No. 129
The People &c.,
Appellant,
v.
Benito Acevedo,
Respondent.

No. 130
The People &c.,
Appellant,
v.
Dionis Collado,
Respondent.

Case No. 129:
Dana Poole, for appellant.
Jan Hoth, for respondent.

Case No. 130:
Dana Poole, for appellant.
Bruce D. Austern, for respondent.

LIPPMAN, Chief Judge:

The threshold, and we believe dispositive, issue on these appeals is whether a resentencing sought by a defendant to correct an illegally lenient sentence is effective to temporally resituate the sentence and thus alter the underlying conviction's utility as a predicate for enhanced sentencing. This common issue arises from the following facts in each of the above-

captioned matters.

People v Acevedo

In 2006, Mr. Acevedo was convicted of criminal sale of a controlled substance in the third degree and possession of a controlled substance in the third degree and sentenced as a predicate felony offender with a prior violent felony to a prison term of six years and three years of post-release supervision (PRS). The predicate conviction for Acevedo's 2006 sentence was one for attempted robbery in the second degree for which Acevedo was originally sentenced in accordance with his plea bargain to a determinate prison term of four years in 2001. Omitted from the 2001 sentence was the statutorily required PRS term (see Penal Law § 70.45 [1]); it had not been made a part of the plea and was not pronounced at the 2001 sentencing proceeding. In 2008, some three years after Acevedo had completed the sentence imposed in the 2001 judgment, but while he was still serving his sentence under the 2006 judgment, he moved pursuant to CPL 440.20 to be resentenced on his 2001 conviction. The motion was granted on the People's consent in December 2008, and defendant was resentenced, with the People's consent pursuant Penal Law § 70.85,* to the identical term of imprisonment nunc pro tunc to

*Penal Law § 70.85 provides in relevant part that, with the People's consent, the Court may at a resentence to cure the omission of mandatory PRS from a sentence "re-impose the originally imposed determinate sentence of imprisonment without any term of post-release supervision, which then shall be deemed a lawful sentence."

July 19, 2001.

Less than three weeks after the resentence, in early January 2009, Acevedo moved, again pursuant to CPL 440.20, to vacate his predicate violent felony offender adjudication in the 2006 case. He argued that because his resentence on the 2001 conviction occurred in 2008, it postdated the offense for which he was sentenced in 2006 and, accordingly, that the underlying conviction no longer qualified as a predicate for enhanced sentencing in connection with his 2006 conviction. A predicate sentence, he noted, "must have been imposed before the commission of the present felony" (Penal Law § 70.06 [1] [b] [ii]).

The motion court, citing People v Sparber (10 NY3d 457, 472 [2008]), denied vacatur of the 2006 predicate adjudication upon the ground that the defect in the 2001 sentence arose from a mere "procedural error" that did not vitiate the 2001 judgment's validity as a prior felony conviction.

The Appellate Division, with one Justice dissenting, reversed (75 AD3d 255 [2010]). It reasoned that, logically, a resentence entails vacatur of the original sentence and that we had, in fact, held in Sparber that the "sole remedy for a procedural error such as this [the failure of the sentencing court to pronounce a PRS term at sentencing] is to vacate the sentence and remit for a resentencing hearing so that the trial judge can make the required pronouncement" (75 AD3d at 259 [citing Sparber, 10 NY3d at 471 [emphasis added]). Nor was the

Court of the view that the omission to be cured by the procedure described in Sparber was a mere formality inconsequential beyond the limited purpose of curing the trial court's failure to pronounce the required PRS component of a determinate sentence. Here, the Court noted our language in Sparber and Matter of Garner v New York State Dept. of Correctional Servs. (10 NY3d 358 [2008]) in which we stressed that resentencing to pronounce a mandatory PRS term had a substantial effect on a defendant and that the procedure implicated the public interest in ensuring the regularity of sentencing (see Sparber 10 NY3d at 470; Garner, 10 NY3d at 363). Inasmuch, then, as the Court understood Acevedo's 2001 sentence to have been vacated as a necessary antecedent to his resentencing, it concluded that his operative sentence for the 2001 attempted robbery was the one imposed at the 2008 resentencing -- one which plainly did not qualify as a predicate for enhanced sentencing with respect to the crime for which defendant was convicted in 2006.

People v Collado

The enhanced sentence challenged by Mr. Collado was imposed in September 2005; Collado, after being convicted of two counts of second degree robbery based upon an incident that took place in December 2004, was then adjudged a second violent felony offender and sentenced to concurrent eight-year terms. The predicate offense for the second violent felony offender

adjudication was a second degree attempted robbery conviction obtained against Collado in June 2000, for which he was, at that time, sentenced to a determinate term of two years. PRS, although statutorily mandated as a component of both the 2005 and 2000 sentences, was not pronounced by either sentencing court. At the conclusion of the appellate process stemming from the 2005 judgment of conviction, this Court deemed Collado's still undischarged 2005 sentence illegal by reason of the sentencing court's failure orally to pronounce the PRS portion of Collado's determinate sentence (11 NY3d 888, 889 [2008]), and, in accordance with Sparber (10 NY3d at 469-471), we remitted the matter for resentencing (11 NY3d at 889).

In January 2009, before the Sparber proceeding with respect to the 2005 conviction, Collado moved pursuant to CPL 440.20 to be resentenced upon his 2000 conviction (the predicate for his 2005 second violent felony offender adjudication) upon the ground that the sentence imposed thereon suffered from the same defect as the 2005 sentence. At the ensuing Sparber proceeding, in March 2009, the court addressed both sentences. With respect to the 2000 conviction, it resentenced Collado to his originally imposed prison term but added thereto a PRS term of 1 1/2 years. The resentence, however, was imposed nunc pro tunc to the original sentence date of June 29, 2000 and was, as the court put it, "done the second the words are out of my mouth." As to the 2005 conviction, the court resentenced

defendant to the originally imposed eight-year aggregate prison term and, in addition, pronounced as part of the sentence a five-year PRS term. The Court rejected Collado's contention that his 2009 resentence on the 2000 conviction operated to vitiate that conviction's utility as a predicate for enhanced sentencing on the 2005 conviction.

The Appellate Division, for the reasons stated in its decision in Acevedo, held that Collado could not be sentenced as a predicate felon on the 2005 conviction based on a predicate conviction for which sentence was, by reason of the 2009 resentence, subsequently imposed. It, accordingly, reversed, again over the dissent of a single Justice, vacated the judgment of resentence in connection with the 2005 conviction and remanded the matter for resentencing.

Both of the above-described Appellate Division orders are now before us pursuant to leave granted by a Justice of that Court.

The decisive feature of these cases is, we believe, that the sentencing errors defendants sought to correct by resentencing were errors in their favor: PRS was illegally omitted from their original sentences. The only practical benefit defendants could possibly gain from the resentencings was to move their sentences to a later date, thus eliminating their prior crimes as predicates in their later cases. We would hold that this tactic was ineffective: in circumstances like these,

the original sentencing date should be the one to be considered for predicate-felony purposes.

By the time of their resentence motions, Acevedo and Collado had fully served the sentences originally imposed upon the convictions later used as predicates for sentence enhancement. Assuming, without deciding, that their resentences were not nullities under our subsequent decision in People v Williams (14 NY3d 198 [2010], cert denied sub nom New York v Williams, __ US __, 131 S Ct 125 [2010]; but see 14 NY3d at 217) and that they were not for that reason ineffective to alter the relevant sentencing sequences, it remains that resentencing is not in our view permissibly employed simply to leapfrog a sentence forward so as to vitiate its utility as a sentencing predicate.

It is true, of course, that we held in Sparber that the sole appellate remedy for the failure of the trial court to pronounce the PRS component of a determinate sentence is to remit for vacatur of the original sentence followed by a resentence curing the omission (10 NY3d at 469-471). Sparber resentencing, however, was not the remedy sought by the Sparber appellants -- whose object was not a proceeding to cure the omission of mandatory PRS from their original sentences, but the simple expungement of the PRS terms to which they had been subject (id.) -- and, it is fair to say that Sparber resentencing is not from the perspective of most defendants remedial. Ordinarily,

defendants do not move for the addition of PRS to their sentences. Sparber resentencing is rather a remedy most frequently sought by the Department of Correctional Services pursuant to Correction Law § 601-d to assure that a sentence in connection with which PRS is required will in fact legally impose that prescribed element of punishment.

In moving to be relieved of their original sentences and thereafter resentenced in connection with their prior felony convictions, defendants manifestly had no expectation that they would obtain "relief" from those originally imposed, fully discharged sentences. It is instead transparent, if only from the timing of their CPL 440.20 motions, that defendants' purpose was, by means of vacatur and resentence, to render their prior convictions useless as predicates to enhance punishment for the crimes they subsequently committed. Resentence is not a device appropriately employed simply to alter a sentencing date and thereby affect the utility of a conviction as a predicate for the imposition of enhanced punishment.

The present scenarios afford no occasion to decide what effect a bona fide Sparber resentence, or any resentence other than the ones before us, should have for predicate-felony purposes. All that we would decide is that the Sparber relief these defendants obtained was not effective to avoid the penal consequences of reoffending.

Accordingly, in each case, the order of the Appellate

Division should be reversed and the order of Supreme Court reinstated.

People v Benito Acevedo
People v Dionis Collado

No. 129 & 130

PIGOTT, J.:

I agree with Chief Judge Lippman's opinion that defendants are not entitled to have their sentences set aside; but I reach this conclusion for different reasons.

Under New York's Penal Law, a court may sentence a

defendant as a second felony offender only if certain statutory conditions are met. One of those conditions is the obvious one, that the sentence for the prior conviction must have been imposed before commission of the present felony (see Penal Law § 70.04 [1] [b] [ii]; § 70.06 [1] [b] [ii]).

People v Bell (73 NY2d 153 [1989]) is the seminal case addressing this rule. There, prior to pleading guilty to the predicate felony, the defendant was first successful in overturning two jury convictions. Defendant argued that the "sentence" for purposes of determining second felony offender status was the original sentence on the first overturned conviction, more than 10 years before the commission of his current crimes. This Court disagreed, holding that a "reversal" under the Criminal Procedure Law "means the vacating of such judgment" (CPL 470.10 [1]), which includes both the conviction and the sentence (CPL 1.20 [15]). Having successfully challenged his prior convictions, defendant could not thereafter claim that the date of the earliest reversed conviction controlled.

Unlike the scenario in Bell, when a defendant is resentenced based upon a Sparber error, the underlying conviction remains as does that part of the sentence imposing incarceration, because, under Sparber and its progeny, the purpose of the resentence is simply to provide a process to correct a "procedural error", "akin to a misstatement or clerical error" (People v Sparber, 10 NY3d 457, 471 [2008]).

Our recent holding in People v Lingle (2011 WL 1583943 [2011]) makes this clear. We stated specifically that in remitting those several cases to Supreme Court we did so "for resentencing and the proper judicial pronouncement of the relevant PRS terms" (id. citing Sparber, 10 NY3d at 465). We distinguished the decretal paragraph we used in Sparber, which directed that "the order of the Appellate Division should be modified by remitting to Supreme Court for a resentencing hearing that will include the proper pronouncement of the relevant PRS term", from the remittal language we have used in other resentencing cases, noting, for example, that in a case where the court erred in ruling that a defendant was a predicate felon, we remitted for the court to vacate the original sentence and to resentence the defendant.

The resentencing hearings that took place in these Sparber appeals were limited to remedying the specific procedural error of the sentencing judge; i.e., to make the required PRS pronouncement (Lingle, 2011 WL 1583943 ["Put another way, resentencing to set right the flawed imposition of PRS at the original sentencing is not a plenary proceeding"]). The convictions were undisturbed because the resentencing courts lacked the power to reconsider either the conviction or the incarceration component of the original sentence. As a result, the original sentence date remained. For these reasons, I would hold that when determining whether a defendant is a prior felony

offender for purposes of sentencing under the Penal Law, the original sentence date on the prior conviction, and not the Sparber resentencing date, controls.

People v Benito Acevedo & People v Dionis Collado

No. 129 & 130

JONES, J. (dissenting):

Defendants seek to vacate their predicate felony adjudications on the ground that they are not second felony offenders. Their predicate felony sentences were vacated and they were resentenced under People v Sparber (10 NY3d 457 [2008]). The resentencing in each case took place after the commission of the second felony. Criminal Procedure Law § 70.06 makes absolutely clear that: "For the purpose of determining whether a prior conviction is a predicate felony conviction . . . [the s]entence upon such prior conviction must have been imposed before commission of the present felony." Because this criterion is absent from these cases, I respectfully dissent.

This Court fashioned the following remedy for procedurally flawed impositions of PRS terms: "vacate the sentence and remit for a resentencing hearing so that the trial judge can make the required pronouncement" (Sparber, 10 NY3d at 471). Because vacating a sentence has the legal effect of rendering it a nullity, there is no doubt that the Sparber resentences have -- for better or worse -- affected defendants' predicate felony status.

Here, the failure to pronounce defendants' mandatory

PRS terms at the predicate sentencing created the circumstance which mandated that defendants be resentenced. Because their resentencing under Sparber took place after the subsequent felony conviction, defendants' proper sentences were not imposed until after the commission of the present felony; as such, defendants can no longer be classified as second felony offenders (see People v Robles, 251 AD2d 20 [1st Dept 1998]). Accordingly, I would vote to affirm the Appellate Division orders.

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In Each Case: Order reversed and order of Supreme Court, New York County, reinstated. Opinion by Chief Judge Lippman. Judges Ciparick and Smith concur. Judge Pigott concurs in result in an opinion in which Judges Graffeo and Read concur. Judge Jones dissents and votes to affirm in an opinion.

Decided June 30, 2011