

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: CRIMINAL TERM: PART 52

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THE PEOPLE OF THE STATE OF NEW YORK,       :  
  
  Respondent,                :  
  
  -against-                :  
  
  ██████████,                :  
  
  Defendant.                :

: NOTICE OF MOTION  
:  
: Ind. Nos. ██████████  
  and ██████████  
:  
: New York County

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PLEASE TAKE NOTICE that upon the annexed affirmation of DAVID J. KLEM and the exhibits thereto; the annexed memorandum of law; the transcript of the sentence herein; and all prior proceedings had herein; the undersigned will move this Court, at a Criminal Term thereof (Budd G. Goodman, J.), at the Courthouse, 100 Centre Street, Part 52, New York, New York, on the 13th day of April 2000, at 10:00 in the forenoon, or as soon thereafter as counsel can be heard, for an order, pursuant to C.P.L. § 440.20(1), directing that defendant's sentence be set aside and resentencing held.

Dated:       New York, New York  
              March 20, 2000

ROBERT S. DEAN  
Attorney for Defendant  
Center for Appellate Litigation  
74 Trinity Place  
New York, New York 10006

DAVID J. KLEM  
Of Counsel  
(212) 577-2523 (ext. 22)

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: CRIMINAL TERM: PART 52

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THE PEOPLE OF THE STATE OF NEW YORK,     :  
  Respondent,     :  
                                  -against-             : AFFIRMATION  
  :  
  Defendant.     :  
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STATE OF NEW YORK     )  
                                  ) ss.:  
COUNTY OF NEW YORK   )

DAVID J. KLEM, an attorney at law, duly admitted to practice in the Courts of the State of New York, hereby affirms, under penalty of perjury, that the following statements are true, or, if stated on information and belief, that he believes them to be true:

1. I am associated with the office of Robert S. Dean, Center for Appellate Litigation, who was assigned by the Appellate Division, First Department, on July 1, 1999, to represent defendant on appeal from two judgments rendered in this Court, on August 11, 1998, convicting him after a consolidated trial of robbery in the second degree and bail jumping in the second degree and sentencing him, as a second violent felony offender, to consecutive prison terms of eight years determinate and one-and-one-half to three years

indeterminate. (The Appellate Division's Order of Assignment is attached hereto as Exhibit A).

3. Defendant has not perfected his direct appeal pending the outcome of this motion.

4. I make this affirmation in support of defendant's motion, pursuant to C.P.L. § 440.20(1), to set aside his sentence as unlawful and to order a resentencing.

5. On June 3, 1998, a jury returned a verdict of guilty against defendant for robbery in the second degree and bail jumping in the second degree based on allegations that the defendant shoplifted from a Conway's department store on May 19, 1996, and that on May 12, 1997, while out on bail in the robbery case, he did not return to court voluntarily and was bench warranted. The robbery and bail jumping charges had been consolidated for trial.

6. On August 11, 1998, this Court sentenced the defendant on the robbery and bail jumping charges to consecutive terms of imprisonment of eight years determinate and one-and-one-half to three years indeterminate, respectively. Prior to sentencing, the prosecutor stated that the bail jumping and robbery sentences had to be run "consecutive, as it must by law." (See Aug. 11, 1998, sentencing transcript, attached hereto as Exhibit B, at 3).

In imposing sentence, the Court stated "that sentence must run consecutive." (Exhibit B, at 6).

7. For the reasons set forth in the accompanying memorandum of law, defendant maintains that the Court misconstrued its authority. It had the authority to impose a concurrent sentence. However, because of its misunderstanding, the Court improperly felt obligated to sentence the defendant to consecutive terms. Thus, the sentence should be set aside and a new sentencing proceeding held.

WHEREFORE, it is respectfully requested that defendant's sentence be set aside and resentencing ordered.

Dated: New York, New York  
March 20, 2000

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DAVID J. KLEM

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

Respondent, :

-against- :

~~XXXXXXXXXX~~, :

Defendant. :

: MEMORANDUM OF LAW

: Ind. Nos. ~~480706~~  
and ~~XXXXXX~~

: New York County

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ARGUMENT

DEFENDANT'S SENTENCE MUST BE SET ASIDE  
AND RE-SENTENCING ORDERED BECAUSE THE  
COURT MISUNDERSTOOD ITS POWER TO IMPOSE  
EITHER A CONCURRENT OR A CONSECUTIVE  
SENTENCE

Although ~~XXXXXX~~ was convicted of bail jumping as well as robbery, the Court had authority to run the sentences either concurrently or consecutively. Because the Court failed to appreciate its authority in that respect, ~~XXXXXX~~ sentence must be set aside and a new sentencing procedure held.

The Court's authority to run additional sentences concurrently or consecutively is fully governed by statute. Penal Law Section 70.25 controls the situation at issue here. Subsection 2-c of that statute states that "[w]hen a person is convicted of bail jumping in the second degree . . . and while released on recognizance or bail in connection with a pending

indictment . . . of which he is subsequently convicted, and if an indeterminate sentence of imprisonment is imposed in each case, such sentences shall run consecutively." (Emphasis added). Mr. Green, however, received a determinate sentence of imprisonment for the underlying felony (second-degree robbery), and therefore that statutory requirement that the sentences be consecutive does not apply. Instead, under subsection 1 of that statute, the Court had the authority to impose either consecutive or concurrent sentences.

Judge Donnino in his practice commentaries to that statute highlighted the differing rules that govern when a defendant is subject to a determinate as opposed to an indeterminate sentence on the underlying felony:

[I]f an indeterminate sentence is imposed for the bail jumping . . . and a determinate sentence of imprisonment is imposed on the other felony, the court is not required to make the sentences consecutive. On the other hand, the only way a determinate sentence could be imposed under the 1995 legislation would be if the underlying felony was a violent felony offense and the defendant was a second or persistent violent felony offender. In that case, even concurrent sentences would be substantial.

[William C. Donnino, Practice Commentaries, to N.Y. Penal Law § 70.25, at 472 (McKinney 1998) (emphasis added).]

Here, ~~Mr. Green~~ was arraigned and sentenced as a second violent felony offender on the second-degree robbery charge

and was thus properly subject to a determinate sentence. See P.L. § 70.04(3). Accordingly, the Court had full discretion to sentence him on the bail jumping conviction to an indeterminate prison term that would run either concurrently or consecutively to the determinate sentence that was set on the robbery conviction.

The Court, following the prosecution's misapprehension, misconstrued its authority. During the sentencing proceeding, the prosecutor recommended that the Court impose on ~~the defendant~~ a sentence for bail jumping to run "consecutive, as it must by law." Exhibit B, at 3. The Court in imposing consecutive sentences similarly misapprehended its authority and stated that "[o]f course, that sentence must run consecutive." Exhibit B, at 6.

When sentencing courts misconstrue their sentencing discretion, the remedy is a new sentencing proceeding. E.g., People v. Yant, 223 A.D.2d 747 (2d Dept. 1996) ("The sentencing court's misapprehension regarding its discretion . . . to impose a sentence of imprisonment that is to run concurrently with a sentence previously imposed . . . requires that the defendant be resentenced."); People v. Jimenez, 209 A.D.2d 719 (2d Dept. 1994) (same); People v. Vega, 181 A.D.2d 635 (1<sup>st</sup> Dept. 1992) ("[A] misapprehension by the sentencing court regarding its discretion . . . to impose a term

concurrent . . . requires a resentencing of defendant."); People v. Jeffries, 166 A.D.2d 665 (2d Dept. 1990) ("[T]he court apparently believed that the Penal Law mandated consecutive sentencing. Because the sentence may have been based on the court's misapprehension of the law, we remit to the Supreme Court for resentencing . . ."); People v. Carrelero, 107 A.D.2d 588 (1<sup>st</sup> Dept. 1985) (same and noting that the remand was "to allow a complete exercise of sentencing discretion by the trial court").

In sum, because the Court misapprehended its authority to impose a concurrent sentence, 's sentence must be vacated, see C.P.L. § 440.20(1), and resentencing ordered, see C.P.L. § 440.20(4). While this issue could have been raised on defendant's direct appeal, C.P.L. § 440.20(1) also permits the claim to be made in the first instance to the sentencing court so long as the defendant has not yet had his claim decided by an appellate court. See C.P.L. § 440.20(2). Because  has not yet perfected his direct appeal, this Court has authority to correct the illegally imposed sentence. At resentencing, defendant will present argument as



to why a lower sentence than originally given should be imposed.

CONCLUSION

FOR THE REASONS STATED, DEFENDANT'S SENTENCE MUST BE SET ASIDE AND A NEW SENTENCING PROCEEDING ORDERED.

Respectfully submitted,

ROBERT S DEAN  
Attorney for Defendant

DAVID J. KLEM  
Of Counsel  
March 2000