

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, :

-against- :

DEFENDANT, :

Defendant. :

NOTICE OF MOTION

New York County
Ind. No. 1152/01

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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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DAVID J. KLEM
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CRIMINAL TERM: PART 81

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

Respondent,

-against-



Defendant.

AFFIRMATION OF
DAVID J. KLEM, ESQ.
IN SUPPORT OF
§ 440.10 MOTION
TO VACATE
DEFENDANT'S PLEA

New York County
Ind. No. 1152/01

-----X
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, ██████████ 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, ██████████ 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. ██████████, 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. ██████████ 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. (██████████'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 Goldberg, the Managing Attorney of the Criminal Appeals Bureau of the Legal Aid Society. Ms. Goldberg 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

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

~~REDACTED NAME~~

Defendant.

MEMORANDUM OF LAW

NY Ind. No. 1152/01

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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 Mr. Feehan's agreed-upon sentence. The period of post-release supervision will not begin to run until Mr. Feehan 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-

