

Update on Post-Release Supervision Resentencing

By Elon Harpaz*

Pursuant to Chapter 141 of the Laws of 2008, which took effect June 30, thousands of defendants have already been summoned to court to face possible resentencing to the period of post-release supervision (PRS) that should have been pronounced by the sentencing judge, but was instead illegally imposed by the Department of Correctional Services. The vast majority of these defendants have fully served the determinate prison term imposed at sentencing, and have either been reincarcerated for violating conditions of the administratively imposed period of PRS or have been at liberty serving that period under Division of Parole supervision. Thousands more have yet to appear for resentencing, primarily those who remain in custody serving the original prison sentence pronounced in court. Though definitive answers to some questions will have to await resolution in our appellate courts, there are important lessons to be drawn from the proceedings that have already taken place.

First, prosecutors across the state have made ample use of the power the legislature handed them in Penal Law § 70.85 to render the original determinate sentence without PRS a lawful sentence. Prosecutors have exercised this option principally in cases where the defendant would otherwise have a right to plea withdrawal pursuant to *People v Catu*, 4 N.Y.3d 242 (2005), because the plea judge failed to advise the defendant that PRS would be part of the bargain. As a consequence, a great many defendants, perhaps a majority of those whose cases have been resolved thus far, have ended up without post-release supervision and, if they were incarcerated on a PRS violation, have had their liberty restored.

Prosecutors in some cases have declined resentencing to PRS to maintain the defendant's status as a predicate offender on a more recent felony conviction or pending charge. Because a conviction qualifies for predicate purposes only where sentence was "imposed before commission of the present felony," see e.g., Penal Law § 70.04 (1)(b)(ii), resentencing to PRS would render that felony useless for predicate purposes, as the date of resentencing would become the operative sentencing date, resulting in the current felony having been committed before the defendant's sentencing on the prior one. Many defen-

dants would benefit from resentencing to PRS under these circumstances, leading to attempts, largely unsuccessful thus far, to compel resentencing over the prosecutor's objection.

In cases where prosecutors have sought resentencing to post-release supervision, the critical question has been whether a court retains the inherent power to impose PRS even after the judicially pronounced sentence has been fully served. Prosecutors have cited *People v Sparber*, 10 N.Y.3d 457 (2008), in support of that proposition. But, in *Sparber*, the Court of Appeals held only that a sentencing court's inherent power to correct the original illegal sentence by now adding PRS is not limited to the one-year period in which the prosecution can challenge an illegal sentence pursuant to Criminal Procedure Law § 440.40.

The Court of Appeals had no occasion in *Sparber* to consider whether completion of the judicially pronounced sentence serves as an outer temporal limit on the exercise of the court's inherent power to correct an illegal sentence, since all five defendants whose appeals were decided in *Sparber* had served only a fraction of their determinate prison sentences. On the other hand, the petitioner in *Matter of Garner v New York State Department of Correctional Services*, 10 N.Y.3d 358 (2008), decided the same day as *Sparber*, had served the entirety of his prison sentence and advised the court that the resentencing question in his case was different from the one in *Sparber*. The State did not seek resentencing in *Garner*, the question of the court's resentencing power was not briefed on the merits, and the Court of Appeals accordingly did not reach the issue. Instead, the Court dropped a footnote leaving open the possibility that resentencing might be sought, while expressing no opinion as to the outcome of such an application.

That question has now been answered by a number of trial-level courts. As it turns out, though, the answer for some judges may depend not only on whether the defendant has fully served the judicially pronounced sentence, but also on whether the conviction arose from a trial or a plea, and, if the latter, whether the defendant was advised about post-release supervision at the time the plea was entered.

Thus, in *People v Washington*, 21 Misc. 3d 349 (Sup. Ct., New York Co. July 24, 2008 [Bartley, J.]), the court held that resentencing after the defendant had fully served her prison sentence would negate her legitimate expectation of finality in that sentence and thereby violate double jeopardy and due process where the defendant was not advised about post-release supervision at the time she entered her plea of guilty. Though *Washington* expressed no views about whether the outcome might be different if PRS had been mentioned at the plea, it appears, reading the opinion, that the legitimacy of the defendant's expectation of finality in a determinate prison term without PRS stemmed, at least in part, from the failure of the plea court to inform her that post-release supervision would be part of the deal.

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In *People ex rel Pamblanco v Warden*, __ Misc. 3d __, 2008 WL 5072758, 2008 NY Misc LEXIS 6934 (Sup. Ct., Bronx Co. Nov. 28, 2008 [Price, J.]), the court reached the same result as in *Washington* in a case where it had specifically advised the defendant at the plea that he would have to serve five years of post-release supervision. The bottom line for the court, notwithstanding the plea allocution, was that it had never sentenced the defendant to PRS and that it was too late, on both constitutional and jurisdictional grounds, to increase the sentence originally pronounced once the defendant had completed serving that sentence.

A more expansive view of the court's inherent authority to correct an illegal sentence is found in *People v Rogers*, 21 Misc. 3d 1131(A), 2008 WL 4916304, 2008 NY Misc LEXIS 6678 (Sup. Ct., Kings Co. Oct. 28, 2008 [Goldberg, J.]). In concluding that it had the power to resentence a defendant who was convicted after trial, the court held that the defendant could never acquire a legitimate expectation of finality in a sentence without post-release supervision because PRS is mandated by law, it had been administratively imposed with court approval prior to *Garner* and *Sparber*, neither of which precluded resentencing, and legislation to accomplish such resentencing was quickly enacted in the wake of those decisions.

While the defendant in *Rogers* had not fully served his prison sentence, a number of judges using similar reasoning have issued unreported decisions upholding the right to resentence defendants who had completed their prison terms. See *People v Noor*, Ind. No. 1285/99 (Sup. Ct., Queens Co. Dec. 4, 2008 [Buchter, J.]) (trial conviction); *People v Perry*, Ind. No. 7692/99 (Sup. Ct., Kings Co. Sept. 23, 2008 [Dowling, J.]) (plea at which the defendant was specifically advised about PRS); *People v Anderson*, Ind. No. 8093/98 (Sup. Ct., New York Co. June 27, 2008 [White, J.]) (plea at which there was no mention of PRS). Unreported decisions have also gone in the defendant's favor in cases arising from trial convictions, see *People v White* (Sup. Ct., Queens Co. Jan. 5, 2009 [Flaherty, J.]), and those arising from pleas at which the defendant was not advised about PRS, see *People v Albergottie*, Ind. No. 6805/01 (Sup. Ct., New York Co. Aug. 4, 2008 [Zweibel, J.]).

It seems likely that the matter will eventually wind up in the Court of Appeals. That may not be for awhile, however, as the Appellate Divisions have yet to consider the merits of this issue. The Fourth Department recently declined to do so, denying a request by the Monroe County Public Defender's Office for a writ of prohibition to prevent resentencing applications from proceeding in that county. In *Matter of Echevarria v Marks*, __ A.D.3d __, 2008 WL 5413894, 2008 N.Y. App. Div. LEXIS 10105 (4th Dept. Dec. 31, 2008), the Fourth Department held on procedural grounds that a writ of prohibition was unavailable because defendants had an adequate remedy at law, namely, a direct appeal to the Appellate Division from any order granting resentencing.

One issue that does appear resolved is the fate of defendants incarcerated for violating the terms of administrative PRS. Even where prosecutors have successfully sought resentencing, defendants have won their freedom, either because the resentencing judge accepted the logic that the defendant could not have violated a period of post-release supervision that was not lawfully in place prior to resentencing or because a judge hearing an application for a writ of habeas corpus subsequently adopted that same logic. See *Matter of State of New York v Randy M.*, __ A.D.3d __, 2008 WL 5170770, 2008 NY App Div LEXIS 9522 (3rd Dept. Dec. 11, 2008) (adopting the reasoning of *People ex rel Benton v Warden*, 20 Misc. 3d 516 (Sup. Ct., Bronx Co. 2008), the Third Department held that a defendant "could not validly be punished for violating the terms of post-release supervision until after it was imposed by a court . . ."). All told, 651 defendants incarcerated for administrative PRS violations, enough to fill a small prison, have already been released since the decision in *Garner*. See Daniel Wise, *Third Department is First to Release a Sex Offender on Basis of Invalid Post-Release Supervision Order*, N.Y. L.J., Dec. 16, 2008, at 1.

Perhaps the most unanticipated impact of the resentencing process has been on civil commitment proceedings brought against sex offenders pursuant to Article 10 of the Mental Hygiene Law. An Article 10 proceeding, insofar as relevant here, can only be commenced against a defendant who is currently serving a sentence for a sex crime, either in DOCS custody or under Division of Parole supervision. See Mental Hygiene Law § 10.03(g)(1). But, what happens when the State commences an Article 10 proceeding against a defendant who completed his prison sentence and is now incarcerated for a violation of administratively imposed PRS? The answer thus far is that, because administrative PRS is not part of the sentence and because the defendant's incarceration is accordingly unlawful, the Article 10 proceeding is jurisdictionally barred. See *Matter of State of New York v Randy M.*, *supra*; *Matter of State v Robinson*, 21 Misc 3d 1120A, 2008 WL 4694551, 2008 NY Misc LEXIS 6199 (Sup. Ct., Bronx Co. Oct. 15, 2008). Critical to the outcome of both cases was that the resentencing application either resulted in no resentencing to PRS, or in resentencing to a term of PRS that had already expired by the time the Article 10 proceeding commenced.

The battle over PRS resentencing will continue well into 2009, and perhaps beyond. Many more issues than those recounted above have been considered in the course of resentencing applications, and will undoubtedly be raised on appeal. For now, the defense bar can take no small amount of satisfaction in the large number of defendants released from custody because their violations of administrative PRS were invalid, and in the even greater number of defendants who have had their post-release supervision permanently wiped away. ♪