

Short Form Order

SUPREME COURT STATE OF NEW YORK
CRIMINAL TERM - PART K-TRP QUEENS COUNTY
125-01 QUEENS BLVD., KEW GARDENS, N.Y. 11415

P R E S E N T:

HON. BARRY KRON, A.J.S.C.
Acting Justice

THE PEOPLE OF THE STATE OF NEW YORK	:	Ind. No.: 1658/97
	:	
-against-	:	<u>Motion: Vacate Sentence/</u>
	:	
ANDRE BURKE,	:	<u>Vacate Judgment</u>
	:	
Defendant.	:	
	:	

The following papers numbered
1 to 3 submitted in this motion.

By: Andre Burke, Pro Se
For The Motion

HON. RICHARD A. BROWN, D.A.
By: John F. McGoldrick, ADA
Opposed

	<u>Papers Numbered</u>
Notice of Motion/Affidavits/Exhibits	1
Answering & Reply Affidavits/Exhibits	2 - 3

Upon the foregoing papers, defendant's pro se motion to vacate, in the interests of justice, the sentence or, in the alternative, the judgment, rendered July 21, 1997, convicting him of criminal possession of stolen property in the third degree and unauthorized use of a motor vehicle in the third degree, upon his plea of guilty, is denied.

Defendant alleges that he both pled guilty and was sentenced to a one year term of imprisonment in 1997, and that he was detained by the INS in 2004 by reason thereof. He also contends

that the court failed to advise him of the deportation consequences of his plea and that his attorney affirmatively misinformed him that he would only have to serve eight months in jail and that there would be no immigration consequences of his plea.

Defendant is currently under detention by the Immigration & Naturalization Service ("INS"). He is awaiting disposition of his pending appeal of the February 14, 2005 order deporting him on the basis of having been convicted of a felony offense for which a sentence of at least one year was imposed. He seeks to be resentenced to a term one day short of one year to avoid deportation.

First, defendant is mistaken as to, or has misstated, the facts and record of these proceedings; he did not plead guilty in exchange for a one year sentence. Rather, in 1997, defendant pled guilty to the above crimes and received a sentence of five years probation. It was only after he was rearrested in connection with an unrelated matter on December 16, 2000, pled guilty to one of the crimes for which he had been arrested, and subsequently admitted violating the terms of his probation that he was sentenced, on June 6, 2001, to the one year term of imprisonment.

Thus, it is clear that what defendant actually seeks is to be relieved of the repercussions of his criminal acts; had he not committed another crime following the revocable sentence of probation in this matter, he would not now be subject to deportation.

However, the court is without authority to grant defendant the requested relief, even were it inclined to do so. Defendant's sentence may not be vacated, as neither the original sentence of probation nor the sentence imposed upon revocation thereof was "unauthorized, illegally imposed or otherwise invalid as a matter of law" (CPL 440.20). Furthermore, CPL 430.10 provides as follows:

"Except as otherwise specifically authorized by law, when the court has imposed a sentence of imprisonment and such sentence is in accordance with law, such sentence may not be changed,

suspended or interrupted once the term or period of the sentence has commenced."

There are no "specifically authorized" exceptions to the above statutory rule, such as appellate modification of judgment, applicable here (see, Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 430.10, at 400-402; CPL 470.20[6]). Thus, this court may not alter the sentence which defendant has already served.

Defendant appears to be aggrieved not by the advice he did or did not receive in 1997, but, rather, by that with respect to the June, 2001 imposition of his one year sentence. However, any advice concerning deportation consequences was then irrelevant, as defendant had no choice to be made based upon the advice; he had already pled guilty to the crime which formed the basis for revocation of probation, and resentencing was, therefore, automatic. Furthermore, it would appear that the determinate sentence did not carry an adverse deportation effect when then imposed; only after the September 11, 2001 World Trade Center attacks two months later were the immigration laws revised to mandate deportation for "lesser" crimes (see, Immigration & Nationality Act, [8 U.S.C.] § 237 [a][2][A][iii]).

To the extent that defendant seeks to vacate the judgment of conviction on the basis that his 1997 plea was not voluntarily and intelligently made, the claim is without merit. As previously noted, had defendant lived up to the conditions of his probation, there would be no deportation. In any event, the failure of a court or an attorney to advise a defendant of deportation consequences of a plea will not provide a basis for relief (see, People v McDonald, 1 NY3d 109; People v Ford, 86 NY2d 397; People v Kearney, 186 AD2d 270).

To the extent that defendant alleges that his attorney somehow misinformed him in 1997 of the deportation consequences of his plea, he has failed to show that he was prejudiced by any such advice (see, People v McDonald, supra). Furthermore, the claim is supported only by defendant's own conclusory, self-serving affidavit; consequently, he has failed to raise an issue of fact with respect to the effectiveness of counsel's representation (see, CPL 440.30[4] [b], [d]; People v Brown, 56 NY2d 242; People v Ford, 46 NY2d 1021; People v Session, 34 NY2d 254). In

any event, counsel can hardly be faulted for failing to predict the World Trade Center attack and the resulting changes in immigration law and/or policy.

The Clerk of the Court shall distribute copies of this order to defendant at his place of detention with the Immigration & Naturalization Service and to the District Attorney.

October 11, 2005

BARRY KRON, A.J.S.C.