a)(30), like its New York counterparts Criminal Possession of a Controlled

Substance in the Third and Fifth degrees requires "knowing" and not merely "reckless" *mens rea* with respect to the possession of a controlled substance with intent to distribute).

The defendant appealed the conviction, arguing that the judgment should be reversed, raising the above described *mens rea* issue, and also that he had not been adjudicated a predicate felon. On June 27, 2019, the Appellate Division vacated defendant's sentence on the ground that he had not been arraigned as a second felony offender and therefore had been denied the right to controvert the predicate statement. The Court, however, also citing *People v. Mulero, supra*, upheld this Court's determination of defendant's predicate status. In doing so, the Appellate Division expressly stated that defendant "was a second felony offender based on his Pennsylvania conviction, [adhering] to our previous determination (expressed not as 'dicta' but as what was intended to be an alternative holding), *that the Pennsylvania statute in issue . . . is the equivalent of a New York felony*." *People v. Simmons,* 173 AD3d 646 (1st Dept 2019) (emphasis added). The matter was remanded for a predicate felon adjudication and re-sentencing.

On September 11, 2019, the parties appeared before me, and defendant requested an opportunity once again to challenge the predicate statement on the basis of his Pennsylvania conviction. That request was granted, and on September 19, 2019 counsel filed papers, arguing that: 1) the Pennsylvania statute has a "more forgiving" *mens rea* requirement because it criminalizes knowledge only that one is in possession of a controlled substance, while New York's equivalent statutes require knowledge of which controlled substance was possessed; 2) that the Pennsylvania statute outlaws certain substances which are not outlawed in New York and; 3) that the Court should not examine the underlying criminal complaint to determine *how* defendant violated the Pennsylvania statute, but only compare the language of the foreign statute

to its New York equivalent.

Discussion

PL §70.06 (1)(b)(i) provides that:

> [f]or the purpose of determining whether a prior conviction is a predicate felony conviction the following criteria shall apply: (i) [t]he conviction must have been in this state of a felony or in any other jurisdiction of an offense for which a sentence of imprisonment in excess of one year or a sentence of death was authorized in this state irrespective of whether such sentence was imposed.

Because New York authorizes a prison sentence in excess of one year only for felonies, the Court must determine whether defendant's foreign conviction is equivalent to a New York felony before he may be adjudicated a second felony offender. *People v. Jurgins*, 26 NY3d 607, 613 (2016); *People v. Gonzalez*, 61 NY2d 586, 592 (1984) *People v. Muniz*, 74 NY2d 464, 467 (1989). In addition, the Court must also determine, as required by CPL §400.21 (2), whether the foreign offense was in fact punishable by "a term of imprisonment in excess of one year or death."

Generally, in determining whether a defendant qualifies for predicate felony status based upon a foreign conviction, a court is limited by a comparison of the language of the foreign statute with the "equivalent" New York statute. *People v. Olah,* 300 NY 96, 98 (1949). However, an exception to this constraint exists when the foreign statute criminalizes several different acts, "some of which would constitute felonies and others of which would constitute only misdemeanors if committed in New York." *People v. Jurgins*, *supra* at 613 (2016). In such cases, the Court must look beyond the statute and examine the accusatory instrument and any other relevant documents which describe the particular act or acts underlying the charge. *People v. Muniz,*

supra at 468; *see also, People ex. rel., Gold v. Jackson*, 5 NY2d 243 at 246 [1959]; *People v. Gonzalez*, *supra* at 591 (1984). That exception applies here.

The statute at issue, 35 Pa. Stat §780-113(a)(30), prohibits: the manufacture, delivery or possession with intent to manufacture or deliver a controlled substance . . . or knowingly, creating, delivering or possessing with intent to deliver, a counterfeit controlled substance." As the People point out, however, the delivering or possessing with intent to deliver a counterfeit controlled substance can be either a misdemeanor or a felony under New York's equivalent statute, Public Health Law §3383. Subdivision (2) of that section provides that "[I]t shall be unlawful for any person to manufacture, sell or possess with the intent to sell, an imitation controlled substance." Subsection (7) of the statute provides that "[A] violation of subdivision two or three of this statute shall be a class A misdemeanor. A violation of subdivision two or three of this section by a person previously convicted of this section within the preceding five years shall be a class E felony."

Under these circumstances, the propriety of using the foreign conviction cannot be determined from a facial comparison of the statutes because possessing an imitation controlled substance is a felony in Pennsylvania, but in most instances, is only a misdemeanor in New York. Accordingly, I must examine the Pennsylvania accusatory instrument and any other relevant documents underlying defendant's conviction. *See People v. Thompson*, 11 AD3d 295 (1st Dept 2004), *lv.den.* 3 NY3d 761(2004)(in adjudicating defendant a second felony offender court properly consulted the foreign accusatory instrument to determine whether his conviction under 35 Pa. Stat §780-113(30)(a) was for possession of a controlled substance or possession of a counterfeit controlled substance); *see also People v. Diaz* 115 A.D.3d 483 (1st Dept. 2014), *lv. den.* 23 NY3d

103 (2014).

I have examined the accusatory instrument submitted by the People, titled *Commonwealth of Pennsylvania vs. Brandon Michael Simmons,* Criminal Action No. CP-39-2179/11. It reflects that defendant pleaded guilty to count one. That count clearly and unambiguously states that at the time and place of the offense defendant did "knowingly or intentionally possess with intent to deliver a controlled substance to wit: COCAINE." I have also examined the underlying Pennsylvania "Criminal Complaint," which includes an "Affidavit of Probable Cause" by one of the officers involved in defendant's arrest. That affidavit plainly states that the substances recovered from defendant field-tested positive for crack cocaine and powder cocaine. In addition, the People have submitted a September 13, 2011, sentencing document, signed by the Pennsylvania Court, stating that with respect to "Criminal Action No. CP-39-2179/11, the defendant, Brandon Simmons, is sentenced to undergo imprisonment for a period of not less than 18 months nor more than 60 months." Thus, the People have established that the crime for which defendant was convicted in Pennsylvania was for possessing cocaine, not a counterfeit substance, and, that under Pennsylvania law, that crime is punishable by a term of imprisonment in excess of one year.

Accordingly, the motion is denied. The defendant will be re-sentenced as a second felony offender.

This shall constitute the decision and order of the Court.

Dated: December 18, 2019

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J.S.C.

HON. ROBERT STOLZ