

58 Misc.3d 215

County Court, Monroe County, New York.

The PEOPLE of the State of New York, Plaintiff,

v.

Joseph W. AGNELLO, Defendant.

Feb. 6, 2017.

Synopsis

Background: After the defendant was convicted of fourth-degree grand larceny, the People moved to adjudicate him a persistent felony offender for purposes of sentencing.

Holdings: The County Court, Monroe County, [John L. DeMarco, J.](#), held that:

[1] defendant was a persistent felony offender within meaning of sentencing statute, but

[2] defendant's adjudication as a persistent felony offender would not best serve the public interest.

Motion denied.

West Headnotes (5)

[1] Sentencing and Punishment

🔑 Constitutional objections in general

To extent defendant, in contesting the People's motion to sentence him as a persistent felony offender, challenged the constitutionality of the persistent felony offender statute, that contention was not properly raised; there was no indication that the Attorney General was given the requisite notice of that challenge. [McKinney's CPL § 400.20](#); [McKinney's Penal Law § 70.10](#).

[Cases that cite this headnote](#)

[2] Sentencing and Punishment

🔑 Punishment

If a sentencing court determines a defendant is a persistent felony offender, and further finds that his history and character and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision would best serve the public interest, a sentence of imprisonment authorized for a class A–I felony may be imposed. [McKinney's CPL § 400.20](#); [McKinney's Penal Law § 70.10\(2\)](#).

[Cases that cite this headnote](#)

[3] Sentencing and Punishment

🔑 Degree of Proof

Sentencing and Punishment

🔑 Sufficiency

Evidence established beyond a reasonable doubt that defendant was a persistent felony offender within meaning of sentencing statute; defendant had previously been convicted of more than two qualifying felonies, he was imprisoned under sentence for each such conviction prior to his commission of the charged felony, he was not pardoned on the ground of innocence, and none of his convictions were excludable for predicate offense purposes. [McKinney's CPL §§ 70.10, 400.20\(5\)](#); [McKinney's Penal Law § 70.10\(1\)\(b\)\(ii–iv\)](#).

[Cases that cite this headnote](#)

[4] Sentencing and Punishment

🔑 Violent or Nonviolent Character of Offense

Sentencing and Punishment

🔑 Particular intervals

Sentencing and Punishment

🔑 Larceny, embezzlement, and receiving stolen property

The People failed to establish, at sentencing for fourth-degree grand larceny, that defendant's adjudication as a persistent felony offender would best serve the public interest; although defendant had a lengthy history of criminal activity spanning nearly three decades, his criminal history was non-violent

and nearly ten years had elapsed between his commission of the charged offense and his most recent conviction, and in light of the lack of a legislative scheme to rectify the divide between available sentences for defendant, he would be afforded a certain lenity in order to avoid an excessive sentence. [McKinney's Penal Law § 70.10\(2\)](#).

[Cases that cite this headnote](#)

[5] Sentencing and Punishment

🔑 Punishment

Although County Court is vested with discretionary authority to impose a sentence of imprisonment specified for a class A–1 felony if a defendant is shown to be a persistent felony offender, adjudication as such should be utilized only in the most extreme cases and only when extraordinary facts are involved. [McKinney's Penal Law § 70.10\(2\)](#).

[Cases that cite this headnote](#)

Attorneys and Law Firms

****630** Sandra Doorley, Esq., Monroe County District Attorney, by Roman Misula, Esq., Assistant District Attorney, Rochester, for the People.

[Timothy P. Donaher](#), Esq., Monroe County Public Defender, by Emily Rosmus, Esq., Tracie Hiatt, Esq., Assistant Public Defender, Rochester, for the Defendant.

Opinion

[JOHN L. DeMARCO](#), J.

***216** Defendant was convicted of grand larceny in the fourth degree ([Penal Law \[PL\] §§ 20.00; 155.30\[1\]](#)) following a non-jury trial. Thereafter, the People moved to adjudicate defendant a persistent felony offender for purposes of sentencing (*see* [Criminal Procedure Law \[CPL\] § 400.20](#); [PL § 70.10](#)).

On or about November 17, 2016 a hearing was conducted in accordance with [CPL § 400.20](#). Defendant declined

to controvert the specific allegations set forth in the statement of the court, and thus the four convictions submitted by the People were deemed as evidence (*see* [CPL § 400.20\[7\]](#)). The People thereafter sought to admit 24 exhibits (collectively Court Exhibit 1) pertaining to defendant's history and character and the nature and circumstances of his criminal conduct, nearly all of which were admitted into evidence over defendant's objection.¹ In relevant part, the admitted exhibits consisted of crime reports, ****631** accusatory instruments and supporting depositions pertaining to numerous misdemeanor and felony-level convictions spanning approximately 15 years,² and unpaid restitution orders in conjunction with those convictions. Additionally, the victim in the instant case submitted a letter to the Court.

[1] ***217** Defendant further declined to offer any evidence with respect to his history and character. Following the close of proofs, the parties offered oral arguments in support of their respective positions.³ The following constitutes the decision and order of the Court.

[2] A “persistent felony offender” is defined as a person who stands convicted of a felony after having been previously convicted of two or more felonies ([PL § 70.10\[1\]](#)). In order to qualify, the previous felony conviction must have resulted in a sentence of imprisonment in excess of one year, and the defendant must have been imprisoned under the sentence for such conviction before he committed the present felony offense (*see* [PL § 70.10\[1\]\[b\]](#)). If a court determines a defendant is a persistent felony offender, and further finds that his history and character and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision would best serve the public interest, a sentence of imprisonment authorized for a class A–I felony may be imposed (*see* [§§ 70.10\[2\]](#); [CPL § 400.20](#)).

[3] Turning first to the predicate offenses set forth in the statement of the court, the credible evidence established, beyond a reasonable doubt ([CPL § 400.20\[5\]](#)), that defendant was previously convicted of two or more qualifying felonies, those being: (1) grand larceny in the fourth degree ([PL § 155.30 \[1\]](#)), on which defendant was convicted December 17, 2004 and sentenced to a prison term of 1 ½ to 3 years; (2) scheme to defraud in the first degree ([PL § 190.65](#)), on which defendant was convicted June 11, 1997 and sentenced to a prison term of 1 ½ to

3 years; (3) four separate offenses of criminal possession of a forged instrument in the second degree (PL § 170.25), and a fifth offense of forgery in the second degree (PL § 170.10[1]), on which defendant was convicted in various counties on August 17, 1990, August 10, 1990, August 7, 1990, July 5, 1990 and November 12, 1991 respectively, and sentenced to prison terms of 3 ½ to 7 years, 3 *218 to 6 years, 3 ½ years, 2 to 4 years, and 3 to 6 years, 4 with **632 all sentences imposed concurrent to one another; and (4) grand larceny in the fourth degree (PL § 155.30[1]), on which defendant was convicted August 3, 1985 and sentenced to a prison term of 1 ½ to 3 years. Furthermore, defendant was imprisoned under sentence for each such conviction prior to his commission of the present felony (see CPL § 70.10[1][b][ii]). Finally, defendant was not pardoned on the ground of innocence and none of the aforementioned convictions are excludable for predicate offense purposes (see CPL §§ 70.10[1][b] [iii]; [1][b][iv]). Accordingly, the Court concludes that defendant is a persistent felony offender (PL § 70.10[1]). Now, the Court must determine whether the relevant evidence pertaining to defendant's history and character and the nature and circumstances of his criminal conduct establishes, by a preponderance of the evidence (CPL § 400.20[5]), that extended incarceration and life-time supervision is warranted (PL § 70.10[2]).

[4] [5] It is clear that the Court is vested with discretionary authority to impose a sentence of imprisonment specified for a class A–I felony if a defendant is shown to be a persistent felony offender (PL § 70.10[2]; *People v. Sailor*, 65 N.Y.2d 224, 234, 491 N.Y.S.2d 112, 480 N.E.2d 701 [1985], cert. denied 474 U.S. 982, 106 S.Ct. 387, 88 L.Ed.2d 340 [1985]). In light of the severity of the persistent felony offender sentencing scheme, adjudication as such “should be utilized only in the most extreme cases [and] ... only when extraordinary facts are involved” (*People v. Wright*, 104 Misc.2d 911, 919, 429 N.Y.S.2d 993 [Sup.Ct., New York County 1980]). The People duly note this statute is to be applied sparingly.

It is indisputable that defendant has a lengthy history of criminal activity spanning nearly three decades. Beginning with his first arrest in 1971, defendant has demonstrated a steady and nearly unbroken pattern of committing similar crimes: defrauding large corporations, small businesses, and individuals alike. Empirically speaking, it is evident that defendant has disregarded any opportunity to reform,

and has further neglected to express even a scintilla of remorse as evidenced not only by his perpetual criminal conduct, but his failure to pay court-ordered restitution for his crimes. Here, defendant *219 once again stands convicted of another act of theft by engaging in conduct which exploited the desperation of an elderly and defenseless victim. That defendant has continuously committed fraudulent acts despite numerous criminal proceedings—many of which resulted in conviction, incarceration, and court-ordered restitution—causes the Court considerable pause, as his history casts sever doubt upon the makeup of his moral fiber and his ability to integrate into society as a functioning, law-abiding citizen.

Nevertheless, the Court is of the opinion that a persistent felony offender sentence is not warranted, and hereby declines to adjudicate defendant accordingly. The history and character of defendant, and the nature and circumstances of his criminal conduct are not such that extended incarceration (the minimum term of which is 15 years) and life-time supervision would best serve the public interest. The Court certainly does not minimize the effect of defendant's crimes upon the community, nor can it possibly ignore the frequency and repetitive nature of his transgressions. However, the overarching theme of defendant's conduct—*theft and fraud*—is demonstrated by a pattern of petty misdemeanor and low-level, non-violent felony offenses. Additionally, a significant amount of time (nearly 10 years) has elapsed between the commission of the instant offense and defendant's most recent conviction.

**633 Defendant now stands convicted of grand larceny in the fourth degree, a class E non-violent felony. Without persistent felony offender adjudication—but as a second felony offender (see PL § 70.06)—defendant is subjected to an indeterminate sentence with a maximum term between 3 and 4 years, and a minimum term of half the maximum (PL §§ 60.01[3][a]; 70.00[1]; [2][e]; 70.06[3][e]; [4][b]). In this instance, a cavernous divide exists between the statutory maximum as to the underlying offense and the statutory minimum for a persistent felony offender, and the Legislature has not provided a framework authorizing the Court to impose a sentence which falls somewhere in between. The Court now finds itself in the arduous position where the sentencing parameters of neither a class E felony nor a class A–I felony appear to equitably suit the facts of this case and the history and character of defendant. Under circumstances such as this, defendant

should be afforded a certain lenity in order to avoid what the Court deems to be an excessive sentence. In other words, the absence of a legislative scheme to rectify the divide between the available *220 sentences for defendant should not be held against him. Accordingly, this disparity should be resolved in favor of defendant by imposing the lesser of the available penalties. The Court is unpersuaded by the evidence adduced at the hearing, which consisted primarily of criminal convictions occurring between 15 and 30 years ago, that the significant upward departure to life-time supervision is warranted.

In light of defendant's non-violent criminal history, and the length of time which has elapsed since his last arrest and conviction, the Court finds that the People have failed to establish that adjudication as a persistent felony offender would best serve the public interest.

It is hereby ORDERED that the People's application is denied in its entirety.

All Citations

58 Misc.3d 215, 65 N.Y.S.3d 629, 2017 N.Y. Slip Op. 27356

Footnotes

- 1 The Court reserved decision with respect to accusatory instruments related to an out-of-county charge pending supplemental information regarding the final disposition thereof. As the People failed to provide anything further to the Court, the proffered documents constitute nothing more than unsubstantiated allegations irrelevant for the Court's purposes. Accordingly, People's Exhibits 9 and 10 are hereby stricken from Court Exhibit 1.
- 2 In addition to the documentation relative to the convictions set forth in the statement of court, the People submitted records pertaining to a multitude of convictions—and one violation of probation—occurring between 1989 and 2003, to wit: two separate convictions for criminal possession of a forged instrument in the second degree (PL § 170.25), one of which satisfied an additional criminal possession of a forged instrument in the second degree (PL § 170.25) charge; scheme to defraud in the first degree (PL § 190.65[1]); felony driving while intoxicated ([Vehicle and Traffic Law \[VTL\] § 1192\[3\]](#)); and several separate petit larceny (PL § 155.25) and issuing a bad check (PL § 190.05[1]) convictions.
- 3 To the extent defendant challenges the constitutionality of the persistent felony offender statute, that contention is not properly raised in the absence of any indication that the Attorney General was given the requisite notice of that challenge (see [People v. Davis](#), 68 A.D.3d 1653, 1654, 893 N.Y.S.2d 411 [4th Dept.2009], *lv. denied* 14 N.Y.3d 839, 901 N.Y.S.2d 146, 927 N.E.2d 567 [2010]; [Executive Law § 71](#); [Civil Practice Law and Rules \[CPLR\] §§ 1012\[b\]\[1\]; \[b\]\[3\]](#)).
- 4 For purposes of determining predicate felony offenses, these several convictions may only be counted as one, as defendant was not imprisoned for the first crime until after he committed the others (PL § 70.10[1][c]; [People v. Jones](#), 25 N.Y.3d 57, 60, 6 N.Y.S.3d 543, 29 N.E.3d 890 [2015]).