

To be argued by
MARK W. ZENO

New York Supreme Court



Appellate Division -- First Department



THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

Bronx County
Ind. No. 6046/02

- against -

ALEXIS ORTA,

Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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

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Respondent, :
-against- :
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Defendant. :
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PRELIMINARY STATEMENT

This brief is submitted in reply to Respondent's Brief (Resp.Brf.), received by this office on February 3, 2010.

ARGUMENT

Respondent concedes:

the Legislature has not expressly stated, by way of the actual legislation or its history, that the resentencing provisions of CPL §440.46 are not available to those parolees reincarcerated after violation their parole.

Resp.Brf. at 13. This admission compels the disposition of this appeal: the plain language of DLRA-3 grants judges the discretion to resentence defendants in custody on indeterminate sentences for class-B drug offenses imposed under the Rockefeller drug laws, and nothing in the statute,

or its legislative history, excludes reincarcerated parole violators from its reach.¹

Respondent invokes a roster of statutory-construction principles which, he contends, provide reason to disregard the legislation's plain language (see, Resp.Brf. at pp 14-17). But he never cites the most elemental rule of construction: "where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning." Tall Trees Const. Corp. v. Zoning Bd. of Appeals of Town of Huntington, 97 N.Y.2d 86, 91 (2001); accord, Statutes §76 ("[w]here words of a statute are free from ambiguity and express plainly, clearly and distinctly the legislative intent, resort may not be had to other means of interpretation"). When "the statute's language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd - is to enforce it according to its terms." United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989) (internal quotations omitted), quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)).

¹The issue on this appeal is not whether reincarcerated parole violators must be resentenced under DLRA-3, but whether such an offender is eligible to be resentenced. In deciding, in its discretion, whether to resentence an eligible defendant who is a parole violator, the court would be entitled to consider, among other things, the fact that defendant was incarcerated for a parole violation at the time the motion was made.

Courts may only look behind the words of a statute when what it states is doubtful or ambiguous:

If ... the terms of a statute are plain and within the scope of legislative power, it declares itself and there is nothing left for interpretation. To permit a court to say that the law must mean something different than the common import of its language would make the judicial superior to the legislative branch of government and practically invest it with lawmaking power.

See, Finger Lakes Racing Ass'n, Inc. v. New York State Racing & Wagering Bd., 45 N.Y.2d 471 (1978), citing, Johnson v. Hudson Riv. R. R. Co., 49 N.Y. 455, 462 (1872).

Here, DLRA-3's reach is perfectly clear:

Any person in the custody of the department of correctional services convicted of a class B [drug] felony ... who is serving an indeterminate sentence with a maximum term of more than three years, may ... apply to be resentenced.

CPL §440.46(1) [emphasis added]; see, People v. Jose Figueroa, NY Ind. 3664/2002, at 26 (Sup. Ct. NY Cty. 2/8/10) (Conviser, J.) ("plain language of the 2009 DLRA resentencing statute ... does not exclude parole violators"); People v. Joseph Rivera, Bronx Ind. 2608/200 (Sup. Ct. Bx Cty. 2/1/10) (Benitez, J.) (reincarcerated parole violator eligible to be resentenced, because "the language of DLRA 3 is clear and unambiguous").

Yet, notwithstanding the statute's perfect clarity, and without ever contending that its plain language is ambiguous or would produce "absurd" results, respondent infers an

eligibility exclusion for parole violators. Respondent marshals two arguments to support his parole-violator exclusion. First, respondent contends that this Court's recent DLRA-1 decision in People v. Rodriguez, 68 A.D.3d 676 (2009), decided the issue. Second, respondent offers his own assessment of the Legislature's intent: "[s]uffice it to say that the legislature did not intend" for parole violators to be eligible for resentencing (Resp.Brf. at 11).

Both contentions are wrong. Neither offers reason to ignore the Legislature's manifestation of its intent in the statute's plain language. Didner v. Keene Corp., 188 A.D.2d 15, 20 (1st Dep't 1993) (a statute's plain language is the best indication of the legislature's intent).

1. Because Rodriguez Involved a Different Statute, It Does Not Provide Binding Precedent on the Issue Presented Here, Nor Should It Be Followed.

We offered three reasons in our opening brief why Rodriguez does not and should not control the disposition of this appeal.² We shall not revisit them here. But we do address respondent's argument that Rodriguez's interpretation

²First, appellant's case is factually distinguishable because, unlike Rodriguez, appellant is not now in custody for a new crime (see pp. 13 to 15). Second, Rodriguez's conclusion that parole violators should not be eligible for DLRA resentencing - while valid for DLRA-1 and DLRA-2 - should not apply to those seeking resentencing under DLRA-3 (see, pp. 15 to 21; see also, People v. Jose Figueroa, supra; People v. Joseph Rivera, supra). Third, Rodriguez was wrongly decided (see pp. 21 to 27).

of the Legislature's intent when it enacted DLRA-1 reflects its intent when it enacted DLRA-3.

Rodriguez offers no insight into the Legislature's intent at the time it drafted DLRA-3. People v. Jose Figueroa, NY Ind. 3664/2002 (Sup. Ct. NY Cty. 2/8/10) (Conviser, J.) (Rodriguez does not apply to parole violators seeking resentencing under DLRA-3); People v. Joseph Rivera, Bronx Ind. 2608/200 (Sup. Ct. Bx Cty. 2/1/10) (Benitez, J.) (same). To the contrary, at the time DLRA-3 was enacted, People v. Gonzalez, 29 A.D.3d 400 (1st Dep't 2006), was the sole appellate authority then existing on the issue. It provided that parole violators were statutorily eligible for resentencing under DLRA-1. Gonzalez found that the trial court had providently exercised its discretion in denying resentencing to a class-A-1 offender who had been released to parole, but then returned to prison three months later for selling drugs. Nowhere did Gonzalez suggest that an offender's return to prison after release on parole rendered him statutorily ineligible. By approving the trial judge's discretionary substantial-justice denial of resentencing, the decision provides that reincarcerated parole violators are eligible to apply for resentencing.

The Legislature is presumed to have been aware of Gonzalez's ruling when it employed identical language in

adopting DLRA-3. See Jensen v. General Elec. Co., 82 N.Y.2d 77, 86 (1993) (“Legislature is . . . presumed to be aware of the decisional law . . . in existence at the time of an enactment.”); Arbegast v. Bd. of Educ., 65 N.Y.2d 161, 169 (1985), Hammelburger v. Foursome Inn Corp., 54 N.Y.2d 580, 588 (1981); First Hudson Capital, LLC v. Seaborn, 54 A.D.3d 251 (1st Dep’t 2008) (“nothing could make the legislative mandate clearer than when a court finds that a statute does not have a . . . provision and the Legislature later amends that statute but still omits such a provision”); McKinney’s Cons. Laws of N.Y., Book 1, Statutes §191, at 353-54.³

In light of Gonzalez, the Legislature’s use of DLRA-1 eligibility language in enacting DLRA-3 is strong evidence that the statute’s framers intended to offer the possibility of resentencing to parole violators, leaving, as the Gonzalez court had, the impact of a parole violation as a discretionary factor informing a court’s substantial-justice analysis. See, People v. Jose Figueroa, NY Ind. 3664/2002, at 33-34, n.9 (Sup. Ct. NY Cty. 2/8/10) (Conviser, J.) (“The Legislature had no reason to equate what it saw as the favorable results of

³The Legislature is also presumed to have been aware of the existing judicial interpretations deeming parole violators ineligible under the 2005 DLRA, see People v. Then, 11 N.Y.3d 527 (2008), and, thus to have purposely jettisoned the eligibility language of that statute in framing the DLRA-3.

discretionary resentencings under the 2004 law with a rule which barred such resentencings after a parole violation because at the time the 2009 DLRA was enacted no such rule existed"). On this basis alone, this Court should conclude that Mr. Orta's status as a parole violator does not render him statutorily ineligible for resentencing.

Thus, Gonzalez - which held parole violators eligible for resentencing - offers a better measure of the Legislative intent when it enacted DLRA-3 than Rodriguez.

2. The Existence of an Early-Parole-Termination Provision in DLRA-1 Provides No Basis for Concluding That the Legislature Intended to Exclude Reincarcerated Parole Violators from Asking for Resentencing.

As if saying it would make it so, respondent matter-of-factly announces that neither the statute's plain language, nor its legislative history - which contain no parole-violator exclusion - reflects the Legislature's true intent. According to respondent, "[s]urely the legislative intent is not furthered by making reincarcerated parole violators eligible for resentencing" (Resp.Brif. at 11, 16). Because respondent's contention is not grounded in the language of the statute, it amounts to nothing more than an argument that, in respondent's opinion, the Legislature "should" have excluded parole violators from asking for resentencing, because such an exclusion would (in his view), be consistent with the overall

intent of DLRA-3. Whether the Legislature "might or should have" enacted such an exclusion is irrelevant to the question of whether, under the statute's plain language, DLRA-3 excludes parole violators from eligibility. See, People v. Utsey, 7 N.Y.3d 398, 404 (2006) (question of whether Legislature "might or should" have made DLRA sentences retroactive is irrelevant to the question of whether the statute's plain language made it so). As respondent concedes, the plain language of the statute does not.

Even if this Court had the power to reform the statute by reading a parole-violator exclusion into it, respondent fails to make a case for why such an exclusion would further the Legislature's intent. The three drug law reform acts are remedial statutes intended to correct the overly harsh punishments fixed by the failed Rockefeller drug sentencing laws. DLRA-1 shifted sentencing from a scheme of indeterminate sentences with lengthy parole terms, to a determinate sentencing scheme with lesser periods of post release supervision. Collectively, the DLRA's drastically reduced sentences for non-violent drug offenders. For example, a first felony drug offender like appellant convicted of a class-B felony previously faced a minimum indeterminate prison sentence of 2 to 6 years. Today, the minimum sentence is one year, and the post-release supervision term cannot exceed 2

years. PL §§ 70.70(2)(a)(i); 70.45(2)(b). Even straight probation is an option, PL §65.00(3)(a)(I), and judicial diversion is the norm. CPL §216.00.

A defendant convicted of third-degree sale today faces an entirely different sentencing landscape than appellant faced when he was convicted in 2003. DLRA-3's resentencing provisions attempt to correct this unfairness. As a remedial statute, it should be "liberally construed to carry out the reforms intended," i.e., reduction of unduly harsh sentences. Statutes §321; see Practice Commentary to §321 ("remedial statutes ... are liberally construed ... to spread their beneficial result as widely as possible").

Yet respondent advocates reading into the statute a broad sentence-reduction exclusion. "It is clear," respondent contends, that because DLRA-1 also granted offenders an early-parole-termination remedy, that must be the exclusive sentence-reduction remedy available to drug offenders once they are released to parole. See, Resp.Brf. at 30, & 14-20, and Executive Law §259-j. Respondent contends that, once a defendant violates parole, regardless of the nature of the violation, resentencing is no longer an option, because it can be "reasonably presumed" that Executive Law §259-j's early-parole-termination remedy is the exclusive sentence reduction

remedy once a defendant is released to parole. Resp.Brf. at 30.

Once again, nothing in CPL §440.46, the Executive Law, or elsewhere, even hints that early parole termination was intended to preempt CPL §440.46's resentencing remedy. To the contrary, the DLRAs offer a range of overlapping remedial measures. For example, with the enactment of DLRA-1, the Legislature provided that felony drug offenders sentenced to indeterminate sentences became eligible to earn an additional one-sixth merit time reduction off their sentences. See L. 2004, ch. 738, § 30; Correction Law §803[1][d]. Offenders become eligible for sentence reductions by participating in Correctional programs, and refraining from prohibited behaviors. Id. The merit-time-sentence-reduction remedy is complementary to the right to seek a lesser sentence from the court. Neither preempts the other.

The same result should obtain with the early-parole-termination remedy, i.e., it is not the exclusive sentence-reduction remedy for those reincarcerated for parole violations. Rather, the early-parole-termination provisions and the CPL §440.46 are complementary remedies. These complementary remedies reveal the Legislature's intention that no non-violent drug offender should be excluded from even the possibility of relief. As a non-violent drug offender who

violates parole (sometimes for nothing more serious than a curfew violation) becomes ineligible for early termination under Executive Law §259, the Legislature intended such an individual to at least be considered for resentencing under CPL §440.46.

With the passage of the three drug law reform acts, the Legislature unmistakably expressed its intent that the sentences imposed under the Rockefeller drug laws were too harsh. See, March 27, 2009 Press Release of Governor Patterson, available at www.state.ny.us/governor/press_0327091_print.html (stating, "I have seen too many lives destroyed by outrageously harsh and ineffective mandatory sentencing laws..."). DLRA-3 allows drug offenders, like appellant, long ago convicted of class-B offenses to ask judges to consider whether to correct their sentence to one more in line with those currently imposed on offenders.

DLRA-3's provisions, which offer all in-custody class-B drug offenders (with no prior disqualifying violent convictions) the right to ask for resentencing, reflect two important legislative policies: First, the Legislature has concluded that all in-custody non-violent⁴ class-B drug

⁴DLRA-3's exclusions are for prior violence. This is true in the resentencing provisions, see, CPL §440.46(5), as well as the judicial diversion provisions, see, CPL §216.00(1), which parallel CPL §440.46's exclusions, adding only prior conviction of a class-A

offenders are entitled to have their Rockefeller drug law sentences reassessed by a judge in light of contemporary sentencing norms. Second, those offenders have a right to sentence review by a judge regardless of the Division of Parole's assessment that they should be denied parole. The inclusion of an in-custody eligibility requirement in DLRA-3 suggests that those offenders that have been denied parole or reincarcerated for parole violations were a particular target for sentence review, since they are the most likely to be in custody on pre-January-2005 class-B convictions. See, People v. Jose Figueroa, NY Ind. 3664/2002 (Sup. Ct. NY Cty. 2/8/10) (Conviser, J.) (noting that because offenders can only become eligible for resentencing more than 4 years after commission of drug offense, and most offenders were serving "comparatively short" sentences, "many offenders may become technically eligible for resentencing only after a parole violation").

We have never contended that appellant's status as a parole violator is irrelevant to the question of whether he should be resentenced, or, if resentenced, what sentence

drug offense. As a statute "is to be construed as a whole" to determine legislative intent, Statutes §97, the consistent emphasis on violence as the exclusion feature reinforces that violence - and not a non-violent drug offender's violation of parole - raises the only eligibility bar.

should be imposed. Rather we contend that appellant's parole-violator status does not render him ineligible for resentencing. As an eligible offender, it is a matter of the sentencing judge's discretion whether to resentence, and if a resentence is offered, what that resentence should be.

Judicial discretion is the centerpiece of New York's statutory sentencing scheme. It should not be disregarded lightly. People v. Day, 73 N.Y.2d 208, 212 (1989) (it is an "overarching principle" that "sentencing courts, in the exercise of their unique judicial function in criminal proceedings, are wisely allocated wide latitude as they are recognized to be in a superior position to dispense proportionate and fair punishment"). As the Court of Appeals has explained, the sentencing court's "superior position," id., reflects both its unsurpassed access to the facts necessary to render a fair determination, and its assigned role as judge of those facts. People v. Farrar, 52 N.Y.2d 302, 305-06 (1981); see, People v. Jose Figueroa, NY Ind. 3664/2002, at 33 (Sup. Ct. NY Cty. 2/8/10) (Conviser, J.) (finding no exclusion for parole violators, because, among other reasons, "the Legislature, in crafting the 2009 DLRA, wrote a detailed statute which gave courts the discretion to make reasoned judgments and created an adjudicatory process the Legislature deemed fair to both prosecutors and criminal

defendants. Given this carefully considered legislative design, it is difficult to understand why the judiciary would impose categorical limitations on its own discretion which the Legislature did not create:).

Because the ultimate decision whether to grant resentencing rests in the discretion of a judge, respondent's concern that offenders on parole might choose to violate just to avail themselves of an opportunity for a reduced sentence is not a serious one. Resp.Br. at 16. A defendant reincarcerated for a parole violation has a right to ask for resentencing, not a right to be resentenced. A court faced with a reincarcerated parole violator's resentence motion has every right to consider defendant's parole status when deciding whether to resentence. Assuming the court grants a parole violator resentencing, the court also has every right to consider the defendant's sentence on the parole violation, in determining an appropriate period of prison time or post-release supervision. To suggest that a defendant might violate parole, thereby subjecting himself to a perhaps-lengthy period of incarceration for that violation, in the hope that, weeks, or months later, a trial judge might reduce his sentence is simply illogical. People v. Jose Figueroa, NY Ind. 3664/2002, at 26-28 (Sup. Ct. NY Cty. 2/8/10) (Conviser, J.) (rejecting

argument that allowing parole violators to seek resentencing would "foster lawlessness").

Respondent's brief, as we have shown, reads largely like a position paper advocating why, in his opinion, reincarcerated parole violators should not be eligible for resentencing. Were the Legislature drafting DLRA-3 now, it might have influence. But under the plain language of the statute, that was actually enacted, reincarcerated parole violators are eligible for resentencing.

Accordingly, this Court should hold that appellant was eligible to be resentenced under the plain language of the statute - which requires only that he be in custody on a class-B drug felony - and return the matter to supreme court for a consideration of the motion's merits.

CONCLUSION

FOR THE AFOREMENTIONED REASONS, SUPREME COURT'S ORDER FINDING APPELLANT INELIGIBLE FOR DLRA-3 RESENTENCING SHOULD BE VACATED, AND THE MATTER RETURNED TO THAT COURT TO CONSIDER THE MOTION'S MERITS.

Respectfully submitted,

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