

Short Form Order

SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM, QUEENS COUNTY, PART L-5
25-10 Court Square, Long Island City, New York

P R E S E N T :

HON. TIMOTHY J. FLAHERTY,
Justice of the Supreme Court

THE PEOPLE OF THE STATE OF NEW YORK	:	IND. NO. 229/00
	:	1111/00
	:	
-against-	:	MOTION: To vacate
	:	
	:	DATED: August 21, 2006
REINALDO SIERRA	:	
Defendant	:	HEARING:
	:	

Defendant, Pro Se
For the Motion

Hon Richard A. Brown
By: Merri Turk Lasky, Esq.,
Opposed

	<u>Papers</u> <u>Numbered</u>
Notice of Motion and Affidavits Annexed _____	1
Answering and Reply Affidavits _____	2
Exhibits _____	_____
Minutes _____	_____
Other _____	_____

Defendant's motion to vacate is denied for the reasons set forth in the accompanying memorandum.

DATED: August 21, 2006
Gloria D'Amico
Clerk of the Court

TIMOTHY J. FLAHERTY, J.S.C.

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM, QUEENS COUNTY, PART L-5

THE PEOPLE OF THE STATE OF NEW YORK	:	By: Timothy J. Flaherty,
	:	J.S.C.
	:	
- against -	:	Dated: August 21, 2006
	:	
REINALDO SIERRA	:	Ind. No. 229/00; 1111/00
Defendant	:	
	:	

Defendant moves, pro se, for an order vacating the judgment imposed on April 25, 2001 wherein the defendant was sentenced to concurrent determinate terms of imprisonment of ten years arising out of a negotiated plea to two counts of Robbery in the First Degree in full satisfaction of Queens County Indictment Numbers 229/2000 and 1111/2000. These indictments charged the defendant with two gun point holdups, one of an insurance agency on Rockaway Boulevard on January 7, 2000 and the other of an insurance agency on January 9, 2000 on Liberty Avenue, both in Queens County. As part of the plea agreement, appellate review was waived by the defendant.

Defendant claims that his sentence is illegal because it contains a 5 year term of post release supervision, in violation of his state and federally guaranteed constitutional rights to due process. He further claims that his state and federal constitutional rights to effective assistance of counsel were violated because his attorney allegedly failed to advise him that the ten year sentence negotiated by him on defendant's behalf contained the aforementioned term of post release supervision.

This is the fourth application that the defendant has made grounded in the fact that at the

time of plea and sentence he was not advised on the record that the negotiated ten year sentence included a five year term of post relief supervision. The first of these applications was made in 2003. At that time the Court, in denying his motion for re-sentence, noted a reference in defendant's papers suggesting a desire to vacate his plea., and specifically invited the defendant to file a motion to renew, if indeed he sought such relief. It appeared to the Court then and now, that what the defendant truly desired was relief to which he was not entitled, to wit, relief from the post release component of his sentence, and retention of the bargained for sentence of ten years [see Order of this Court dated July 21, 2003].

Defendant did indeed move to renew, but, as expected, limited the relief he sought to re-sentence, rather than risk the loss of his bargained for plea [see Order of this Court dated December 2, 2003].

In 2005 the Court of Appeals decided People v. Catu, 4 NY3rd 242 and vacated a plea on a direct appeal on the grounds that the defendant was entitled to be advised, on the record , that the bargained for sentence included a period of post release supervision. Thereafter, defendant filed a new motion - once again limiting the relief sought therein to a re-sentence. On January 30, 2006 this Court again denied defendant's motion for the reasons set forth in the earlier decisions.

In the instant motion defendant invokes 440.10 of the CPL, the statutory vehicle for collaterally attacking a judgment, rather than, as he did previously, 440.20, by which a collateral attack can be made against the sentence. But in his initial moving papers, defendant again carefully avoids specifically requesting the withdrawal of his plea of guilty, although he does make such a request in his reply affidavit dated August 9, 2006.

Section 440.10 (3)(b) permits the Court to deny a 440.10 application when the merits of a motion has previously been decided. Section 440.10(3)(c) permits the Court to deny a 440.10 application when “the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.”

The motion to vacate the sentence has previously been addressed. If indeed, at this late juncture, defendant wants to vacate his plea, he certainly could have sought that relief in any of his several prior applications. He also could have made the claim that his attorney’s alleged failure to advise him about the post release component to the sentence constituted ineffective assistance of counsel. He did not do so.

In short, all of defendant’s present claims can easily be fit within one or the other of the aforementioned procedural bars. Accordingly, the Court, in the exercise of its discretion and in the interests of justice, denies the motion in its entirety [CPL Section 440.10(3)(b)(c)].

Order entered accordingly.

The Clerk of the Court is directed to mail a copy of this Memorandum and Order to the defendant at his last known address and to the District Attorney.

DATED: August 21, 2006

TIMOTHY J. FLAHERTY, J.S.C.