

Casenote: A Prior Felony Conviction Which is Unconstitutional Under Current Law Can Be Used to Sentence a Defendant as a Predicate Felony Offender

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A. INTRODUCTION

In *People v. Catalanotte*,¹ the Court of Appeals held, by a 4 to 3 decision, that a prior felony conviction which is unconstitutional under current law can be used to sentence a defendant as a predicate felony offender. The court held that since the conviction was constitutional when it was obtained, it could be used to enhance a sentence. The significance of this case is that it further restricts the ability of defendants to challenge prior convictions. This includes convictions which are unconstitutional under present law. The thesis of this article is that the applicable provisions of the Criminal Procedure Law should prohibit the use of any unconstitutional conviction to make a predicate felony finding.

The specific issue which will be addressed is whether the decision in *Catalanotte* properly authorizes enhancement pursuant to the predicate felony statute and whether it is desirable and just to make a finding.

B. STATEMENT OF CASE

1. *The Unconstitutional Conviction.*

Defendant Steven Catalanotte's first conviction was after a jury trial, to various drug-related felonies and he was sentenced to a term of imprisonment of ten years. During the trial, there was testimony by an undercover police officer. Prior to his testimony, the court summarily closed the courtroom. Although this issue was raised on appeal, this conviction was affirmed by the Appellate Division, Second Department

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1. See *People v. Catalanotte*, 137 A.D.2d 697 (Second Dept., 1987), affirmed 72 N.Y.2d 641 (1988) (Kaye, dissenting) reargument denied 73 N.Y.2d 918 certiorari denied — S.Ct. — (1989).

and the Court of Appeals.² Four years later, the Court of Appeals held that summary exclusion of the public was unconstitutional under the Sixth Amendment and reversible error per se, without any showing of prejudice.³ This rule was extended by the Court of Appeals to require an adequate inquiry of the prosecution witness, in addition to factual findings enunciated in the *Jones* decision.⁴ The People concede that *Jones* error was present at the trial.⁵ Nonetheless, they were able to utilize this conviction to have the defendant sentenced as a predicate felony offender.

2. The Second Felony Conviction.

a. Trial Court Plea.

Defendant Steven Catalanotte was indicted by Kings County Supreme Court and entered a plea of guilty and was sentenced under indictment number 5265/81 on May 22, 1986 for the crime of attempted robbery (unarmed) in the second degree. The sentencing court accepted a plea to a D felony without a specific term of imprisonment, and imposed an indeterminate sentence of 2 to 4 years, the minimum sentence for a predicate felon. The court indicated it could not impose a lesser sentence, finding defendant to be a predicate felony offender.

At sentencing, the constitutionality of the first conviction was challenged.⁶ The court rejected this argument, holding that the defendant was collaterally estopped since he had raised this on appeal.⁷ Thereafter, the court imposed its sentence. The defendant appealed only the sentence imposed and was released on bail pending the decision of the Appellate division.

On February 16, 1988 the Appellate Division affirmed the sentence

2. See *People v. Catalanotte*, 41 A.D.2d 968, (Second Dep't., 1973), affirmed 36 N.Y.2d 192 (1975).

3. See *People v. Jones*, 47 N.Y.2d 409, (1979) cert. denied, 444 U.S. 192. The Court of Appeals held that this was a constitutional error in violation of a defendant's right to a public trial pursuant to the Sixth Amendment. Many convictions were reversed because of this constitutional error. See Generally, *People v. Gonzalez*, 74 A.D.2d 928 (Second Dept., 1980); *People v. Warren O.*, 86 A.D.2d 895 (Second Dept., 1982); *People v. Brown*, 79 A.D.2d 659 (Second Dept., 1980); *People v. Diory*, 73 A.D.2d 802 (Fourth Dept., 1979); *People v. McNarnee*, 71 A.D.2d 550, *People v. Cousant*, 74 A.D.2d 877, (Second Dept., 1980).

4. *People v. Cuevas* 50 N.Y.2d 1022 (1980).

5. On the first appeal, the people urged in the brief that the courts should summarily exclude the public and to take judicial notice that an undercover officer, by the nature and danger involved in his occupation should be allowed to testify in a closed courtroom.

6. The trial court took the position that the defendant was collaterally stopped from challenging the constitutionality of the closure. The Court of appeals rejected the collateral estoppel argument of the trial court.

7. 41 A.D.2d 968, (2d Dept. 1973) affirmed 36 N.Y.2d 192 (1975).

of the trial court. In its reasonings, a unanimous court held that although the first conviction was unconstitutional under existing law, the defendant could not have a benefit of the subsequent change in the law unless the constitutional error would be retroactive in its application.⁸ Leave was granted, however, by the New York Court of Appeals on April 19, 1988 and the defendant was allowed to remain out on bail. The subsequent decision of this court would reflect sharp division on this case.

b. Decision in Court of Appeals.

In a sharply divided panel, the Court of Appeals held, by a 4 to 3 vote, that an unconstitutional conviction could be used towards a predicate felony finding as long as it was constitutional when it was obtained. Honorable Justice Simons, writing for the majority, held that the clear import of the phrases "was obtained" and "was unconstitutionally obtained" indicated that the validity of the conviction shall be determined as of the time it was entered.⁹

Justice Kaye wrote the dissenting opinion, which was joined by Associate Justice Hancock and Associate Justice Titone. The dissenting opinion stated that the plain meaning of the statute requires that a previous conviction obtained in violation of the defendant's Federal constitutional rights "must not be counted".

As stated by Justice Kaye: ¹⁰

To that end the statute gives a defendant the right to first challenge the constitutionality of a prior conviction at any time during the second felony hearing. The statute bespeaks a legislative intention, indeed a defendant may have already served a lengthy term of imprisonment that flawed conviction should not, in fairness, be used anew as a basis for a second period of incarceration. . . .

As to the application of the statute to this case, Justice Kaye wrote that:

This case fits the statute in letter and spirit. In 1971, the defendant was convicted of various drug offenses under circumstances the majority conceded would compel reversal as a matter of Federal constitutional law were it tried today. Despite his diligent efforts to litigate the constitutional issue, the courts recognized the merit of his claim only four years later in an unrelated case. Now the People seek new use of the

8. 137 A.D.2d 697, (2d Dept., 1987).

9. See Generally 72 N.Y.2d 645-646, (1988).

10. 72 N.Y.2d 647-650.

1971 conviction, to add to defendant's term of imprisonment for a 1986 robbery conviction. To my mind, CPL 400.21 (7)(b) proscribes the use of the earlier conviction, and I therefore respectfully dissent.

In opposition to the reasoning of the majority, the dissent stated that:

"The statutes use of the past tense prohibiting use of a conviction that "was obtained" or "was unconstitutionally obtained" —signals a legislative direction that the validity of the conviction is to be determined "as of the time it was entered. In that the statute deals with past convictions, use of the past tense is inevitable. Nothing in the statute omits its application to convictions that were obtained in violation of defendant's rights as courts were willing to recognize them at the moment of conviction, nor does the statute call for applicability of retroactivity principles. Had the legislature intended to confine the statute, it could have and undoubtedly would have said so.

In fairness, CPL Section 400.21(7)(b) should speak to the constitutionality of a conviction at the time the People seek its use to enhance a sentence by determining a defendant to be a predicate felon. The court needs simply to determine the validity of the conviction when its use is sought under the predicate felony statute. To use an infirm conviction towards a predicate felony finding allows it to rise up from the dead and strike the defendant again.

C. ANALYSIS

1. CPL Section 400.21.¹¹ *The Predicate Felony Statute*

Section 400.21(7)(6) governs the sentencing court as to whether a defendant is to be sentenced as a predicate felon. As stated in relevant part:

A previous conviction in this or any other jurisdiction which was obtained in violation of the rights of the defendant under the applicable provisions of the constitution of the United States must not be counted in determining whether the defendant has been subjected to a predicate felony conviction. The defendant may, at any time during the course of the hearing hereunder controvert an allegation with respect to such

11. See Generally C.P.L. Section 400.21. This casenote does not address constitutional challenges to prior convictions by plea. This constitutional challenge has been limited by the Court of Appeals in *People v. Harris*, 61 N.Y.2d 9 and now places the burden on the defendant to produce evidence of unconstitutionality of his plea. See also 58 St. John's L.R. 658-659.

conviction in statement on the grounds that the conviction was unconstitutionally obtained.

On this appeal, the challenge was made pursuant to this section which states that a conviction which was obtained in violation of the rights of the defendant under the applicable provisions of the constitution of the United States must not be counted in determining whether the defendant has been subjected to a predicate felony conviction.

Cases in point were few and it was submitted that the ability to use the conviction towards a predicate felony finding depended upon its constitutionality at the time that the People sought to use it for a predicate felony finding.

In their brief, the People argued that the first conviction was constitutional when it was obtained and that since the constitutionality was recognized after the case was decided, the conviction is valid for purposes of its use under CPL 400.21. Their argument was premised on the concept that the defendant could only benefit from subsequent change in the law if the application of the constitutional error was retroactive. They further argued that it was not constitutional error which was entitled to retroactive application. Therefore, it was argued that this conviction should be used again to enhance the sentence on the present felony. Having previously argued this matter in the Appellate Division, I prepared in anticipation of this argument.

2. *The Argument Against Retroactivity: CPL Section 440.10.*

In response to the anticipated argument of retroactivity, CPL Section 400.21 and CPL 440.10 were compared. Section 440.10(1)(h), (2)(a) governs in a motion to vacate a conviction¹² when:

(h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

2. Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment when:

(a) The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue;

12. The appellant challenged the 1971 conviction pursuant to 440.20. On November 21, 1986 the Kings County Supreme Court held in a written opinion that while it was undisputed that constitutional error was committed during the trial. It denied the motion, however, holding that this error was not entitled to retroactive application.

At oral argument, it was submitted that the applicable standard in CPL Section 400.21(7)(b) proceeding is to be contrasted with a motion to set aside a conviction on the ground that the judgment was obtained in violation of a right under the CPL Section 440.10(1)(h),(2)(a).

A CPL 440 application has expressly set forth the limitation which requires that "the court must deny an express limitation which requires that the court must deny a motion to vacate a judgment when the ground or issue was previously determined upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue." This means that 440 applications have a retroactivity standard built to limit challenges when there is a subsequent change in the law.

A comparison of the statutes indicates that CPL Section 400.21(7)(b) omits this additional "retroactively effective change in law" standard even though it was enacted many years after it was expressly set forth in CPL Section 440.10. It was submitted that the legislature omitted this restrictive provision because it did not intend to adopt the same retroactivity limitation in a CPL Section 400.21(7)(b) application.

A retroactivity standard should only affect the right to challenge a conviction in a CPL Section 440.10 application.¹³

Thus, it was argued in the court of appeals that the contention of the People that the *Jones* holding its nonretroactive should only properly apply to an attack on a conviction under CPL 440.10. It seems logical that there should be a lesser standard in applying the *Jones* error under CPL Section 400.21 than in a CPL Section 440.10 application. The logic was based on the absence of retroactivity language in the predicate felony statute.

It was strongly submitted that the plain meaning of CPL Section 400.21 governs when it states clearly that an unconstitutional conviction "must not be used" for enhancement of a later felony conviction.

To apply a retroactively standard in a 400.21(7)(b) would make this proceeding to be virtually identical to a challenge to set aside a judgment pursuant to CPL Section 440.10. Of course, a determination that a defendant is not a second felony offender has far less consequences than the setting aside of a judgment of conviction.

In its decision, the Court of Appeals never addressed this issue. With this reasoning, it has eliminated all possible predicate felony challenges based upon convictions which were previously constitutional but are now unconstitutional under existing law. This exceeded the argument put forth by the People. As a result of the decision in *Catalanotte*,

all convictions which are unconstitutional under existing law can be used so long as they were constitutional when they were obtained. This would arguably include convictions which are to receive benefit of any retroactive change in the law. Therefore, the present 400.21 law exceeds the standard set forth in motions to set aside a judgment of conviction. Given this incongruence, a defendant could be sentenced as a predicate felon based on an earlier infirm conviction and then that conviction could be set aside without benefit.

CONCLUSION

As a result of the decision in *Catalanotte*, certain unconstitutional convictions can be used. Given the sharp division of the court and present guideline which exceeds the standard to set aside a conviction, a future challenge could reverse the present 4 to 3 split in the court.



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