

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FOURTH DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

v.

████████████████████
████████████

**NOTICE OF MOTION
FOR LEAVE TO APPEAL
PURSUANT TO CPL 460.15**

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████████████████████████████████████

PLEASE TAKE NOTICE that, upon the attached affidavit, I will move this Court at a term of the Appellate Division, 50 East Avenue, Rochester, New York 14604 on the 31st day of May, 2022, for an order granted leave to appeal pursuant to CPL 460.15, and for any other relief that the Court deems just and proper.

Dated: May __, 2022

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TO: Erie County District Attorney
25 Delaware Avenue
Buffalo, New York 14202

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

SUPPORTING AFFIDAVIT

v.

██████████
Defendant.

STATE OF NEW YORK
COUNTY OF ERIE

ss:

██████████ being duly sworn, deposes and says:

1. I am an attorney duly licensed to practice law in the State of New York.
2. I represented ██████████ upon assignment from Judge ██████████, Erie County Court, on the defendant's pro se application under CPL 400(1) &(2).
3. I make this affidavit in support of the defendant's motion for leave to appeal, pursuant to CPL 460.15, for permission to appeal from the trial court's denial of his motion to set aside his sentence, issued ██████████ in Erie County Court ██████████

Procedural Posture

4. Under Indictment ██████████ the defendant was charged with Criminal Possession of a Weapon in the Second Degree (Penal Law §265.03[3]). Defendant waived a jury trial and was found guilty after a bench trial.
5. While housed at Erie County Correctional Facility on the above matter, the defendant was charged under ██████████ with Assault in the Second Degree (Penal Law §§120.05[7], 20.00) for injuring an inmate.
6. After the court found the defendant guilty on ██████████ and further negotiations, the defendant pled guilty as charged on ██████████. As a condition of the plea package, the defendant agreed to admit his persistent violent felony offender status on both matters. In return, the court ordered both matters to be served concurrently and imposed indeterminate terms of between 16 years and life on the weapon charge and between 12 years and life on the assault.
7. The defendant appealed both his convictions to the Appellate Division, Fourth Department. On July 2020, the convictions were confirmed (*People v. Atkinson*, 185 AD3d 1438, *People v. Atkinson*, 185 AD3d 1440). On August 19, 2020, the defendant filed on application for leave

- to appeal to the Court of Appeals. The Court denied leave on September 30, 2020. (*People v. Atkinson*, 35 NY3d 1092).
8. On August 26, 2020, the defendant filed a motion pursuant to CPL 440.10 and 440.20, to vacate the judgment of conviction and to set aside the sentence of his conviction under Indictment No. 01813-2014-S01 and Indictment No. 01608-2015.
 9. In a written motion, filed [REDACTED], the trial court ([REDACTED]) denied the motion under 440.10 without a hearing.
 10. A hearing was held on [REDACTED] regarding defendant's claim under 440.20. After the hearing, in a written motion, filed on [REDACTED], the trial court ([REDACTED]) denied the motion under 440.20.

Defendant's 440.20 Argument

11. The defendant argues that his 2005 conviction for Criminal Possession of a Weapon in the Third Degree was unconstitutional because the superior court information that he pled guilty to did not contain the same charge for which he was held for the grand jury, which was Criminal Possession of a Weapon in the Second Degree, (see *People v. Goforth*, 36 AD3d 1202, 1203 [4th Dept. 2007], *lv. Demoed* 8 NY3d 946 [2007], holding that "because the SCI does not also include the offense that was contained in the felony complaint, i.e., Criminal Possession of a Weapon in the Second Degree, the the offense of criminal possession of a weapon in the third degree is not a joinable offense to the charge on which defendant was held for action of a grand jury. Thus, the SCI is jurisdictionally defective on that ground as well (see [Kohl](#), 19 AD3d at 1156; cf. [People v June](#), 30 AD3d 1016, 1017 [2006], *lv denied* 7 NY3d 813, 868 [2006]; [People v Clark](#), 24 AD3d 1225, 1226 [2005], *lv denied* 6 NY3d 832 [2006]; see generally [People v McClain](#), 24 AD3d 1271, 1272 [2005]).
12. The defendant argues that because his 2005 conviction was constitutionally defective, it cannot serve as a predicate for this adjudication as a persistent violent felony offender.

Trial Court's Decision

13. The trial court ruled that the defendant's conviction was properly used as a predicate.
14. The trial court found that the Defendant's CPW 2nd conviction was originally filed in [REDACTED] City Court and the charge remained pending there and the defendant was never held for action of the Grand Jury on that charge.
15. When the defendant appeared on [REDACTED] the defendant appeared before the Hon. [REDACTED] in Erie County Court. There attached to the superior court information, was a felony complaint charging Criminal Possession of a Weapon in the Third Degree. Judge Wolfgang sat as a lower court judge and arraigned the defendant on the felony complaint and held for further proceedings. The defendant waived indictment and plead guilty to Criminal Possession of a Weapon in the Third Degree.
16. The trial court found that because the defendant pled guilty to the same charge included in that felony complaint, for which he was held for the grand jury, the plea was lawful.

Discussion

17. Defendant now seeks permission to appeal from the order denying his motion to vacate the judgment.
18. The trial court may set aside a sentence upon the ground that it was “unauthorized, illegally imposed, or otherwise invalid as a matter of law” (CPL 440.20(1)). The Court of Appeals has determined that “[o]ne of the legal defects that can be challenged in a CPL 440.20 motion is an alleged error in sentencing a defendant as a second or third felony offender, including the decision to consider certain prior convictions as predicates” (People v. Jurgins, 26 NY 3d 607, 612 [2015]).
19. Pursuant to CPL 190.50:
 1. A defendant may waive indictment and consent to be prosecuted by superior court information when:
 - (a) a local criminal court has held the defendant for the action of a grand jury; and
 - (b) the defendant is not charged with a class A felony punishable by death or life imprisonment; and
 - (c) the district attorney consents to the waiver.
 2. A defendant may waive indictment pursuant to subdivision one in either:
 - (a) The local criminal court in which the order was issued holding the defendant for action of a grand jury, at the time such order is issued; or
 - (b) the appropriate superior court, at any time prior to the filing of an indictment by the grand jury.
20. The waiver of indictment procedure is triggered by the defendant being held for Grand Jury action on charges contained on a felony complaint, (CPL 195.10) and it is in reference to those charges that its availability must be measured. [People v D'Amico, 76 NY2d 877, 879 \[1990\]](#).
21. The court did not review the issue of whether the practice of filing new felony complaints in superior court – when there remains a pending felony complaint in the local criminal court for which the defendant was not held for action of the grand jury is permissible under CPL 195.10.
22. If leave to appeal is granted, it is requested that defendant be granted permission to appeal as a poor person and that an assignment of counsel be made. Defendant is incarcerated and there is no reason to believe that his financial circumstances have changed since the trial court assigned counsel on the 440 motion.

WHEREFORE, defendant respectfully requests this Court to: (1) issue a certificate granting him leave to appeal the denial of his CPL §440 motion, (2) grant him leave to appeal as a poor person, (3) appoint counsel to represent; and (4) grant such other and further relief as this Court deems just and proper.

Dated: Buffalo, NY

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[REDACTED]