SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CRIMINAL TERM: PART 81

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THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, : NOTICE OF MOTION

-against- :

[redacted], : New York County
Ind. No. 1152/01

Defendant. :

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PLEASE TAKE NOTICE, that upon the annexed affirmation of David J. Klem, Esq., the annexed exhibits, the annexed memorandum of law, and upon all the prior proceedings herein, the undersigned will move in the Supreme Court, New York County, before the Hon. Micki Scherer, at 100 Centre Street, New York, New York 10013, at 10:00 a.m., on August 25, 2003, or as soon thereafter as counsel can be heard, for an order to vacate defendant's plea pursuant to C.P.L. § 440.10(1)(h), and granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
July 28, 2003

ROBERT S. DEAN
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Of Counsel
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CRIMINAL TERM: PART 81

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THE PEOPLE OF THE STATE OF NEW YORK,	:	AFFIRMATION OF DAVID J. KLEM, ESQ.
Respondent,	:	IN SUPPORT OF § 440.10 MOTION
-against-	:	TO VACATE DEFENDANT'S PLEA
[redacted]	:	
Defendant.	:	New York County Ind. No. 1152/01

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STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DAVID J. KLEM, an attorney at law, duly admitted to practice in the Courts of the State of New York, hereby affirms, under penalty of perjury, that the following statements are true or, if stated on information and belief, that he believes them to be true:

1. I am associated with the office of Robert S. Dean, Center for Appellate Litigation, who was assigned by the Appellate Division, First Department, on January 23, 2003, to represent defendant on appeal from a judgment of the Supreme Court, New York County, rendered on June 6, 2001 (Scherer, J., at plea and sentence). (The Appellate Division's Order of Assignment is attached hereto as Exhibit A).

2. I make this affirmation in support of defendant's motion, pursuant to C.P.L. § 440.10(1)(h), to vacate his guilty plea as unknowing and involuntary because he was neither informed of nor otherwise aware of the five-year period of post-release supervision, which he automatically received pursuant to C.P.L. § 70.45, when he entered his plea of guilty.

3. By indictment number 1152/01, [redacted] was charged with attempted second-degree murder, first-degree assault, and reckless endangerment in the first degree, arising out of a February 17, 2001, incident.

4. On May 23, 2001, [redacted] entered a plea of guilty to first-degree assault with a promised sentence of 10 years' incarceration to cover the indictment. No transcript of that plea is available. (The affidavit of Court Reporter Claudine Davidson is attached hereto as Exhibit B.)

5. On June 6, 2001, Your Honor sentenced Mr. [redacted], as a first-felony offender, to a term of 10 years' incarceration. (A copy of the June 6, 2001, transcript is attached hereto as Exhibit C.) During the sentencing proceedings, the prosecutor stated that the "People rely on the promised sentence of ten years." (Exhibit C, at 3). Defendant's counsel, Lorraine Brown, Esq., similarly relied "on the promise." (Exhibit C, at 3). Defendant stated that he "believe[d] the sentence [to be] uncalled for . . . but [he agreed to] accept the ten years." (Exhibit C, at 3). Your Honor then recounted how the Court had offered defendant a sentence of "ten years" despite the People's recommendation of 12 years and that defendant had plenty of opportunity to discuss the plea with his attorney and that the plea had been entered knowingly and voluntarily. (Exhibit C, at 3-4). The Court imposed "a determinate sentence of ten years" "as . . . promised." (Exhibit C, at 4).

6. [redacted] swears that no mention was made on the record at the time of plea or sentence of the five-year period of post-release supervision that would automatically be included with his determinate sentence. ([redacted]'s sworn affidavit is attached hereto as Exhibit D). The minutes of the sentencing show no mention of any

period of post-release supervision. (Exhibit C). Even the Sentence and Commitment sheet makes no mention of post-release supervision. (A copy of the Sentence and Commitment sheet is attached hereto as Exhibit E).

7. Not only was [redacted] never informed on the record of any period of post-release supervision, but [redacted] swears that he never learned of post-release supervision until long after his plea and sentence (Exhibit D, at ¶¶ 4-6).

8. Lorraine Brown (now Lorraine McEvilley) and Robert Bigelow, attorneys with the Legal Aid Society, represented Mr. [redacted] at his plea and sentence. I have spoken with both Ms. McEvilley and Mr. Bigelow, who have informed me that they have no specific recollection of having spoken with Mr. [redacted] about post-release supervision.

9. My office has contacted Bonnie Goldburg, the Managing Attorney of the Criminal Appeals Bureau of the Legal Aid Society. Ms. Goldburg reviewed her office's case file on this case and informed my office that no reference to post-release supervision exists in the file.

10. Despite the Court not specifying the fact, the defendant not being informed of the fact, and the defendant never learning of it from any other source, [redacted] received a sentence that included five years of post-release supervision in addition to the agreed upon determinate sentence. See Memorandum of Law (discussing C.P.L. § 70.45).

11. Had [redacted] known of the term of post-release supervision, he would not have pleaded guilty. (Exhibit D, at ¶ 7). Having now learned of that term of post-release supervision and now knowing that the amount of time he could be incarcerated as well as the amount of time he is under parole supervision is longer than he had originally believed,

Mr. Feehan seeks to have his plea vacated. (Exhibit D, at ¶ 1).

12. Post-release supervision is a direct consequence of pleading guilty and thus a defendant must be aware of it at the time of his plea in order for the plea to be considered knowing and voluntary. The record here is silent on post-release supervision, and because [redacted] was not advised about it by his attorney, the Assistant District Attorney, or the Court, and because [redacted] did not learn of it from any other source, his plea must be vacated. (See Memorandum of Law).

WHEREFORE, it is respectfully requested that defendant's guilty plea to first-degree assault be vacated. Alternatively, it is requested that a hearing be held on the matter.

Dated: New York, New York
July 28, 2003

DAVID J. KLEM, ESQ.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CRIMINAL TERM: PART 81

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

[redacted],

Defendant.

MEMORANDUM OF LAW

NY Ind. No. 1152/01

ARGUMENT

DEFENDANT'S GUILTY PLEA WAS UNKNOWING AND INVOLUNTARY BECAUSE HE WAS NEVER INFORMED OF THE POST-RELEASE SUPERVISION PERIOD. (U.S. Const. amend. XIV; N.Y. Const. art. 1 § 6).

Although [redacted] agreed to, was informed of, and pleaded guilty in return for a determinate sentence of 10 years, by operation of statute he was also sentenced to an undisclosed period of five years of post-release supervision. No mention of post-release supervision was made at either the plea or sentence. The defendant had no actual knowledge that the five-year period of post-release supervision would automatically be included with his agreed-upon determinate sentence, and he would not have accepted the plea bargain had he known of the supervisory period. The failure to inform defendant of his post-release supervision, and its attendant risks of five additional years of incarceration, renders defendant's plea unknowing and involuntary. Therefore, defendant's guilty plea must be vacated. U.S. Const., amend. XIV; N.Y. Const., art. I, § 6; Bousley v. United States, 523 U.S. 614 (1998).

A. Background

During the plea discussions no mention was made of post-release supervision by defendant's attorneys, the Court, the prosecutor, or anyone else (Exhibit D, at ¶¶ 4-6; Klem's Affirmation, at ¶¶ 6-9). At sentencing, the Court again made no mention of post-release supervision. The Court merely reiterated that it would impose its "promised" sentence of "a determinate sentence of ten years" (Exhibit C, at 4). Never once was Mr. [redacted] told that the promised determinate sentence included a five year period of post-release supervision. (Exhibit C; Exhibit D, at ¶¶ 4-6).

Despite the fact that no mention was ever made of post-release supervision, by operation of statute, such a sentence was in fact imposed. Section 70.45 of the Penal Law states, in relevant part, that "[e]ach determinate sentence also includes, as a part thereof, an additional period of post release supervision." For a class B violent felony, such as assault in the first degree, the mandatory supervision period is five years, unless a shorter period of not less than two and a half years is specified by the court at sentencing. P.L. §70.45(2). Notably, despite [redacted]'s eligibility for a shorter period of post-release supervision, counsel made no such request. Sentencing courts do not have discretion to exclude the post-release supervision period from a determinate sentence.

Post-release supervision can increase [redacted]'s agreed-upon sentence. The period of post-release supervision will not begin to run until [redacted] is released from imprisonment. P.L. § 70.45(5)(a). A violation of the conditions of post-release supervision "shall subject the defendant to a further period of imprisonment of at least six months and up to the balance of the remaining period of post-release supervision, not to exceed five years." P.L. § 70.45(1)(3). Post-release supervision is unlike parole, mandating six-

months reincarceration for a violation of the conditions of supervision. As a result, it poses a far greater likelihood of reincarceration than parole.

While no statistics are yet available for post-release supervision, the re-incarceration rate for parolees tops 40% in the three years after their release. Jennifer Gonnerman, Life Without Parole?, N.Y. Times Magazine, May 19, 2002; U.S. Dep't of Justice, Bureau of Justice Statistics, Trends in State Parole, 1990-2000, at 10 (Oct. 2001). In 1999 in New York State, 31½% of all admissions to the prison system, were parole violators. Trends in State Parole, 1999-2000, at 13. The New York State Division of Parole acknowledges that "more parolees are being returned to prison for parole violations than ever before." New York State Division of Parole, Reducing the Number of Parole Violators in Local Correctional Facilities in New York State (available at <http://www.parole.state.ny.us/jailpopmaninit.html>). In New York, 13% of parolee's are locked up every year for technical violations alone. Gonnerman, Life Without Parole? In 1998-99, 10,619 out of 67,571 parolees were returned to prison. New York State Division of Criminal Justice Services, Coordinated Parole Case Management Program - Program Abstract (available at <http://www.criminaljustice.state.ny.us/ofpa/pdfdocs/coorparolecase.pdf>). Thus, despite Mr. Feehan only agreeing to a term of ten years' incarceration, he faces a realistic possibility of being kept in custody much longer than that term.

B. Post-Release Supervision is a Direct Consequence of Pleading Guilty.

Due process requires that a defendant's plea be a voluntary and knowing choice made with a full understanding of the attendant ramifications. See People v. Ford, 86 N.Y.2d 397, 402-03 (1995) (citing Boykin v. Alabama, 395 U.S. 238, 244 (1969)). While

a court cannot foresee and inform a defendant of all of the collateral consequences that arise out of the defendant's unique personal situation, the court has a constitutional duty to inform the defendant of the direct consequences of accepting a guilty plea. People v. Ford, 86 N.Y.2d at 403. The "direct" consequences of which a defendant must be informed are those having a "definite, immediate and largely automatic effect" on the defendant's punishment. Id. at 403.

Courts have repeatedly distinguished direct consequences from those that are merely collateral. Examples of such collateral consequences to a guilty plea include deportation, the discontinuance of work release and college programs for inmates, loss of civil service employment, loss of a driver's license, loss of a passport, and an undesirable discharge from the armed services. These have been deemed collateral because they are generally the result of an action taken by an agency outside of the court's control and are not "definite, immediate and largely automatic." Id.; People v. Berezansky, 229 A.D.2d 768, 770 (3d Dept. 1996); United States v. Crowley, 529 F.2d 1066, 1072 (3d Cir. 1976); Moore v. Hinton, 513 F.2d 781, 782-83 (5th Cir. 1975); Meaton v. United States, 328 F.2d 379, 380-81 (5th Cir. 1964); Redwine v. Zuckert, 317 F.2d 336, 338 (D.C. Cir. 1963).

Statutorily mandated post-release supervision that automatically appends to a determinate sentence cannot be considered merely a collateral consequence to pleading guilty. Rather, the five-year supervisory period imposed in the instant case amply satisfies the Ford criteria for the type of direct consequence to a guilty plea that a defendant must be made aware of at the time of pleading. Such a consequence cannot possibly be dismissed as comparable to the loss of the right to have a passport or a driver's license. A class B violent felony, such as assault in the first degree, automatically includes post-

release supervision by statute in every determinate sentence as a "part thereof," and commences automatically upon release. P.L. §§ 70.45(1), (5). The sentencing court lacks the discretion to exclude the supervision from a defendant's sentence. Thus, in the absence of court specification reducing the supervisory period (to no less than two-and-one-half years), a five year period is automatically applied immediately upon sentencing. Consequently, the period of post-release supervision has a "definite, immediate and largely automatic effect" on the defendant's punishment.

Not surprisingly, every court that has ruled on this issue has agreed that post-release supervision has an automatic, direct, and definite effect on a defendant's punishment. In People v. Goss, 286 A.D.2d 180 (3d Dept. 2001), the Third Department concluded that post-release supervision is a direct consequence of a plea that if not told to a defendant renders the plea involuntary. Id. at 183-84. The Goss court considered a defendant who pleaded guilty on the understanding that he would receive a twelve-year determinate sentence, but who was not advised during his plea colloquy that five years of post-release supervision would automatically follow that determinate sentence. The Third Department held unequivocally that "postrelease supervision in this context is a direct consequence of defendant's plea. Since defendant was not advised of it prior to entering the plea, he should have been permitted to withdraw his guilty plea." Id. at 311 (citations omitted). The Goss decision emphasizes the trial court's constitutional duty to ensure that a defendant has a full understanding of the connotations and consequences of his guilty plea, and the prerequisite that a defendant be informed of each essential component of his sentence for a guilty plea to be deemed knowing and voluntary.

The other published opinions in this State have agreed with Goss. The Second

Department, for example, has explicitly held that "under New York's statutory scheme [post-release supervision] has a 'definite, immediate and largely automatic effect on [a] defendant's punishment' and is therefore a direct consequence of a plea about which a defendant must be informed before the plea is entered." People v. Melio, 304 A.D.2d 247 (2d Dept. 2003). The "failure to advise a defendant of the statutorily required postrelease supervision requires that he be permitted to withdraw his guilty plea." People v. Jachimowicz, 738 N.Y.S.2d 770, 770 (3d Dept. 2002); see also People v. Vahedi, ___ A.D.2d ___, 758 N.Y.S.2d 874 (3d Dept. 2003); People v. Jaworski, 296 A.D.2d 597 (3d Dept. 2002); People v. Rawdon, 296 A.D.2d 599 (3d Dept. 2002); People v. Yekel, 288 A.D.2d 762 (3d Dept. 2001); People v. Owens, 192 Misc. 2d 101 (Richmond Cty. Sup. Ct. 2002). Reviewing courts have, therefore, uniformly agreed that post-release supervision is a direct consequence of pleading guilty without knowledge of which a defendant's plea cannot be considered knowing and voluntary.

Although the First Department has yet to specify that post-release supervision is a direct consequence, see People v. Ammarito, ___ A.D.2d ___, 2003 WL 21357327 (1st Dept. 2003) ("not reach[ing] the issue of whether PRS is a direct consequence of certain guilty pleas"),[1] this Court is not free to simply reject the holdings of the numerous courts that have so found. As this Court undoubtedly recognizes, New York has a unified court system. Under that system "[t]he Appellate Division is a single statewide court divided into departments for administrative convenience." Mountain View Coach Lines, Inc. v. Storms,

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[1] See also People v. Rosenthal, ___ A.D.2d ___, 760 N.Y.S.2d 460 (1st Dept. 2003) (avoiding issue by reducing defendant's sentence, in the interest of justice, from five years' incarceration plus two years' PRS to three years' incarceration plus two years' PRS).

102 A.D.2d 663, 664 (2d Dept. 1984). Because those appellate departments are part of a single system, "the doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule." Id. Therefore, because the cases cited above are the only appellate decisions on point, this Court must follow "the correct procedural course in holding those cases to be binding authority." Id.; see also People v. Shakur, 215 A.D.2d 184, 185 (1st Dept. 1995) ("Trial courts within this department must follow the determination of the Appellate Division in another department until such time as this court or the Court of Appeals passes on the question.").[2]

As with the defendants in Goss and its progeny, [redacted] had no knowledge that his guilty plea would result in the direct consequence of five years of post-release supervision. [redacted] believed that he would be incarcerated for no more than 10 years. Because the five years of post-release supervision automatically added to his sentence without his knowledge, he faces an additional period of incarceration. He has thus been denied the benefit of his bargain. See People v. Jachimowicz, 738 N.Y.S.2d at 771 (finding that defendant who received a twelve-year determinate sentence lost the benefit of the bargain when given four years of post-release supervision in addition to the

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[2] Those State court decisions finding that post-release supervision is a direct consequence of a plea are consistent with federal court rulings. Federal courts have considered the nearly identical issue of "special parole" – a period immediately following defendant's release wherein a violation would result in defendant's reconfinement for the entire length of the parole term – and have uniformly classified such a period of statutorily "mandatory" or "special" parole as a direct consequence of a guilty plea, without knowledge of which a defendant has the right to have his plea vacated. See Michel v. United States, 507 F.2d 461, 463 (2d Cir. 1974) (stating that defendant should be advised that special parole will be imposed and he must be asked by the court if he understands that fact); Ferguson v. United States, 513 F.2d 1011, 1011-12 (2d Cir. 1975) (vacating drug plea where sentencing court did not inform defendant of non-discretionary special parole period of supervised release).

agreed upon four-year prison term). As in Jachimowicz, [redacted] bargained for a known, determinate sentence and subsequently received an additional unbargained for period of post-release supervision, causing him to lose the benefit of the bargain.

C. Defendant Would Have Opted for Trial Had He Been Informed of PRS

[redacted] would not have accepted the plea had he known about the five years of post-release supervision. To the extent that a retroactive hypothetical analysis of Mr. Feehan's subjective state of mind is appropriate – and defendant maintains that it is not – a hearing on the issue would be appropriate if the People dispute [redacted]'s sworn allegations.

Several courts have seemingly considered the issue of the effect that knowledge of post-release supervision would have had on a defendant's decision to plead guilty. See, e.g., People v. Ammarito, ___ A.D.2d at ___, 2003 WL 21357327 (agreeing with the motion court's finding, after a hearing, "that knowledge of the PRS component of the sentence would not have affected defendant's decision to plead guilty"); People v. Melio, 304 A.D.2d at ___ (applying "harmless error analysis" to such claims and directing that a hearing be held to determine whether the defendant would have pled guilty despite the imposition of PRS). Other courts, however, have rejected that analysis. See, e.g., People v. Jaworski, 296 A.D.2d 597; People v. Jachimowicz, 738 N.Y.S.2d 770; People v. Goss, 286 A.D.2d 180; People v. Owens, 192 Misc. 2d 101. Defendant maintains that such an inquiry is only relevant when the claim concerns ineffectiveness of counsel, not where – as here – the claim is solely that the defendant was not informed or otherwise aware of a direct consequence of his plea. Defendant would object to any ruling that the hypothetical

effect knowledge would have had on defendant's decision to plead is relevant to this claim or otherwise an appropriate matter for a hearing.

An analogy may help elucidate defendant's position. If a defendant were to enter a plea with an understanding that he would be sentenced to two years' incarceration, but thereafter he received a sentence of three years' incarceration (perhaps because that was the minimum allowable sentence), we maintain that such a result is violative of due process. The defendant in that situation would be entitled to get his plea back regardless of whether he might have pleaded guilty in exchange for a three year sentence. See People v. Selikoff, 35 N.Y.2d 227, 238-39 (1974); Santobello v. New York, 404 U.S. 257, 260 (1971). The fact remains that the defendant in that hypothetical pled guilty in exchange for a two year sentence and he could not, absent his consent, be sentenced to three years under that plea. Similarly, here, [redacted] entered a plea to a ten year sentence, yet he received a sentence in excess of ten years. Whether or not he might have accepted that longer sentence is immaterial to his claim that his current sentence in excess of his agreed upon sentence is violative of due process.

To the extent that the effect, if any, that knowledge of post-release supervision would have had on Mr. Feehan's decision to plead guilty is relevant – and, again, we submit that it is not – that issue is, at most, one of harmless error. See People v. Melio, 304 A.D.2d at ___. Because the requirement that a plea be both knowing and voluntary is a rule of constitutional magnitude, if any rule of harmless error would be applicable, it would be a constitutional harmless error analysis. Pursuant to that standard, once a defendant establishes that he was unaware of a direct consequence of his plea, the burden would shift to the prosecution to establish beyond a reasonable doubt that there is no

reasonable possibility that had he timely been made aware of that direct consequence, he would not have pleaded guilty. See generally Chapman v. California, 386 U.S. 18 (1967); Fahy v. Connecticut, 375 U.S. 85 (1963); People v. Crimmins, 36 N.Y.2d 230, 237 (1975). In any event, if the People dispute [redacted]'s sworn contention that he would not have entered a guilty plea had he been informed of post-release supervision and if this Court overrules defendant's objections to that inquiry, then a hearing on the issue must be held. See People v. Ammarito, ___ A.D.2d at ___, 2003 WL 21357327 (affirming after a hearing); People v. Melio, 304 A.D.2d 247 (remanding for a hearing).

C. A § 440 Motion Is the Appropriate Vehicle in Which to Raise this Claim

This claim is properly before the Court on a C.P.L § 440.10 motion. "The voluntariness of a plea is challenged prior to sentencing by a motion to withdraw the plea under CPL 220.60, or after sentencing by a motion to set aside the plea under CPL 440.10." People v. Latham, 90 N.Y.2d 795, 798 (1997) (emphasis added); see also People v. Ford, 86 N.Y.2d 397 (considering voluntariness issue on merits after motion to vacate conviction had been converted into a C.P.L. § 440.10 motion); People v. Higgins, 304 A.D.2d 773 (2d Dept. 2003) (ruling that issue of PRS cannot be raised in the first instance on direct appeal but should be brought by way of a motion to vacate in the trial court); People v. Wilson, 296 A.D.2d 430 (2d Dept. 2002) (same); People v. Jachimowicz, 738 N.Y.S.2d at 771 (vacating plea, on direct appeal, in the interest of justice but holding that defendant should have pursued a post-conviction motion in county court).

* * * *

In sum, post-release supervision is a direct consequence of pleading guilty about which a defendant must be informed in order to render his plea knowing and voluntary. The record here is silent on post-release supervision, and [redacted] was not so informed by his attorney. [redacted] had no actual knowledge of the supervisory period at the time of pleading, and he lost the benefit of his plea bargain. That alone requires this Court to grant his motion to vacate his plea. To the extent that this Court determines that an inquiry into [redacted]'s state of mind is necessary, defendant maintains that a hearing should be held at which time the People would have the burden to establish that the error in failing to inform [redacted] of a direct consequence of his plea was harmless beyond a reasonable doubt.

CONCLUSION

FOR THE REASONS STATED HEREIN, DEFENDANT'S PLEA MUST BE VACATED.

Respectfully Submitted,

Robert S. Dean
Attorney for Defendant

DAVID J. KLEM
Of Counsel
July 28, 2003