No. 47

The People &c.,
Respondent,
v.
Andre Stewart,
Appellant.

Alan S. Axelrod, for appellant.
Susan Axelrod, for respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed.

In 2003, when defendant pleaded guilty to attempted robbery in the first degree, the court advised him that he would receive a three and one-half year prison term with "maximum postrelease supervision time." At sentencing, the court

pronounced the determinate sentence along with a five-year term of postrelease supervision. Defendant did not object to the imposition of postrelease supervision at sentencing nor did he pursue a direct appeal. However, in 2008, he filed a CPL 440.10 motion seeking vacatur of his plea based on People v Catu (4 NY3d 242 [2005]), contending that his plea was involuntary because the court failed to advise him of the specific term of postrelease supervision during the plea proceeding. Supreme Court denied the motion, relying on People v Louree (8 NY3d 541 [2007]) for the proposition that defendant's Catu claim could not be raised in a CPL 440.10 motion. The Appellate Division affirmed, as do we.

In Louree, we held that when "a trial judge does not fulfill the obligation to advise a defendant of postrelease supervision during the plea allocution, the defendant may challenge the plea as not knowing, voluntary and intelligent on direct appeal" because the error is evident from the transcript of the plea proceeding (id. at 545-546). Catu claims have therefore been treated no differently than any other failure to advise a defendant of a direct consequence of a plea under the rule articulated in People v Ford (86 NY2d 397 [1995]). We further observed in Louree that, since the omission is clear from the face of the trial record, a Catu claim generally cannot be raised in a CPL 440.10 motion (Louree, 8 NY3d at 546 n *; see CPL 440.10[2][c]).

Defendant's contention that Louree changed the law

concerning the types of claims that may be brought in a CPL 440.10 collateral proceeding is without merit. As far back as 1986, this Court had made clear that "[w]hen, as will usually be the case, sufficient facts appear on the record to permit the question to be reviewed, sufficiency of the plea allocution can be reviewed only by direct appeal" (People v Cooks, 67 NY2d 100, 104 [1986] [emphasis added]; see also, People v Angelakos, 70 NY2d 670 [1987]). A Catu claim is indistinguishable from a challenge to the adequacy of the plea allocution and, as we stated previously, it is reviewable on direct appeal. In the absence of justification for a defendant's failure to pursue this issue in a direct appeal (which is absent here), such a claim may not be raised in a CPL 440.10 motion. We are therefore foreclosed from addressing defendant's argument on the merits.

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Order affirmed, in a memorandum. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Decided April 5, 2011