

To be submitted by:
David Billingsley

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

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

SERVISIO SIMMON,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT
SERVISIO SIMMON
Ind. No. 2128N-2017 (N.Y. Cty.)

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Supreme Court of the State of New York
Appellate Division: First Department

The People of the State of New York,
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Servisio Simmon,
Defendant-Appellant.

Ind. No. 2128N-2017
(N.Y. Cty.)

PRELIMINARY STATEMENT

This is an appeal from a judgment rendered on Aug. 28, 2018, by Supreme Court, New York County. Servisio Simmon was convicted, after guilty plea, of one count of criminal sale of a controlled substance in the fifth degree under N.Y. Penal Law § 220.31 under Ind. No. 2128N-2017 (N.Y. Cty.). Mr. Simmon was sentenced to 2 ½ years in prison with 2 years' post-release supervision.

Justice Curtis Farber presided over the plea. Justice Ann Scherzer presided over the sentencing. Timely notice of appeal was filed. Sentence was executed on Oct. 5, 2018. Mr. Simmon has completed his term of imprisonment and is serving his term of post-release supervision.

QUESTIONS PRESENTED

Where Servisio Simmon had a lesser role in the offense, a history of mental illness, was severely beaten while being held prior to trial, and was promised the minimum sentence, was his term of post-release supervision unduly harsh and excessive?

STATEMENT OF FACTS

On June 5, 2017, Servisio Simmon was charged with one count of criminal sale of a controlled substance in the third degree. Ind. No. 2128-2017 (N.Y. Cty.). According to the criminal complaint, on May 30, 2017, two undercover officers approached Mr. Simmon and asked to buy “hard,” i.e., crack-cocaine. Crim. Compl. at 1. Mr. Simmon then allegedly made a phone call and engaged in a “narcotics related conversation,” after which the two officers followed Mr. Simmon to meet a co-defendant from whom the officers purchased crack-cocaine. *Id.*

Mr. Simmon was held in jail for over a year following his arrest. Presentence Investigation Face Sheet, Ind. No. 2128N-2017 (hereinafter, “PSI”) at 4. On June 26, 2018, about one month before his guilty plea, Mr. Simmon was “found unconscious” by corrections staff after having been severely beaten by an unknown assailant. *Id.* His injuries required surgery to place a titanium plate in his jaw, and he continued to have difficulty speaking and eating solid food up through the resolution of his case. *Id.*

Mr. Simmon also suffers from several psychiatric conditions, including schizophrenia and bipolar disorder. PSI at 4. He has been prescribed several medications to control the symptoms. *Id.*

On July 19, 2018, Mr. Simmon pled guilty to one count of criminal sale of a controlled substance in the fifth degree, N.Y. Penal Law § 220.31. P. 7-14.¹ In exchange for his guilty plea, the District Attorney offered a sentence of two-and-a-half years' imprisonment with two years' post-release supervision. P. 2. The assistant District Attorney described this as the "minimum legal offer that the People can make" due to Mr. Simmon's prior conviction for first-degree robbery in 2007. P. 2; Statement of Predicate Felony Conviction Pursuant to C.P.L. § 400.21 & Penal Law § 70.70 (hereinafter, Statement of Predicate Felony); *see also* P. 3 ("THE COURT: ... And you're offering the minimum? [ASSISTANT DISTRICT ATTORNEY]: That's correct, Judge.").

During the plea proceeding, Mr. Simmon informed the court he was mentally ill and had been suffering for a long time. P. 3-4. He also hesitated in describing his understanding of the nature of the controlled

¹ Citations "P." followed by a page number refer to the transcript of plea proceedings held on July 19, 2018. Citations "S." refer to sentencing proceedings held on Aug. 28, 2018.

substance he allegedly sold. When Mr. Simmon was asked to allocate to the charges and name what substance was sold, he had to confer with counsel before stating specifically what it was:

THE COURT: What did you sell?

THE DEFENDANT: (No response.)

I don't know what it was, but it was –

THE COURT: What did you sell?

(Defense counsel conferring with defendant.)

THE DEFENDANT: I sold drugs.

THE COURT: What drug?

THE DEFENDANT: Cocaine.

P. 13-14.

An appeal waiver was a condition of Mr. Simmon's plea arrangement. P. 2. The court explained during its colloquy that the appeal rights are separate from the rights given up by guilty plea, and that he was being asked to give up his appeal rights separately. P. 10. The court stated that "on appeal you may have argued that an error took place in this Court[], which would require[] a reversal of the conviction

and either new proceedings in the Court or dismissal,” but the court made no mention of any claims that might survive a waiver of appeal. P. 10-11. Mr. Simmon also stated that he had signed a written waiver of appeal prior to the court’s colloquy. S. 9-10; Waiver of Right to Appeal (hereinafter, “Written Waiver”).

On August 28, 2018, Mr. Simmon was sentenced to two-and-a-half years’ imprisonment with two years’ post-release supervision. S. 4.

Execution of sentence was stayed until Oct. 5, 2018, so that Mr. Simmon could receive further medical treatment for his jaw and psychiatric conditions. P. 17.

ARGUMENT

IN ACCORDANCE WITH THE PROSECUTOR'S OFFER, SERVISIO SIMMON SHOULD HAVE BEEN SENTENCED TO THE STATUTORY MINIMUM, RENDERING HIS CURRENT SENTENCE UNDULY HARSH AND EXCESSIVE.

Although the promised sentence of 2 ½ years with 2 years' post-release supervision was represented by the District Attorney as the minimum legal sentence Mr. Simmon faced, Mr. Simmon actually could have been sentenced to only one year of post-release supervision. Simmon should have received only one year of post-release supervision in view of his lesser role in the offense, his brutal treatment while held pending trial, and history of mental health issues. This Court should modify his sentence accordingly.

A. Mr. Simmon's Sentence was Excessive Given His Lesser Role in the Offense, His History of Mental Health Issues, and His Treatment While Incarcerated.

This Court has "broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances . . . without deference to the sentencing court." *People v. Delgado*, 80 N.Y.2d 780, 783 (1992). The Court should consider "the nature of the crime, the defendant's circumstances, the need for societal protection, and the prospects for the defendant's rehabilitation." *People v. Fernandez*, 84 A.D.3d 661, 664 (1st

Dep't 2011) (internal quotation omitted). The Court should also consider these factors with a view toward imposing the “minimum amount of confinement” necessary. *People v. Notey*, 72 A.D.2d 279, 282-83 (2d Dep't 1980) (internal citation omitted).

The sentence offered was not the legal minimum as the District Attorney intended. Mr. Simmon stood before the court on a controlled substance offense with one prior violent felony, first-degree robbery, within the past 10 years. Statement of Predicate Felony. As a result, the minimum statutory sentence Mr. Simmon could have received was 2 ½ years in prison with 1 year of post-release supervision. See N.Y. Penal Law §§ 70.45(2)(c) (post-release supervision for non-sex offense shall not be less than one year and not more than two years when determinate sentence of imprisonment is imposed under Penal Law § 70.70(4)), 70.70(4)(b)(iii) (second felony drug offender previously convicted of a violent felony shall be sentenced to a determinate term of at least 2 ½ years in prison for D felony), & 220.31 (sale of controlled substance in fifth degree is a D felony). Thus, the District Attorney's representation that their offer of two years' post-release supervision represented the “legal minimum” was inaccurate, as the District Attorney was offering

only the minimum prison time. P. 2. Mr. Simmon could have received one year less of post-release supervision.

Mr. Simmon deserved the actual statutory minimum. First, Mr. Simmon is not alleged to have actually directly sold drugs to the undercover officers. *See* Crim. Compl at 1. He is alleged only to have directed the officers to the person who ultimately sold them. *See* Crim. Comp at 1. Thus, Mr. Simmon's culpability was relatively less than his co-defendant, who was the primary actor in the sale. His hesitation during the plea colloquy also suggests that he may not have even known what drug was actually sold, as he had to confer with counsel before stating that it was cocaine. P. 13-14.

Mr. Simmon's time under incarceration was also particularly horrible. Mr. Simmon was held in jail for over after his arrest until, in June 2018, he was beaten unconscious and found by corrections staff. PSI at 4. He had been assaulted so badly that he needed a titanium plate in his jaw and could not eat solid food. *Id.* Mr. Simmon pled guilty only one month after this, in July 2018. P. 1. No one deserves the treatment that Mr. Simmon received during his extended time held pending trial, especially given the lesser role in the low level offense of conviction. His

sentence of post-release supervision should be reduced to the minimum to reflect that.

Second, Mr. Simmon has struggled with severe mental illness for many years. He takes several medications to control schizophrenia and bipolar disorder, and he attempted suicide in 1999. PSI at 4. This Court has often reduced sentences in view of a defendant's history of mental illness and substance abuse issues, for much worse offenses than Mr. Simmon's. *See People v. Reyes*, 89 A.D.3d 401, 402 (1st Dep't 2011) (attempted murder sentence reduced in light of schizophrenia diagnosis); *People v. Solomon*, 78 A.D.3d 521, 523 (1st Dep't 2010) (modifying consecutive sentences to run concurrently for possession of a forged instrument, theft of services and criminal mischief given, *inter alia*, mental illness); *People v. Thompson*, 132 A.D.3d 1364, 1367 (4th Dep't 2015) (robbery and weapon possession sentences reduced given history of mental illness); *People v. Nealon*, 36 A.D.3d 1076, 1077, 1079 (3d Dep't 2007) (reducing sentence in drug case despite an "extensive" criminal history, in view of the history of mental health issues); *People v. Strawbridge*, 299 A.D.2d 584, 594 (3d Dep't 2002) (reducing sentence for

depraved-indifference murder due to “impaired mental and emotional health”). This Court should do the same for Mr. Simmon.

In sum, Mr. Simmon has been punished enough. Given Mr. Simmon’s lesser role in the offense, his mitigated culpability in view of his mental health issues, and his horrific treatment while being held, his post-release supervision term should actually reflect what the District Attorney described – the true statutory minimum sentence, not merely the minimum term of imprisonment. Therefore, this Court should reduce Mr. Simmon’s term of post-release supervision to one year.

B. Mr. Simmon’s Purported Waiver of Appeal is Invalid and Unenforceable.

The trial court failed to inform Mr. Simmon that some claims survive an appeal waiver. As a result, Mr. Simmon did not make a knowing, intelligent and voluntary decision to waive his appellate rights. *See People v. Lopez*, 6 N.Y.3d 248, 256 (2006) (appeal waiver must be knowing, intelligent, and voluntary); *People v. Flores*, 134 A.D.3d 425, 425-26 (1st Dep’t 2015) (appeal waiver invalid where court improperly stated that it covered “any legal issues connected with the case” since “a defendant cannot waive certain rights.”); *People v. Ramos*, 122 A.D.3d 462, 464 (1st Dep’t 2014) (appeal waiver invalid where “the court never

adequately explained the nature of the waiver, [or] the rights the defendant would be waiving”).

“[A] trial court must make certain that a defendant’s understanding of the waiver, along with the other terms and conditions of a plea agreement is evident on the face of the record.” *People v. Bradshaw*, 18 N.Y.3d 257, 265 (2011) (internal quotation marks omitted). Certain claims survive a waiver, including challenges to the legality of the sentence, constitutional speedy trial claims, challenges to competency to stand trial, and claims regarding the voluntariness of the guilty plea itself. *See People v. Campbell*, 97 N.Y.2d 532 (2002); *People v. Hankerson*, 305 A.D.2d 288 (1st Dep’t 2003). “Because only a few reviewable issues survive a valid appeal waiver, it is all the more important for trial courts to ensure that defendants understand what they are surrendering when they waive the right to appeal,” and to ensure that such understanding “is evident on the face of the record.” *Lopez*, 6 N.Y.3d at 256 (2006).

Here, the court never told Mr. Simmon that he retained the right to raise certain claims even if he executed a waiver of appeal. The Court stated only that he was waiving in general the right of appeal, in which “you may have argued that an error took place in the Court[], which

would require[] a reversal of the conviction and either new proceedings in the Court or dismissal.” S. 11. A reasonable person in Mr. Simmon’s position would be left with the impression that he was making a *blanket* waiver, such that any possibility of appeal was now foreclosed. This statement is similar to the one rejected by this Court in *Flores*, which stated that the waiver covered the “right to appeal any legal issues connected with the case.” *Flores*, 134 A.D.3d at 425-26. But this Court concluded the trial court’s instruction was erroneous, since “a defendant cannot waive certain rights, such as the right to challenge the legality of a sentence or raise a speedy trial claim.” *Id.* Under these circumstances, it is important for a person entering a waiver to understand what is, and is not, being waived. *Lopez*, 6 N.Y.3d at 256 (2006). It is also critical to the fundamental fairness of the proceeding that the court not suggest that an appeal waiver will foreclose all avenues of appeal. But that is exactly what the trial court did here when it gave the impression that any claim for appeal was waived. Because the trial court’s instruction fundamentally misled Mr. Simmon about the rights he would forfeit and the rights he would retain, his appeal waiver was not knowing or voluntary. *Flores*, 134 A.D.3d at 425-26.

Moreover, Mr. Simmon's waiver cannot be considered knowing, intelligent and voluntary because he might not have waived his right of appeal had he understood he was not receiving the statutory minimum sentence. A reasonable person in his position would might have chosen to waive the right of appeal specifically because he was receiving the minimum sentence, since, in such a case, there would be no point to challenging the sentence on excessiveness grounds. However, having been told inaccurately that he was receiving the legal minimum, Mr. Simmon unknowingly gave away a right that he did not know he could make use of.

Although Mr. Simmon signed a written waiver of appeal, it is well-settled that "it is the trial court's obligation to ensure that a defendant's understanding of the appeal waiver is made apparent on the face of the record." *Bradshaw*, 18 N.Y.3d at 267. Indeed, "a written waiver is not a complete substitute for an on-the-record explanation of the nature of the right to appeal." *People v. Oquendo*, 105 A.D.3d 447, 448 (1st Dep't 2013). *See also Bradshaw*, 18 N.Y.3d at 267 (written appeal waiver could not cure court's inadequate explanation of appeal waiver); *People v. Harris*, 137 A.D.3d 514, 514 (1st Dep't 2016) (holding written waiver

unenforceable in view of court's deficient colloquy); *Flores*, 134 A.D.3d at 426 (“[D]efendant’s execution of a written waiver does not, standing alone, provide sufficient assurance that the defendant is knowingly, intelligently and voluntarily giving up his or her right to appeal”) (internal citation and quotation omitted).

Because the court failed to ensure that Mr. Simmon understood the full nature and scope of the appeal waiver, and Mr. Simmon did not know that he was waiving a claim that could have reduced his sentence, Mr. Simmon’s purported waiver of appeal is unenforceable.

CONCLUSION

Mr. Simmon's term of post-release supervision should be reduced to the statutory minimum of one year.

Dated: New York, New York
Dec. 30, 2019

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ADDENDA

Supreme Court of the State of New York
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Defendant-Appellant.

Ind. No. 2128N-2017
(N.Y. Cty.)

Statement Pursuant to Rule 5531

1. The indictment number in the court below was 2128N-2017.
2. The full names of the original parties were “The People of the State of New York” against “Servisio Simmon” and “Keith Barner.”
3. These actions were commenced in Supreme Court, New York County.
4. These actions were commenced by the filing of indictments.
5. This is an appeal from a judgment rendered on Aug. 28, 2018, by Supreme Court, New York County. Servisio Simmon was convicted, after guilty plea, of one count of criminal sale of a controlled substance in the fifth degree under N.Y. Penal Law § 220.31, under Ind. No. 2128N-2017. Mr. Simmon was sentenced to 2 ½ years in prison with 2 years’ post-release supervision. Justice Curtis Farber presided over the plea. Justice Ann Scherzer presided over the sentencing. Timely notice of appeal was filed. Sentence was executed on Oct. 5, 2018. Mr. Simmon has completed his term of imprisonment and is serving his term of post-release supervision.
6. Mr. Simmon has been granted leave to appeal as a poor person on the original record and typewritten briefs.

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— against —

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Ind. No. 2128N-2017
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Printing Specification Statement

1. The following statement is made in accordance with First Department Rule 1250.8(j).
2. Mr. Simmon's brief was prepared with Microsoft Word 2010 with Century Schoolbook typeface 14 point in the body and 12 point in the footnotes.
3. The text of the brief has a word count of 2,438 as calculated by the processing system and is 15 pages.

