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PENAL LAW

Penal Law § 70.04(1)(v): New York Court of Appeals holds incarceration resulting from invalid conviction does not toll limitation period for determining recidivist status

In an effort to reduce rising crime rates, many states have enacted sentencing laws that impose harsher penalties on repeat offenders.¹ In New York, Penal Law § 70.04 requires that a convicted felon receive an enhanced sentence² if he has been convicted of a

¹ Many theorists argue that because only a small percentage of the population commits most of society's crime, if this group could be incapacitated, crime rates would drop significantly. See NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, A NATIONAL STRATEGY TO REDUCE CRIME 13 (1973) ("[b]y far the greatest proportion of all serious violence is committed by repeaters" (quoting NATIONAL COMM'N ON THE CAUSES AND PREVENTION OF VIOLENCE, TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY 20-24, 26 (1969))); RICHARD G. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT 12 & n.4 (1979). In response to evidence citing recidivists as largely responsible for the bulk of society's criminal activity, policy makers and legislatures are targeting repeat offenders in an effort to reduce crime. See JOAN PETERSILIA ET AL., CRIMINAL CAREERS OF HABITUAL FELONS V (1978) ("[i]n response to high urban crime levels and recent evidence that a small minority of persons commits the majority of serious crimes, policy makers have been shifting concern away from rehabilitation toward deterrence, punishment, and incapacitation of serious habitual offenders"); Mario Merola, *Federal, State and Local Governments: Partners in the Fight Against Violent Crime*, 73 J. CRIM. L. & CRIMINOLOGY 965, 975 (1982) ("New York City Police Department's response to the serious offender is . . . that a small but definable group of individuals commit a disproportionate share of serious crimes, and that the apprehension and conviction of these individuals should receive the highest priority.") There is a growing trend among the states to enact legislation that increases sentences for subsequent crimes. See Alexis M. Durham III, *Justice in Sentencing: The Role of Prior Record of Criminal Involvement*, 78 J. CRIM. L. & CRIMINOLOGY 614, 620 (1987) ("most sentence enhancement provisions have been conceived as crime control strategies"); Daniel Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFF. L. REV. 99, 104 (1971) (provisions increasing penalties for repeat offenders exist in most jurisdictions); see also ARTHUR W. CAMPBELL, LAW OF SENTENCING § 7:5, at 152 (2d ed. 1991) ("all repeat-offender legislation is directed at those whose prior crimes make them eligible for enhanced incarceration terms" (footnote omitted)). For example, Article 70 of the New York Penal Law provides for enhanced sentencing for persistent offenders. N.Y. PENAL LAW § 70.10 (McKinney 1987). In 1973, New York amended its sentencing statute to create the new category of second felony offender, mandating a harsher sentence for "a person . . . who stands convicted of a felony . . . after having previously been subjected to one or more predicate felony convictions." *Id.* § 70.06(1)(a). In 1978, New York added a second violent felony offender category requiring an enhanced sentence where a person "stands convicted of a violent felony offense . . . after having previously been subjected to a predicate violent felony conviction." *Id.* § 70.04(1)(a).

² See N.Y. PENAL LAW § 70.04. Section 70.04 requires enhanced sentencing for second violent felony offenders. For the purposes of this analysis, the term "second offender" refers

felony within the ten years prior to commission of the felony for which he is being sentenced.³ Additionally, if the defendant was incarcerated "for any reason" during this ten year period, the time spent under incarceration is excluded for the purposes of determining whether the defendant will be sentenced as a repeat offender.⁴ The ten year period will not be tolled, however, if the incarceration resulted from an unconstitutional conviction.⁵ Recently, in *People v. Dozier*,⁶ the New York Court of Appeals broadened this exception to section 70.04 by holding that incarcerations resulting from invalid,⁷ although not unconstitutional, con-

to either a second felony offender, pursuant to Penal Law § 70.06, or a second violent felony offender, pursuant to Penal Law § 70.04. See *supra* note 1 (explaining the differences between the two categories). A second felony offender or a second violent felony offender is subject to harsher penalties than a first offender. Compare N.Y. PENAL LAW § 70.02(3)(a) (maximum sentence for first offender of class B felony is between 6-25 years) with *id.* § 70.04(3)(a) (maximum term for second violent felony offender for class B felony is between 12-25 years) and *id.* § 70.02(4) (mandatory minimum term for first time violent felony offender is one third of maximum term imposed) and *id.* § 70.04(4) (mandatory minimum term for second violent felony offender is one half of maximum term).

³ See *id.* § 70.04(1)(b)(iv). A felon is classified as a second offender, and therefore subject to an enhanced sentence, if the sentence from the prior conviction was imposed "not more than ten years before commission of the felony of which the defendant presently stands convicted." *Id.* § 70.04(1)(b)(iv). Note that the criteria for determining whether a prior conviction serves as a predicate offense is essentially identical in both N.Y. PENAL LAW § 70.04 and N.Y. PENAL LAW § 70.06. For the purposes of this analysis, all references will be to N.Y. PENAL LAW § 70.04.

⁴ *Id.* § 70.04(1)(b)(v). This "tolling provision" reads:

In calculating the ten year period under subparagraph (iv), any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration.

Id. Note that the identical limitations period and tolling provisions apply to second felony offenders, *id.* § 70.06(1)(b)(iv)-(v), and persistent violent felony offenders, *id.* § 70.08(1)(b).

⁵ See *People v. Love*, 71 N.Y.2d 711, 716, 525 N.E.2d 701, 704, 530 N.Y.S.2d 55, 58 (1988). In *Love*, the court construed N.Y. PENAL LAW § 70.06(b)(1)(v) and held that incarceration for an unconstitutional conviction can not be used to extend the ten year limitation period. *Id.* The court read the statute in conjunction with CPL § 400.21(7)(b), which states in part that "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." CPL § 400.21(7)(b) (McKinney 1983). In reaching its decision, the court relied on two Supreme Court decisions that held that convictions obtained in violation of the constitutional right to counsel could not be used to enhance punishment. See *United States v. Tucker*, 404 U.S. 443, 449 (1972); *Burggett v. Texas*, 389 U.S. 109, 115 (1967).

⁶ 78 N.Y.2d 242, 577 N.E.2d 1019, 573 N.Y.S.2d 427 (1991).

⁷ *Id.* at 250, 577 N.E.2d at 1023, 573 N.Y.S.2d at 431. The court found that Penal Law § 70.04 (1)(b)(v) did not toll the ten year limitation period during incarceration resulting

victions could not serve to toll the limitations period.⁸

In 1987, Robert Dozier was convicted on two counts of robbery in the first degree and sentenced as a second violent felony offender.⁹ A 1972 robbery conviction served as the predicate felony to create his repeat offender status.¹⁰ Although more than ten years had passed since Dozier's prior conviction,¹¹ the Supreme Court, New York County, held that the limitation period¹² tolled while defendant was incarcerated from April 1, 1977 through March 13, 1979¹³ and September 10, 1979 through November 17, 1982.¹⁴ Therefore, the limitation period had not expired and the 1972 robbery conviction served as a basis to enhance his sentence.¹⁵ On appeal, the Appellate Division, First Department, vacated defendant's sentence and remanded the matter for resentencing as a first violent felony offense.¹⁶ The Appellate Division reasoned that since the conviction underlying the incarceration between September 10, 1979 and November 17, 1982 was subsequently vacated for newly discovered evidence, the defendant had, in effect, regained the status of an innocent person.¹⁷ Therefore,

from a 1980 rape and sodomy conviction that was subsequently vacated pursuant to CPL § 440.10(1)(g) for newly discovered evidence. *Id.* at 250, 577 N.E.2d at 1023, 573 N.Y.S.2d at 431. The trial hinged on the credibility of complainant as to the issue of consent, and defendant was convicted. *Id.* at 245-46, 577 N.E.2d at 1020-21, 573 N.Y.S.2d at 428-29. The trial judge later vacated this conviction and ordered a new trial, based on new evidence showing the victim suffered from psychiatric disorders that cast doubt on her allegations against defendant. *Id.* at 246-47, 577 N.E.2d at 1021, 573 N.Y.S.2d at 429. The District Attorney did not retry the case, stating he believed that under the facts before the court, the people would be unable to prove guilt beyond a reasonable doubt. *Id.* at 247, 577 N.E.2d at 1021, 573 N.Y.S.2d at 429.

⁸ *Dozier*, 78 N.Y.2d at 250, 577 N.E.2d at 1023, 573 N.Y.S.2d at 431.

⁹ *People v. Dozier*, 163 A.D.2d 220, 220, 558 N.Y.S.2d 941, 942 (1st Dep't 1990), *aff'd*, 78 N.Y.2d 242, 577 N.E.2d 1019, 573 N.Y.S.2d 427 (1991).

¹⁰ *Dozier*, 78 N.Y.2d at 245, 577 N.E.2d at 1020, 573 N.Y.S.2d at 428. On December 28, 1972, defendant was convicted of robbery in the second degree. *Id.*

¹¹ *Id.* Defendant was previously convicted of robbery in the second degree on December 28, 1972. Over fourteen years later, on June 3, 1987, defendant pleaded guilty to two counts of first degree robbery. *Id.* at 244-45, 577 N.E.2d at 1020, 573 N.Y.S.2d at 428.

¹² N.Y. PENAL LAW § 70.04(1)(b)(iv)-(v) (ten year statute of limitations, excluding incarceration time, for use of a prior felony to enhance sentence).

¹³ *Dozier*, 78 N.Y.2d at 245, 577 N.E.2d at 1020, 573 N.Y.S.2d at 428.

¹⁴ *Id.* The supreme court excluded the period for which defendant was imprisoned on a rape and sodomy conviction that was subsequently vacated. *See supra* note 7 (discussing invalid conviction).

¹⁵ *Dozier*, 163 A.D.2d at 221, 558 N.Y.S.2d at 942.

¹⁶ *Id.* The Appellate Division modified the judgment by vacating the finding that the defendant was a second felony offender. *Id.*

¹⁷ *See supra* note 7 (discussing invalid rape and sodomy conviction).

the court concluded that the resulting period of incarceration could not serve to toll the limitation period.¹⁸

The New York Court of Appeals affirmed, holding that a period of incarceration that resulted from an invalid conviction will not extend the statute's ten year limitation period.¹⁹ Judge Hancock, writing for the court, rejected the prosecution's contention that "incarcerated for any reason"²⁰ should be literally construed to include periods of incarceration resulting from invalid convictions.²¹ The Court premised its decision on its prior interpretation of the tolling provision in *People v. Love*.²² *Love* read "incarcerated for any reason" to mean incarcerations for which the defendant had not been "imprisoned without reason or unconstitutionally."²³ The court, finding that defendant's invalid conviction resulted in imprisonment "without reason," concluded that the legislature could not have intended the statutory limitation period to toll during that time.²⁴

In his dissent,²⁵ Chief Judge Wachtler, the author of the *Love* opinion, accused the court of rewriting section 70.04.²⁶ He argued that the court's liberal application of the *Love* exception contradicted the express statutory language, and that this exception should be limited to unconstitutional convictions.²⁷ In his concurrence, Judge Bellacosa stated that *Dozier* should be limited to its facts because the majority's broad reading of *Love* "virtually eliminates the phrase '[incarcerated] for any reason' from the statute."²⁸

¹⁸ *Dozier*, 163 A.D.2d at 222-23, 558 N.Y.S.2d at 943-44.

¹⁹ *Dozier*, 78 N.Y.2d at 250, 577 N.E.2d at 1023, 573 N.Y.S.2d at 431.

²⁰ N.Y. PENAL LAW § 70.04(1)(b)(v). The statute provides that the ten year limitation period is tolled during any time defendant was "incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony." *Id.*

²¹ *Dozier*, 78 N.Y.2d at 250-51, 577 N.E.2d at 1023, 573 N.Y.S.2d at 431.

²² 71 N.Y.2d 711, 525 N.E.2d 701, 530 N.Y.S.2d 55 (1988).

²³ *Id.* at 716, 525 N.E.2d at 704, 530 N.Y.S.2d at 58.

²⁴ *Dozier*, 78 N.Y.2d at 250, 577 N.E.2d at 1023, 573 N.Y.S.2d at 431.

²⁵ *Id.* at 252, 577 N.E.2d at 1024, 573 N.Y.S.2d at 432 (Wachtler, C.J., dissenting) (Judge Simons joining in Judge Wachtler's dissent).

²⁶ *Id.* at 254, 577 N.E.2d at 1026, 573 N.Y.S.2d at 434 (Wachtler, C.J., dissenting) ("[I]f the statute is capable of producing harsh results, the Court's role is limited to calling the matter to the Legislature's attention, it may not assume the legislative role and rewrite the statute to satisfy its own sense of justice.").

²⁷ *Id.* at 252-53, 577 N.E.2d at 1025, 573 N.Y.S.2d at 433 (Wachtler, C.J., dissenting).

²⁸ *Id.* at 251, 577 N.E.2d at 1024, 573 N.Y.S.2d at 432 (Bellacosa, J., concurring) (*Love* rationale applies because vacatur restored defendant "to the status of presumed innocent

It appears that by expanding the court-made exception to section 70.04, the *Dozier* court intended to insure that the tolling provision would be applied consistently by the courts.²⁹ It is submitted, however, that the *Dozier* court's rationale may actually work to circumvent the statute's intended purpose.

In its interpretation of the tolling provision, the court failed to consider the objectives underlying the sentencing statute.³⁰ Enhanced sentencing is based on the premise that repeat offenders are responsible for the bulk of society's crime³¹ and removing them from society best protects the public interest.³² The Legislature included the tolling provision in the sentencing statute to require that a felon prove he is able to function lawfully in society for ten full years in order to avoid recidivist treatment.³³ Therefore, even

for all time as to the accusation which produced that incarceration"). Although Judge Bellocosa felt that the result in *Dozier* was justified, he argued that the majority expanded *Love* too far. He reasoned that extending the *Love* exception to cover all invalid convictions "seems to swallow the narrow exception . . . and virtually eliminates the phrase 'for any reason' from the statute." *Id.*

²⁹ *Id.* at 249, 577 N.E.2d at 1023, 573 N.Y.S.2d at 431. The court contended that the Legislature could not have intended that application of the tolling provision in *Penal Law* § 70.04(1)(b)(v) to "extend the 10-year period for an unjustified incarceration . . . depend[s] on the difficult and sometimes blurred differences between a conviction that is invalid but not unconstitutional and one that is invalid and constitutional." *Id.* The court justified its decision by claiming that nothing in the statute, its legislative history or in *Love* supports the State's argument that the words "incarcerated for any reason" be literally construed. *Id.* The court did not consider the basic tenet of statutory construction that the plain meaning controls in the absence of ambiguity. See 1 MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK, STATUTES § 76 (stating this rule and annotating New York cases).

³⁰ See COMMISSION STAFF NOTES ON N.Y. PENAL LAW § 70.00 & § 70.10, reprinted in [1984] N.Y. Consolidated Laws Service vol. 23, at 277. The purpose of New York's repeat offender legislation is to allow courts to sentence recidivists to extended terms. *Id.* at 277. New York's sentencing scheme is designed to serve three basic objectives: (1) deter criminals (2) remove them from the community, and (3) rehabilitate them. *Id.* at 218; see also *Rummel v. Estelle*, 445 U.S. 263 (1980) (primary goal of recidivist statutes is to deter repeaters and isolate them from society for extended periods); Alexis M. Durham III, *Justice in Sentencing: The Role of Prior Record of Criminal Involvement*, 78 J. CRIM. L. & CRIMINOLOGY 614, 618 (1987) (primary justification for enhancement provisions is preservation of public safety); Michael Zebendilos Okpala, *Repeat Offender Statutes—Do They Create a Separate Offense?*, 32 How. L.J. 185, 185 (1989) ("primary purpose of the New York Law was not punishment but protection of the public").

³¹ See NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, *supra* note 1, at 13.

³² See PETERSILIA ET AL., *supra* note 1, at v (to reduce urban crime, focus should be on isolating recidivists who commit majority of crime).

³³ *People v. Bell*, 138 A.D.2d 298, 300, 526 N.Y.S.2d 105, 107 (1st Dep't 1988) (Sullivan, J., dissenting) (second felony offender statute intended to enhance sentence of predicate felon who fails to prove he can function lawfully in society for ten years), *modified*, 73 N.Y.2d 153, 535 N.E.2d 1294, 538 N.Y.S.2d 754 (1989); *People v. Orr*, 57 A.D.2d 578, 578,

if a conviction is later vacated, any time spent under incarceration should still extend the limitation period since it is impossible for the defendant to fulfill the statutory requirement in prison.³⁴

While the *Dozier* court's rationale is arguably justified in the limited case in which an innocent person has been unjustly convicted and confined,³⁵ the holding should not extend beyond these facts in the absence of legislative intent to create such a broad exception.³⁶ Clearly, under *Love*, an exception to the tolling provision exists when the underlying conviction is unconstitutional,³⁷ but

393 N.Y.S.2d 580, 581 (2d Dep't 1977) ("prior felon can properly be required to demonstrate that he can function in society in a law-abiding manner for a 10-year period to avoid being sentenced as a recidivist").

New York courts have readily adopted this principle. For example, one court found the statute did not toll during the time a prisoner was released for a work release program. *See* *People v. Varrecchia*, 141 Misc. 2d 1, 4, 530 N.Y.S.2d 747, 749 (Sup. Ct. Nassau County 1988); *see also* *People v. Abbott*, 113 Misc. 2d 766, 449 N.Y.S.2d 853 (Sup. Ct. N.Y. County 1982), *aff'd*, 178 A.D.2d 281, 577 N.Y.S.2d 370 (1st Dep't 1991). In *Abbott*, a defendant was being sentenced for a crime he committed while in prison. *Id.* at 768, 449 N.Y.S.2d at 856. The court refused to give credit for crime free time in prison, stating that:

It is clearly not irrational to distinguish between a law abiding citizen living outside . . . a penal institution and a prisoner . . . the restrictive nature of incarceration reduces the likelihood that a person will commit a crime. Therefore, it cannot be maintained that a crime free period in prison amounts to a true reflection of an inmate's propensity to lead a crime free existence outside of prison.

Id. at 782-83, 449 N.Y.S.2d at 864.

³⁴ *See Dozier*, 78 N.Y.2d at 252, 577 N.E.2d at 1023, 573 N.Y.S.2d at 432 (Wachtler, C.J., dissenting); *Dozier*, 163 A.D.2d at 223, 558 N.Y.S.2d at 944 (Rubin, J., dissenting).

In the dissenting opinion in *Dozier*, Appellate Division Justice Rubin argued that the legislature did not intend any other exceptions to the tolling provision aside from incarcerations that resulted from unconstitutional convictions. In his opinion, he argued that:

The legislature clearly realized that, while an offender is incarcerated, the opportunity to exhibit anti-social behavior is severely limited. An individual may be a model prisoner but, upon release, prove to be a menace to the community. The tolling provision of the recidivist statute recognizes that a prisoner's conduct while under confinement may reveal little about his capacity to function while at liberty in society.

A careful distinction must be observed between use of a prior conviction as a predicate felony for the purpose of enhancing sentence and the use of a period of incarceration for the purpose of tolling the ten-year statutory period. To constitute a predicate felony, a conviction must be both constitutionally obtained and upheld upon appeal. But to be utilized to toll the statutory period, incarceration may be 'for any reason.'

Id. at 225, 558 N.Y.S.2d at 945 (Rubin, J., dissenting). *But see* *People v. Beard*, 143 A.D.2d 101, 102, 531 N.Y.S.2d 351, 352 (2d Dep't 1988) (time served under an invalid conviction cannot be used to toll limitation period and enhance sentence).

³⁵ *See* *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988) (for sentencing purposes, individual whose conviction has been reversed is innocent unless and until retried).

³⁶ *See supra* notes 29-30 and accompanying text.

³⁷ *See* *People v. Love*, 71 N.Y.2d 711, 525 N.E.2d 701, 530 N.Y.S.2d 55 (1988) (incarcer-

when the conviction is merely invalid, the courts should only prevent tolling when the defendant is effectively penalized for being incarcerated on a wrongful or mistaken conviction.³⁸ It is not the case that in every instance of a vacated judgment the defendant will have been an innocent person, as was *Dozier*.³⁹ Accordingly, it is submitted that *Dozier* should be limited to its facts, allowing courts to promote the broader societal objectives New York's repeat offender law is intended to achieve.

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ation resulting from unconstitutional conviction does not toll statutory period to enhance sentence pursuant to *N.Y. Penal Law* § 70.06); *see also* CPL § 400.21(7)(b) (unconstitutional conviction may not serve as a predicate felony conviction); *United States v. Tucker*, 404 U.S. 443 (1972) (conviction obtained in violation of defendant's constitutional right to counsel may not be used to enhance sentence); *Burgett v. Texas*, 389 U.S. 109 (1967) (same).

³⁸ *See supra* note 34.

³⁹ *See* CPL § 440.10(a)-(h) (indicating grounds for motion to vacate judgment). A conviction may be vacated, for example, when the court lacked jurisdiction over the defendant, CPL 440.10(a), or when prejudicial conduct occurred during the trial, CPL 440.10(f). Suppose the newly discovered evidence in *Dozier's* rape case was not so overwhelming as to cause the State to drop further prosecution. *See supra* note 7 (discussing *Dozier's* rape conviction). It is submitted that if the State pursued a second trial and obtained a valid conviction, it would have been reasonable to apply the tolling provision to the time *Dozier* was imprisoned for the "invalid" conviction.

