

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.:01772-02
	:	
	:	
-against-	:	<u>Motion To Vacate Sentence</u>
	:	
CORDELL VAUGHAN,	:	
	:	
Defendant.	:	
_____	:	

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

By: Defendant, Pro Se  
For The Motion

HON. RICHARD A. BROWN, D.A.

By: Merri Turk Lasky, ADA  
Opposed

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

Upon the foregoing papers, defendant's motion to vacate his  
previously imposed sentence and resentence him is granted in  
accordance with the accompanying memorandum.

Date: May 16, 2006

  
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BARRY KRON, A.J.S.C.

M E M O R A N D U M

SUPREME COURT, QUEENS COUNTY  
CRIMINAL TERM, PART K-TRP

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THE PEOPLE OF THE STATE OF NEW YORK : BY: BARRY KRON, AJSC  
: :  
: :  
-against- : DATED: MAY 16, 2006  
: :  
CORDELL VAUGHAN, : :  
: IND. NO.: 1772/02  
Defendant. : :  
:

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Defendant has moved, *pro se*, for an order pursuant to Criminal Procedure Law 440.20 to set aside his sentence on the ground that the indeterminate sentence of ten years to life, as a persistent violent felony offender, for a class E violent felony was illegal.

Defendant was indicted for Criminal Possession of a Weapon in the Second Degree (PL §265.03), and three counts of Criminal Possession of a Weapon in the Third Degree (PL §265.02-1; PL §265.02-3; PL §265.02-4).

On May 20, 2003, defendant and the prosecution requested reinspection of the grand jury minutes and agreed to a dismissal of the top count of the indictment, Criminal Possession of a Weapon in the Second Degree. All parties acknowledged that this consent reinspection was a legal fiction that would allow defendant to plead guilty to the crime of Attempted Criminal Possession of a

Weapon in the Third Degree with a sentence that all parties agreed would serve the interests of justice. In exchange for his guilty plea, the Court promised to sentence defendant to a term of ten years to life.

Defendant indicated that he had adequate time to speak with his attorney; that no one was forcing him to plead guilty; that he understood the rights that he was waiving by his plea and that he understood the conditions set forth by the Court. Defendant then pled guilty to Attempted Criminal Possession of a Weapon in the Third Degree (PL §110/265.02(4)), a class E violent felony.

Defendant was arraigned as a mandatory persistent violent felony offender based upon a 1987 conviction for Attempted Robbery in the Second Degree (PL §110/160.10) and a 1990 conviction for Criminal Possession of a Weapon in the Third Degree (PL §265.02(4)). Defendant admitted to the two prior convictions and declined to raise any issue as to the constitutionality of the convictions. The Court then adjudicated defendant a persistent violent felony offender.

On June 18, 2003, defendant was sentenced, as promised, to an indeterminate prison term of from ten years to life.

A motion to set aside a sentence pursuant to CPL §440.20 is applicable only to a sentence which is "unauthorized, illegally imposed, or otherwise invalid as a matter of law" (see, People v Minaya, 54 NY2d 360, cert denied, 455 US 1024(1981)). Here, defendant has moved to set aside only his sentence claiming that the law mandates that his sentence for a class E violent felony

must be four years to life.

Penal Law §70.08 governs the sentencing of a defendant adjudicated a persistent violent felony offender. However, the statute is silent as to the permissible minimum term for a class E persistent violent felony offender. It has been established that, under such circumstances, it is proper to impose, as the minimum term of imprisonment, the permissible determinate sentence for class E second violent felony offenders (People v. Tolbert, 93 N.Y.2d 86(1999); People v. Williams, 288 A.D.2d 245(2d Dept. 2001); People v. Bryant, 273 A.D.2d 320(2000)). The sentence of imprisonment for a second violent felony offender who has been convicted of a class E violent felony may not exceed a determinate sentence of four years (PL §70.04(3)(d)).

It is well-settled that although CPL 430.10 prohibits a court from altering a sentence once its term or period has commenced, a court has the inherent power to correct its records in relation to mistakes or errors which may be termed clerical, or in a situation where the court merely misspoke. Similarly, a court has the authority to vacate a final criminal judgment on the grounds of fraud or misrepresentation (People v. Moquin, 77 NY2d 449,452(1991)). The Court of Appeals has made clear, however, that a court does not have inherent authority to vacate a plea after imposition of sentence in order to remedy a substantive legal error in the acceptance of the plea, after a defendant has begun serving his sentence (People v. Moquin, supra at 452; Matter of Kisloff v. Covington, 73 NY2d 445(1989); Matter of Campbell v. Pesce, 60

N.Y.2d 165,167(1983)).

Notably, in Matter of Kisloff, supra, all parties were under the erroneous impression that the crime the defendant pled guilty to was a class E felony when, in fact, it was a class A misdemeanor. The Court held that the defendant's request to be resentenced for a class A misdemeanor had to be granted, despite the unintended result of the People being deprived of the agreed upon plea bargain.

In the instant matter, defendant is only seeking to be resentenced, and does not request that his plea or conviction be vacated. The record establishes that at the time of the plea and sentence, all of the parties operated under the mistaken belief that he could be sentenced to a term of ten years to life as a persistent violent felony offender. This Court does not have the authority to vacate the plea or conviction to remedy this substantive error. Rather, this Court must resentence defendant to a term of four years to life in accordance with the law.

Accordingly, defendant is resentenced to a term of imprisonment of four years to life.

In light of defendant's new parole eligibility date, this Court finds it necessary to address defendant's extensive criminal record. As noted earlier, defendant had two prior violent felony offense convictions prior to his plea in this matter. Additionally, defendant's criminal history dates back to 1980 and includes eight misdemeanor convictions, two 1984 felony convictions for attempted criminal possession of a weapon in the third degree and attempted

robbery in the second degree, respectively, and two violations of probation.

Thus, while this Court must reduce the minimum term of defendant's sentence to four years, it is also of the strong opinion that based upon defendant's deplorable prior criminal history and the circumstances surrounding the sentencing in this case, including defendant's voluntary acceptance of a ten year minimum sentence to avoid going to trial on a C violent felony where conviction after trial would have required a minimum sentence of sixteen years to life, the interests of justice require that he serve a minimum of ten years prior to being released from incarceration. This is of course ultimately in the discretion of the Parole Board consistent with its responsibilities and the technical eligibility now available because of the re-sentencing.

Based on the foregoing, the motion to set aside the sentence is granted.

Order entered accordingly.

The Clerk of the Court is directed to forward a copy of this decision and order to counsel for the defendant and the District Attorney.

  
BARRY KRON, A.J.S.C.