

SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM: PART K-19

P R E S E N T: HON. SEYMOUR ROTKER,
Justice.

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THE PEOPLE OF THE STATE OF NEW YORK

- against-

Indictment No.: 2545-01

Motion: To Vacate Sentence

JUAN MENJIVAR,

Defendant.

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DEFENDANT PRO SE

For the Motion

RICHARD A. BROWN, D.A.

BY: A.D.A. CHRISTINE BATTAGLIA
Opposed

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

Kew Gardens, New York
Dated: September 14, 2005

SEYMOUR ROTKER
JUSTICE SUPREME COURT

SUPREME COURT, QUEENS COUNTY

CRIMINAL TERM, PART K-19

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

BY: SEYMOUR ROTKER, J.S.C.

- against -

Indictment No.: 2545-01

JUAN MENJIVAR,

Defendant.

-----X

The following constitutes the opinion, decision and order of the Court.

By motion dated July 22, 2005, defendant seeks an order of the court to vacate his plea and sentence previously imposed upon the ground that it was not knowingly, voluntarily and intelligently made because he was not informed of the direct consequences of his plea. Specifically, defendant contends that he was not advised that there would be a mandatory period of post-release parole supervision included as part of his sentence.

In response, the People have filed an affirmation in opposition, dated September 12, 2005, whereby they assert that defendant's motion should be denied in its entirety arguing that his claim is mandatorily procedurally barred pursuant to CPL § 440.10(2)(c). Moreover, the People assert that the rule annunciated in People v. Catu, 4 N.Y.3d 242, 792 N.Y.S.2d 887 (2005) is not subject to retroactive application on CPL § 440 review. Furthermore, the People contend that defendant's sentence was authorized, legal and otherwise valid under the law and therefore his claim is not cognizable under CPL § 440.20 because the sentence was not illegal or unauthorized.

For the reasons stated herein, defendant's motion is denied.

FACTS

On August 14, 2001, an indictment was filed with the court charging defendant with Robbery in the First Degree (P.L. § 160.15([3])). On or about September 17, 2002, defendant pled guilty to the charge and was sentenced to five years incarceration and a period of two and a half years of post-release parole supervision. At the time of his plea, defendant waived his right to appeal.¹ No appeal was taken by defendant.

DECISION

Pursuant to Penal Law Section 70.45(1), each determinate sentence also includes, as a part thereof, an additional period of post-release supervision. Thus, pursuant to Penal Law Section 70.45(2)(f), a mandatory period of not less than two and a half years and not more than five years applies as part of defendant's sentence pursuant to his guilty plea to a class B violent felony offense.

Defendant now moves to have his judgment and sentence vacated asserting he was not advised of the period of post-release parole supervision that was a mandatory part of his sentence pursuant to statute, a direct consequence of his plea.

Initially, this Court finds that defendant's claim is procedurally barred and no hearing is warranted. See CPL § CPL 440.10(2)(c). The Court must deny a motion to vacate a judgment when a defendant, although having filed an appeal, did not have appellate review or determination upon the issues because of defendant's unjustifiable failure to raise these grounds. See CPL 440.10(2)(c).² Since defendant did not raise these issues on appeal, and this Court views these as

¹Defendant commenced an appeal, however, sought to withdraw it. Defendant's application to withdraw his appeal was granted, on consent, by the Appellate Division in a decision dated August 11, 2003. See Decision dated August 11, 2003, annexed as part of the Court file. The parties had entered a stipulation dated July 31, 2003 for withdrawal of the appeal.

²Even if defendant had pursued this issue upon appeal, it is questionable as to whether defendant preserved the issue for appellate review having not moved to withdraw the plea or vacate the sentence prior to its imposition. See CPL § 470.05(2); People v. Dale, 14 A.D.3d 712,

on the record claims, defendant's motion is also procedurally barred upon this ground. Here, defendant initially filed an appeal and then withdrew it. Defendant's claims are on the record claims, which should properly have been raised upon an appeal and thus, are mandatorily barred.³

In any event, as the People argue, the new rule enunciated in Catu, that post-release parole supervision is indeed a direct consequence of a plea that a defendant must be informed of since it is part of the sentence, does not apply retroactively to defendant's case in this Court's view.

In People v. Mitchell, 80 N.Y.2d 519, 591 N.Y.S.2d 990 (1992), the Court reiterated three factors to consider when determining if a new rule has retroactive effect. These three factors are: "(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect on the administration of justice of retroactive application." Mitchell, *supra*, citing People v. Pepper, 53 N.Y.2d 213; 440 N.Y.S.2d 889 (1981). Since no question of Federal constitutional principles are involved here, the question of retroactivity is one of State law. Id.; *see also* People v. Martello, 93 N.Y.2d 645; 695 N.Y.S.2d 525 (1999). *See* Martello, *supra* at 652.

The law set forth in Catu does not address guilt or innocence since it is clear that the rule applies to defendants who have already entered a guilty plea. Thus, the purpose of this new rule is unrelated to the fact-finding process and, in that respect, in no way affects the determination of guilt or innocence.

788 N.Y.S.2d 613 (2d Dept. 2005); People v. Shumway, 295 A.D.2d 916, 743 N.Y.S.2d 763 (4th Dept. 2002)(because defendant failed to move to withdraw guilty plea or vacate judgment, he failed to preserve issue that plea and sentence must be vacated and indictment dismissed based upon assertion that court did not advise him that sentence included period of post-release supervision).

³This situation is distinguishable from People v. Catu, 4 N.Y.3d 242, 792 N.Y.S.2d 887 (2005), which **raised the issue on appeal and not pursuant to collateral motion** as defendant now does (emphasis added). In Catu, the Court of Appeals held that post-release parole supervision is a direct consequence of a defendant's plea of which he must be notified. Thus, since the defendant had not been advised about that portion of his punishment, his plea was vacated and the conviction was reversed. A harmless error analysis was held not to be applicable. Thus, a defendant is not required to demonstrate that he would not have pled guilty had he known of the post-release supervision. *Cf.* People v. Melio, 304 A.D.2d 247, 760 N.Y.S.2d 216(2d Dept. 2003).

Under the second factor, the Court's have extensively relied upon the old law and have not generally advised a defendant of post-release parole supervision as part of the sentence since it had not been determined that this factor was a direct and not indirect consequence of a defendant's plea.

Finally, in light of the extent of the reliance by the Courts when taking plea allocutions upon the old rule where defendants again were generally not advised of post-release parole supervision, retroactive application of the rule would work a substantial hardship upon the administration of justice. A large number of cases currently pending in the trial and appellate court dockets would be affected by a retroactive application. See Martello, *supra* at 652; see also Affidavit of Robert Schlesinger, annexed as an Exhibit to the People's opposition.⁴ Furthermore, retroactive application would not have any beneficial effect upon the integrity of the truth-seeking process. Id. Thus, had there not been a mandatory procedural bar applicable here, only prospective application of the Catu rule is warranted in any event.

Moreover, the sentence imposed here is not illegal, unauthorized or invalid as a matter of law under CPL 440.20 and defendant's motion pursuant to this section must be denied.

Accordingly, defendant's motion is denied.

Dated: September 14, 2005
Kew Gardens, New York

SEYMOUR ROTKER
JUSTICE SUPREME COURT

⁴This affidavit details the number of cases, based upon a search of the data base of the Queens County District Attorney's Office that would be effected by a retroactive application of the Catu rule. The cases that were part of the search are limited to those in Queens County.