

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-

MICHAEL SCHOOLER,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT
MICHAEL SCHOOLER

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	iii
INTRODUCTION.....	1
QUESTIONS PRESENTED	2
STATEMENT OF FACTS	3
ARGUMENT	5
POINT	5
MICHAEL SCHOOLER’S SENTENCE WAS UNDULY HARSH AND EXCESSIVE BECAUSE HE HAD A NEARLY UNBLEMISHED CRIMINAL RECORD, HIS CONDUCT WAS AN ATTEMPT TO PROTECT HIMSELF FROM CONTINUING NEIGHBORHOOD VIOLENCE, AND HE ACCEPTED RESPONSIBILITY.....	5
CONCLUSION	9
ADDENDA.....	A-1
Statement Pursuant to Rule 5531	A-1
Printing Specification Statement	A-2

TABLE OF AUTHORITIES

Cases

<i>People v. Board</i> , 97 A.D.2d 610 (3d Dep’t 1983)	6, 7
<i>People v. Charles</i> , 124 A.D.3d 986 (3d Dep’t 2015)	7
<i>People v. Delgado</i> , 80 N.Y.2d 780 (1992)	5
<i>People v. Fernandez</i> , 84 A.D.3d 661 (1st Dep’t 2011)	6
<i>People v. Garland</i> , 155 A.D.3d 527 (1st Dep’t 2017)	8
<i>People v. Matias</i> , 161 A.D.2d 292 (1st Dep’t 1990)	6
<i>People v. Milan</i> , 189 A.D.2d 627 (1st Dep’t 1993).....	6, 7
<i>People v. Morales</i> , 155 A.D.3d 487 (1st Dep’t 2017)	8
<i>People v. Notey</i> , 72 A.D.2d 279 (2d Dep’t 1980)	6
<i>People v. Powell</i> , 140 A.D.3d 401 (1st Dep’t 2016).....	8
<i>People v. Ramos</i> , 152 A.D.2d 209 (1st Dept. 1989).....	8
<i>People v. Reyes</i> , 89 A.D.3d 401 (1st Dep’t 2011)	5
<i>People v. Roldan</i> , 222 A.D.2d 132 (1st Dep’t 1996)	6
<i>People v. Santiago</i> , 119 A.D.3d 484 (1st Dep’t 2014)	8
<i>People v. Thompson</i> , 60 N.Y.2d 513 (1983)	5, 7
<i>People v. Wiggins</i> , 24 A.D.3d 263 (1st Dep’t 2005)	5

Statutes

N.Y. Penal Law § 70.02	7
N.Y. Penal Law § 70.45	7

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

The People of the State of New York,

Respondent,

— against —

Michael Schooler,

Defendant-Appellant.

Ind. No. 2687-2015

PRELIMINARY STATEMENT

This is an appeal from a judgment rendered on April 25, 2016, by Supreme Court, Bronx County. Michael Schooler was convicted after a guilty plea of one count of attempted criminal possession of a weapon in the second degree, N.Y. Penal Law §§ 110 & 265.03(3). Mr. Schooler received a sentence of two years' imprisonment followed by two years' post-release supervision.

Justice Miriam Best presided over the plea and sentencing. No stay of execution has been sought. Mr. Schooler has been released following the completion of his term of imprisonment and is currently under post-release supervision.

INTRODUCTION

Mr. Schooler's sentence following his conviction for attempted criminal possession of a weapon in the second degree was excessive. Although it is not an excuse, his culpability is diminished because his conduct was the result of a reasonable fear for his safety given the violence he experienced in his neighborhood. Aside from a single misdemeanor in Alaska in 2009, he had no prior criminal record. Mr. Schooler should therefore have received the minimum term of post-release supervision.

QUESTIONS PRESENTED

1. Where Michael Schooler's conduct was the result of a reasonable fear for his safety, and his prior criminal record consisted of a single misdemeanor in 2009, was the sentence of two years' imprisonment and two years' post-release supervision for attempted criminal possession of a weapon in the second degree excessive?

STATEMENT OF FACTS

A. Background.

Other than a conviction for disorderly conduct in 2009 in Alaska, for which he received probation, Mr. Schooler has no previous record of criminal convictions. Presentence Investigation Report (hereinafter, “PSI”) at 5.

B. Mr. Schooler is Arrested After He Acquires a Gun Due to the Fear Of Violence in His Neighborhood.

In 2015, Mr. Schooler found himself living in a dangerous neighborhood in the Bronx and was desperate to protect himself from the violence he found himself exposed to. See Voluntary Disclosure Form at 1, (hereinafter, “VDF”). Mr. Schooler was tried to keep to himself to avoid “getting involved in the ignorance that goes on in the neighborhood.” *Id.* Nevertheless, at the time of arrest he had recently been “jumped” three times, and shot at twice. *Id.*

Due to these attacks, he grew “tired of the neighborhood he lived in” and began carrying a .22 caliber revolver because he felt that he needed to defend himself. *Id.*; P. 8-9¹. He carried the gun “not in the intent to hurt no one but to protect myself from being hurt.” VDF at 1.

When Mr. Schooler was arrested on September 1, 2015, he immediately accepted responsibility for his behavior and gave written and videotaped statements to

¹ Citations to “P” refer to the guilty plea on April 4, 2016. Citations to “S” refer to the sentencing on April 25, 2016.

the police within hours of his arrest. *Id.*; *see also* PSI at 3. He later pled guilty to one count of attempted criminal possession of a weapon in the second degree. P. 8-9.

Mr. Schooler was sentenced to two years' imprisonment followed by two years' post-release supervision. S. 3.

C. Written Waiver of Appeal.

Mr. Schooler signed a written waiver of appeal. The written waiver stated that Mr. Anderson was waiving "any and all rights to appeal including the right to file a notice of appeal[.]" Waiver of the Right to Appeal, dated April 4, 2016. The written waiver also stated that he "waive[d] his right to appeal and file a notice of appeal." *Id.*

ARGUMENT

POINT

MICHAEL SCHOOLER’S SENTENCE WAS UNDULY HARSH AND EXCESSIVE BECAUSE HE HAD A NEARLY UNBLEMISHED CRIMINAL RECORD, HIS CONDUCT WAS AN ATTEMPT TO PROTECT HIMSELF FROM CONTINUING NEIGHBORHOOD VIOLENCE, AND HE ACCEPTED RESPONSIBILITY.

A. Mr. Schooler Should Have Received the Minimum Sentence.

Given Mr. Schooler’s nearly clean criminal record, and diminished culpability for acting out of a fear for his own safety, and his immediate acceptance of responsibility, Mr. Schooler’s should have received the minimum sentence. 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). Moreover, this plenary power exists even when an individual’s conviction was the result of a negotiated guilty plea rather than a trial verdict. *People v. Thompson*, 60 N.Y.2d 513, 520 (1983); *see, e.g., People v. Reyes*, 89 A.D.3d 401, 402 (1st Dep’t 2011) (defendant’s sentence reduced after negotiated plea). This Court’s discretionary power may be exercised “without deference to the sentencing court.” *Delgado*, 80 N.Y.2d at 783; *People v. Wiggins*, 24 A.D.3d 263, 263 (1st Dep’t 2005).

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).

This Court has reduced sentences where the offense resulted from the defendant’s fear for their physical safety. *See People v. Matias*, 161 A.D.2d 292 (1st Dep’t 1990) (sentence was excessive where defendant was convicted of manslaughter after shooting the decedent, who “had a known history of threatening behavior directed at defendant and other tenants of [his] building...”); *see also People v. Roldan*, 222 A.D.2d 132, 136-141 (1st Dep’t 1996) (sentence was excessive where defendant was a security guard who shot the decedent during a physical altercation, and decedent had been involved in numerous violent confrontations with security personnel in the past). This Court should recognize Mr. Schooler’s diminished culpability because his conduct was the result of a reasonable fear for his safety. Despite Mr. Schooler’s efforts to avoid confrontation, he had been shot at twice and “jumped” three times prior to his arrest. VDF at 1. He acquired a weapon to “protect [him]self from being hurt.” *Id.* Although it is not an excuse, Mr. Schooler’s goal was to keep himself safe, not to cause harm to others. *Id.*

New York Courts have often reduced sentences in view of a “relatively unblemished” criminal record. *People v. Board*, 97 A.D.2d 610, 610 (3d Dep’t 1983). In *People v. Milan*, 189 A.D.2d 627, 628 (1st Dep’t 1993), this Court reduced a sentence

where the defendant's prior record consisted of a sole, decade-old misdemeanor conviction. *See also Thompson*, 132 A.D.3d at 1367 (sentence excessive where "[d]efendant ha[d] no prior felony convictions, and none of the misdemeanor convictions was a violent offense."); *People v. Charles*, 124 A.D.3d 986, 988 (3d Dep't 2015) (sentence reduction warranted where defendant had no prior felonies). Similar to *Milan*, Mr. Schooler's prior criminal record consisted solely of a single, out-of-state disorderly conduct conviction from 2009. He also immediately accepted responsibility for his actions by giving statements to the police hours after his arrest. VDF at 1. As such, there is a minimal need to protect society from someone with a "relatively unblemished" record where the "lengthy period between his arrests indicates that he is not a career criminal." *Board*, 97 A.D.2d at 610; *Milan*, 189 A.D.2d at 628.

In view of these facts, the appropriate sentence would have been the statutory minimum. This Court should therefore reduce Mr. Schooler's term of post-release supervision to the minimum of one and one-half years. *See* N.Y. Penal Law § 70.02(1)(b)-(c) (attempted criminal possession of a weapon in the second degree is class D felony); § 70.45(2)(e) (minimum of one and one-half years of post-release supervision for Class D felony when determinate sentence of imprisonment is imposed).

B. Mr. Schooler's Purported Waiver of Appeal was Invalid.

A valid waiver of the right of appeal must be knowing, intelligent, voluntary, and not contrary to public policy. *People v. Ramos*, 152 A.D.2d 209, 210 (1st Dep't 1989). As this Court has repeatedly held, a "written waiver of appeal signed by defendant, insofar as it expressly 'waives any and all rights to appeal including the right to file a notice of appeal' is unenforceable," thereby invalidating any purported waiver. *People v. Powell*, 140 A.D.3d 401, 401 (1st Dep't 2016) (emphasis in original) (citing *People v. Santiago*, 119 A.D.3d 484 (1st Dep't 2014)); *People v. Garland*, 155 A.D.3d 527, 529 (1st Dep't 2017); *People v. Morales*, 155 A.D.3d 487, 487 (1st Dep't 2017). This language is against public policy because it discourages defendants from filing notices of appeal even if they may have claims that cannot be waived. *Santiago*, 119 A.D.3d at 485-86.

The written waiver Mr. Schooler signed contained the exact language this Court has held invalid. It read that Mr. Schooler was waiving "any and all rights to appeal including the right to file a notice of appeal[.]" Waiver of the Right to Appeal, dated April 4, 2016. It also read that Mr. Schooler "waive[d] his right to appeal and file a notice of appeal." *Id.* Thus, when Mr. Anderson signed this waiver, he was unfairly discouraged from raising any claims that he may have retained. His purported appeal waiver is therefore invalid.

CONCLUSION

For the foregoing reasons, Mr. Schooler's sentence of post-release supervision should be reduced to the minimum term.

Dated: New York, New York
April 9, 2018

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ADDENDA

Statement Pursuant to Rule 5531

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

The People of the State of New York,

Respondent,

— against —

Michael Schooler,

Defendant-Appellant.

Ind. No. 2687-2015

1. The indictment number in the court below was 2687-2015.
2. The full names of the original parties were “The People of the State of New York” against “Michael Schooler.”
3. This action was commenced in Supreme Court, Bronx County.
4. This action was commenced by the filing of an indictment.
5. This is an appeal from a judgment rendered on April 25, 2016, by Supreme Court, Bronx County. Michael Schooler was convicted after a guilty plea of one count of attempted criminal possession of a weapon in the second degree, N.Y. Penal Law §§ 110 & 265.03(3). Mr. Schooler received a sentence of two years’ imprisonment followed by two years’ post-release supervision. Justice Miriam Best presided over the plea and sentencing.
6. Mr. Schooler has been granted leave to appeal as a poor person on the original record and typewritten briefs.

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

The People of the State of New York,

Respondent,

— against —

Michael Schooler,

Defendant-Appellant.

Ind. No. 2687-2015

Printing Specification Statement

1. The following statement is made in accordance with First Department Rule 600.10.
2. Mr. Schooler's brief was prepared with Microsoft Word 2010 with Garamond typeface 14 point in the body and 12 point in the footnotes.
3. The text of the brief has a word count of 1,432 as calculated by the processing system and is 9 pages.

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

The People of the State of New York,

Respondent,

— against —

Michael Schooler,

Defendant-Appellant.

Note of Issue

Ind. No. 2687-2015

For the September 2018 Term

This is an appeal from a judgment rendered on April 25, 2016, by Supreme Court, Bronx County. Michael Schooler was convicted after a guilty plea of one count of attempted criminal possession of a weapon in the second degree, N.Y. Penal Law §§ 110 & 265.03(3). Mr. Schooler received a sentence of two years' imprisonment followed by two years' post-release supervision. Justice Miriam Best presided over the plea and sentencing.

Notice of appeal filed:

April 26, 2016

Record filed with Appellate Division:

November 22, 2016

Note of issue filed by attorney for Defendant-Appellant.

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

The People of the State of New York,

Respondent,

— against —

Michael Schooler,

Defendant-Appellant.

Affirmation of Service

Ind. No. 2687-2015

David Billingsley, Esq., an attorney duly admitted to practice in the State of New York, hereby affirms the following under penalties of perjury:

1. I am associated with the Office of the Appellate Defender, which has been assigned to represent the defendant-appellant in the above-captioned case.
2. On April __, 2018 I served a Note of Issue and Brief on the attorney for the respondent, the People of the State of New York, at the Office of District Attorney, Bronx County, 198 E. 161st St., 10th Floor, Bronx, New York 10451, by mailing said copies in a depository designated by the United States Postal Service. Respondent has consented to service by mail on the date of filing.

Dated: New York, New York
April __, 2018

David Billingsley

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

The People of the State of New York,

Respondent,

— against —

Michael Schooler,

Defendant-Appellant.

Stipulation

Ind. No. 2687-2015

It is hereby stipulated and agreed, by and between the attorneys for Defendant-Appellant and Respondent, the People of the State of New York, that subject to the approval of the Court, that Defendant-Appellant's time to file a Brief in the above-captioned case be extended to July 9, 2018, for the September 2018 Term of the Court.

Dated: New York, New York
April 9, 2018

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