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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART K-TRP

PRESENT:

HON. SEYMOUR ROTKER
Justice.

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

-against-

Indictment No.: 5039-87

LOUIS TATTA,

Motion: VACATE SENTENCE
CPL 440.20

Defendant.

-----X

DEFENDANT, PRO SE
For the Motion

RICHARD A BROWN, DA

BY: KATHLEEN MURRAY, ADA
Opposed

Upon the foregoing papers, and due deliberation had, the motion is denied. See accompanying memorandum this date.

Kew Gardens, New York
Dated: September, 2001

SEYMOUR ROTKER, Acting J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
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MEMORANDUM DECISION

LOUIS TATTA,

Defendant.

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The defendant was charged by indictment filed on August 10, 1987 with attempted murder in the second degree and related crimes. Following trial by jury, he was convicted of burglary in the first degree and related crimes. On December 20, 1998, the court, after a hearing, adjudicated the defendant a second violent felony offender and sentenced him to a term of twelve and one half to twenty five years in prison for the burglary conviction and to various lesser terms for the related felonies. The defendant appealed and, among other issues, raised the question of the legality of the sentence that was imposed by the trial court.

On November 18, 1991, the Appellate Division, Second Department, found that the predicate felony statement filed by the People was inadequate and remanded the matter to the trial court for re-sentencing, People v. Tatta, 177 AD2d 674 (2nd Dept., 1991). The defendant sought leave to appeal this decision to the Court of Appeals. Leave was denied, see, People v. Tatta, 79 NY 2nd 923 (1991).

On April 23, 1992, this Court, acting pursuant to the directive of the appellate court, held a second hearing on the defendant's predicate felony status and re-sentenced him to the same sentence. The defendant again appealed.

On April 8, 1994, the Appellate Division, Second Department, ruled that the defendant was not a second violent felony offender and modified the defendant's sentence by reducing the minimums from one half to one third of the maximums imposed, see, People v. Tatta, 196 AD2d 328 (2nd Dept., 1994). The defendant sought leave to appeal this decision to the Court of Appeals. Leave was denied, see, People v. Tatta, 83 NY 2nd 972 (1994).

Six years later, the defendant filed a motion with this Court pursuant to CPL 440.20 seeking to vacate the reduced sentence. This motion was denied on August 28, 2000. The defendant sought leave to appeal the denial of the motion to the Appellate Division, Second Department. Leave was denied by a Justice of that Court on May 14, 2001.

The defendant now moves for a second time in this Court pursuant to CPL 440.20 to vacate his sentence. The basis of the motion is that the defendant's continued detention is "illegal in that the appellant's due process was violated at this parole hearing when the appellant's parole release was denied on August 30, 2000, based in part, in a materially false pre-sentence report and re-sentencing transcript indicating appellant to be a second felony offender" (Defendant's Affidavit, paragraph 2).

The People have responded to the defendant's motion with an affirmation in opposition dated September 6, 2001.

CPL 440.20(1) provides that "the court in which a judgement was entered may, upon motion of the defendant, set aside (its) sentence on the ground that it is unauthorized, illegally imposed or otherwise invalid as a matter of law". The defendant here states no ground upon which the sentence imposed by this court and modified by the Appellate Division is either "unauthorized, illegally imposed or invalid as a matter of law." His argument is that the Parole Board erroneously considered him to be a second violent felony offender. This argument does not relate to the legality of the sentence and is not a ground that can be raised by motion pursuant to CPL 440.20.

CPL 440.20(2) provides that the court must deny a motion pursuant to subdivision (1) when “the ground or issue raised thereupon was previously determined on the merits upon appeal from the judgement or sentence”. The legality of the defendant’s sentence was decided by the Appellate Division, Second Department on April 8, 1994, see, People v. Tatta, 196 AD2d 328 (2nd Dept., 1994) and leave to appeal that decision was denied by the Court of Appeals, see, People v. Tatta, 83 NY2d 972 (1994). Thus, the issue which the defendant seeks to raise here has already been decided against him by two appellate courts.

CPL 440.20 (3) provides that the court “may deny a motion (to vacate a sentence) when the ground or issue raised thereupon was previously determined on the merits upon a prior motion or proceeding in a court of this state”. By decision dated August 30, 2000. this Court specifically ruled on the legality of the defendant’s sentence. The defendant sought to appeal that decision and leave to appeal was denied.

For all of the foregoing reasons, the defendant’s motion to vacate the sentence imposed by this court on April 23, 1992 and modified by the Appellate Division on April 8, 1994 is, in all respects, denied.

Kew Gardens, New York
Dated: September, 2001

SEYMOUR ROTKER, Acting J.S.C.