



## DECISION

### **I. The Court May Resentence the Defendant Because it is Empowered to Correct an Illegal Sentence**

The court is required by law to include a term of post-release supervision to a determinate sentence imposed upon a felony offender. PL § 70.45(1). During sentencing, the court must state not only the term of imprisonment, but also an additional period of postrelease supervision.

Id. If the court fails to advise the defendant of mandatory post-release supervision, the determinate sentence alone is an illegal sentence, and the defendant is entitled to a proceeding to determine whether he must be resentenced with a period of post-release supervision. NY Penal Law § 70.45(5); NY Corrections Law § 601-d; See also People v. Sparber, 10 N.Y.3d 457, 469 (2008); People v. Garner, 10 N.Y.3d 358, 363 (2008). In addition, CPL § 440.20(1) similarly provides that at any time after the entry of a judgment, the court in which the judgment was entered may, upon motion of the defendant, set aside the sentence on the ground that it was illegally imposed.

Upon calendaring such person for a court appearance, the court shall promptly seek to obtain sentencing minutes, plea minutes and any other records and shall provide copies to the parties and conduct any reconstruction proceedings that may be necessary to determine whether to resentence such person. Corrections Law § 601-d(4)(b). If upon review of the minutes the court finds that it did, in fact, either pronounce a term of post-release supervision at sentencing, or alternatively, promised such period at the time of the plea, it may issue a superseding commitment order to reflect the legally imposed sentence. NY Corrections Law § 601-d(3). In such a case, a defendant would not be entitled to be resentenced. Sparber, supra, at 472.

In this instance, a review of the sentencing minutes confirms that after the defendant had

been found guilty after a jury trial, the court failed to pronounce a term of post-release supervision upon imposing a determinate sentence. Accordingly, the defendant has received an illegal sentence and is thus entitled to a resentencing hearing.

**II. The Court Resentences the Defendant to Include Two and One-Half Years Post-Release Supervision, *Nunc Pro Tunc*, Based on (1) the Illegality of the Currently Imposed Sentence, (2) the District Attorney's Objection to Reimpose a Sentence Without Post-Release Supervision, (3) the Court's Original Intention as Directed by Statute, and (4) Terms Imposed Upon Similarly Situated Defendants**

The defendant's claim that the court is barred from resentencing because he has already served the entire term of his sentence is without merit. First, post-release supervision is a mandatory part of a determinate sentence. Sparber, supra, at 469. Second, if between September 1, 1998 and June 30, 2008, a court had imposed an illegal sentence by failing to pronounce a term of post-release supervision, the court may re-impose the determinate sentence without a period of post-release supervision, but only upon consent of the district attorney. Penal Law § 70.85. Otherwise, the court may resentence the defendant to include a period of post-release supervision, thereby correcting the illegal sentence. Id; Sparber, supra, at 472.

Here, the defendant is serving his second year of post-release supervision, which has been administratively imposed by the Division of Parole. Notwithstanding its illegality, the defendant himself cannot strike the post-release supervision portion of his sentence on such basis and claim that he has completed his sentence. Rather, as mentioned, he is entitled to a resentencing hearing whereupon the court will determine whether to seek permission from the District Attorney to strike the post-release portion of the illegal sentence.

Here, the District Attorney moves to have this court resentence the defendant to five years post-release supervision, *nunc pro tunc*. As such, the court is barred from reimposing the

original sentence (nine years without post-release supervision). In addition, the District Attorney's resentencing request reflects the court's original and reasonable intention to impose a period of post-release supervision based on the statutory mandate. See PL § 70.45(2) (2002). Given that the defendant's 1999 conviction of Robbery in the First Degree is a Class B violent felony offense, as well as the defendant's first felony conviction, the court's original and reasonable intention in 2000 would have been to impose as much as five years, but not less than two-and-one-half years, of post-release supervision following imprisonment. Id. Given that this court has consistently imposed the minimum term of post-release supervision upon similarly situated defendants (ie. those with first-degree robbery convictions who had completed the determinate portions of their illegal sentences at the time of resentencing), this court resentences the defendant to the original period of incarceration as well as to a period of post-release supervision of two and one-half years, *nunc pro tunc*.

### **III. Resentencing the Defendant Neither Violates the Double Jeopardy Clause Nor Offends Due Process**

The defendant's claim that resentencing by the court amounts to Double Jeopardy in violation of the Constitution is without merit. The Double Jeopardy Clause of the Fifth Amendment protects against a second prosecution for the same offense after acquittal. U.S.C.A. Const. Amend. 5; See also U.S. v. Pettus, 303 F.3d 480 (2002) (extension of sentence did not allow defendant to be sentenced to more than one punishment for one crime). An order setting aside a sentence pursuant to either CPL § 440.20(5) or Penal Law §§ 70.45, 70.85 does not affect the validity or status of the underlying conviction. Rather, it empowers the sentencing court to correct an illegal sentence. Sparber, supra, at 471.

The defendant relies on numerous *post-Sparber* cases in support of his Double Jeopardy

argument, all of which are not analogous. Further, the defendant's reliance on numerous cases, published and unpublished, in which defendants had received sentences based on guilty pleas (e.g., People v. Washington (21 Misc.3d 349 [Sup Ct NY County 2008]), People v. Rodriguez, \_\_\_ Misc.3d \_\_\_, 2007 N.Y. Slip Op 51712 [Sup Ct, NY County 2007]; People v. Albergottie, Sup Ct, NY County, August 4, 2008, Zweibel, J., indictment No. 6805-01) is plainly distinguishable here. Where a defendant is convicted upon a jury verdict, as opposed to a plea of guilty, and therefore does not receive any indication or assurance of what the sentence will be, the defendant has no legitimate expectation in the finality of the original sentence for double jeopardy purposes should it later turn out to have been an illegal sentence. People v. Somerville, 33 A.D.3d 733U, 734 (N.Y. App. Div. 2d Dep't, 2007) (citing People v Todd, 183 A.D.2d 861 [1992]). Here, the defendant had never been in a position to bargain for his sentence, nor had he ever been promised a specified sentence. Therefore, the defendant here had no expectation of finality in his original sentence, and thus no double jeopardy or due process violation would occur upon resentencing.

Accordingly, based upon the foregoing, the People's motion is granted in part and denied in part, in that the defendant is resentenced to a term of post-release supervision of two and one-half years.

This constitutes the decision and order of the court.

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RICHARD L. BUCHTER, J.S.C.