

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : CRIMINAL TERM : PART 44

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THE PEOPLE OF THE STATE OF NEW YORK

Ind. No. 6210/04

-against-

PROPOSED DECISION
AND ORDER ON
DEFENDANT'S
MOTION FOR
RESENTENCING ON
CLASS B DRUG
FELONY OFFENSE

ENRIQUE ALVAREZ,

Defendant.

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MARCY L. KAHN, J.:

By notice of motion dated February 17, 2010, defendant Enrique Alvarez, convicted in this case of criminal sale of a controlled substance in the third degree (PL §220.39[1]), a class B felony drug offense, has moved pursuant to the Drug Law Reform Act of 2009 (L.2009, ch. 56, Part AAA [DLRA-3], §9 [codified at CPL §440.46]) for an order vacating the sentence originally imposed on him and resentencing him to a determinate term of two years' incarceration followed by a term of one and one-half years of post-release supervision. The People have opposed the motion. For the reasons stated in this decision, the motion is granted to the extent set forth below.

I. FACTUAL AND PROCEDURAL BACKGROUND

On November 11, 2004, at 131st Street and 5th Avenue in Manhattan, an undercover police officer working as part of a buy and bust team, approached defendant and asked for "krills" - a

street term for crack cocaine. Defendant asked the officer how many he wanted and to hand over the money. The officer walked with defendant to 2101 Madison Avenue, a building in the Lincoln Houses complex between 132nd and 133rd Streets, where he handed defendant \$10. Defendant then led the officer into the building at 2101 Madison Avenue and asked him to wait in the lobby.

Defendant then took the elevator to a higher floor, during which time the officer radioed the field team that he was going to make a purchase and described defendant. Defendant then returned to the lobby and handed the officer a twist containing crack cocaine. They both left the building and, at defendant's suggestion, walked to 2114 Fifth Avenue, where defendant lived. After they reached the building, the officer left defendant and radioed the field team again. A detective on the field team arrived promptly and arrested defendant. The officer, peeking from behind a building across the street, confirmed that defendant was the seller.

On December 23, 2004, defendant was arraigned and charged with one count of criminal sale of a controlled substance in the third degree (PL §220.39[1]). On April 28, 2005, after a jury trial before this court, defendant was convicted of one count of criminal sale of a controlled substance in the third degree (PL §220.39[1]), a class B drug felony. On August 30, 2005, defendant was adjudicated a second felony offender and sentenced

by this court to an indeterminate term of four and one-half-to-nine years' imprisonment.

On March 27, 2008, the Appellate Division, First Department unanimously affirmed the judgment of conviction and sentence. (People v. Alvarez, 51 AD3d 167 [1st Dept. 2008]). On September 10, 2008, the Court of Appeals denied leave to appeal the decision of the First Department. (People v. Alvarez, 11 NY3d 785 [2008]). The instant motion has followed.

II. CLASS B DRUG FELONY RESENTENCING UNDER THE DRUG LAW REFORM ACT OF 2009

The Drug Law Reform Act of 2009 (L.2009, ch. 56, Part AAA [DLRA-3], §9 [codified at CPL §440.46][Apr. 7, 2009, effective Oct. 7, 2009]) continues the Legislature's revision of the Rockefeller drug sentencing laws commenced under the Drug Law Reform Act (L. 2004, ch. 738 [DLRA]) and Drug Law Reform Act of 2005 (L.2005, ch. 643, section 1 [DLRA-2]). The statutory changes effected by the DLRA and the DLRA-2 were specifically designed to ameliorate the harsh sentences previously mandated for certain offenders convicted of class A-I and class A-II drug felonies, respectively. The enactment of the DLRA-3 was a continuation of that process, further extending the ameliorative relief to certain class B drug felony offenders.

Under the new law, a defendant is eligible to apply for

resentencing on a prior B felony drug conviction upon meeting the following five criteria: 1) the defendant must be in the custody of the New York State Department of Correctional Services (DOCS); 2) the defendant must stand convicted of a class B drug felony offense under Article 220; 3) the offense for which the defendant was convicted must have been committed before January 13, 2005; 4) the defendant must have received a sentence to an indeterminate term of imprisonment, the maximum term of which exceeded three years; and 5) the defendant must not be currently serving a sentence for, or have a predicate felony conviction for, an "exclusion offense" as defined in CPL §440.46(5).

The applicable procedure for a CPL §440.46 resentencing motion is the same as that provided for in section 23 of the DLRA, which is incorporated by reference in CPL §440.46(3). Upon receiving of CPL §440.46 motion papers, the court "shall offer an opportunity for a hearing" and bring the defendant before it. (DLRA, §23). The court may also hold a hearing to determine a defendant's eligibility for resentencing or to determine any controverted issue of fact. (Id.).

The statutory standard for review of a CPL §440.46 motion is also the same as the DLRA standard. (CPL §400.46[3]; DLRA, §23). Under that standard, an eligible defendant's motion for resentencing must be granted, unless the court "[u]pon its

review of the submissions and the findings of fact made in connection with the application" determines that "substantial justice dictates that the application be denied." (Id.). In reaching its determination, the court "may consider any facts or circumstances relevant to the imposition of a new sentence," including "the institutional record of confinement." (Id.). Moreover, CPL §440.46(3) provides that "the court's consideration of the institutional record of confinement of [an eligible] person shall include but not be limited to such person's participation in or willingness to participate in treatment or other programming while incarcerated and such person's disciplinary history," although inability to participate in treatment or other programming despite the inmate's willingness to do so is not to be considered a negative factor in determining a CPL §440.46 motion. (CPL §440.46[3]).

Upon review of the parties' submissions, and after holding any hearing and making its findings of fact, the court, unless denying the application, "shall . . . specify and inform [the defendant] of the term of determinate sentence of imprisonment it would impose" (Id.). The defendant then may pursue one of three options: (1) appeal the order specifying and informing the defendant of the term of the determinate sentence the court has proposed; (2) proceed with resentencing, reserving the right to appeal; or (3) withdraw the resentencing motion, in

which case the original sentence would remain in effect. If the order denies the resentencing motion, the defendant may appeal that order.

Pursuant to CPL §440.46, a second felony drug offender, such as defendant, who stands convicted of a class B felony after having been convicted of a non-violent felony may be re-sentenced to a determinate sentence ranging from a minimum term of ~~three and one-half~~ ^{two years} years of incarceration to a maximum term of twelve years' incarceration (PL §70.70[3][b][i]), followed by a period of not less than one and one-half years nor more than three years of post-release supervision. (PL §70.45[2][d]).

III. PARTIES' CONTENTIONS

Defendant seeks DLRA-3 resentencing on his class B drug felony conviction in this case. The People oppose resentencing on the ground that substantial justice dictates that defendant be denied resentencing.

With respect to the drug felony conviction in the instant case, defendant contends that he is eligible for resentencing because he is currently in the custody of DOCS; he stands convicted of a class B drug felony offense; the crimes for which he was convicted in this case were committed prior to January 13, 2005; the maximum term of the sentence exceeds three years;

and he is not precluded from resentencing either because he is serving a sentence for or has a predicate felony conviction for an exclusion offense, i.e., either a crime for which he was previously convicted within the preceding ten years, which was either a violent felony offense or any other offense for which a merit time allowance is not available, or a second violent felony offense or a persistent violent felony offense for which defendant has previously been adjudicated.

The People do not contend that defendant fails to meet the five eligibility requirements of the statute, but argue that substantial justice dictates that resentencing be denied. Specifically, the People point to defendant's criminal history; his disciplinary history, which the People describe as "poor;" his history of recidivism; and his "lackadaisical" approach to rehabilitation. (Affirm. of Christopher Edel, Esq. in Support of People's Response to Petitioner's Motion for Resentencing, dated Mar. 29, 2010 [People's Response], at 15-20)).

Defendant replies that the People exaggerate the seriousness of his disciplinary history, ignore his history of mental illness and downplay his successful completion of the ASAT program. He further contends that this court's imposition on him of the minimum applicable sentence at the time of his original sentencing notwithstanding the court's awareness of his prior criminal record indicates that denial of resentencing is

unwarranted now. For these reasons, he argues that substantial justice does not dictate denial of his resentencing application.

IV. ANALYSIS

This court must first address the threshold issue of defendant's eligibility for resentencing under the statute.

A. Eligibility

Defendant satisfies the five eligibility requirement for resentencing: 1) defendant is in the custody of DOCS; 2) he stands convicted of a class B drug felony offense under Article 220; 3) the offense was committed prior to January 13, 2005; 4) defendant's indeterminate sentence of four and one-half-to-nine years' imprisonment contained a maximum term in excess of three years; and 5) defendant is not ineligible due to a conviction of any exclusion offense (CPL §440.46[5][a], [b]).¹

Accordingly, defendant is eligible for DLRA-3 resentencing. The sole remaining issue is whether "substantial justice dictates" denial of defendant's resentencing application.

¹Although defendant's criminal history includes a conviction for attempted criminal possession of a weapon in the third degree (PL §§110/265.02[1]), a class E felony offense, that offense, unlike attempts to commit the offenses codified under PL §§265.02(4) and (5), was not among those defined as violent felony offenses under the statutory scheme in effect on April 30, 1987, the date of defendant's commission of that crime. (See PL former §70.02[1][d]). Therefore, the 1987 felony is not an exclusion offense. (See CPL §440.46[5][a], [b]).

B. Substantial Justice

Section 23 of the DLRA provides that the sole criterion for denial of resentencing for a felony drug conviction to an otherwise eligible defendant is a judicial finding that to do so would violate "substantial justice."

The DLRA provides no specific guidance for determining when "substantial justice dictates" that the application for resentencing be denied. The DLRA places virtually no limits on the information that a court may consider in deciding whether or not to grant a resentencing application. Under section 23, the court "may consider any facts or circumstances relevant to the imposition of a new sentence which are submitted by such person or people, and may . . . consider the institutional record of confinement of such person," but shall not order a new pre-sentence investigation report. (DLRA §23).

In examining whether "substantial justice" dictates denial of a resentencing application, the court should consider the totality of circumstances (People v. Rodriguez, 54 AD3d 600 [1st Dept. 2008]; People v. Jones, 50 AD3d 282, 283 [1st Dept. 2008]) and, in the provident exercise of its discretion, balance the factors weighing favorably and unfavorably toward defendant based upon reliable information. (People v. Batista, 45 AD3d 396 [1st Dept. 2007]). Because the clear intent of the statute as

expressed in its language is to grant resentencing, the statute presumes that resentencing will be offered to any inmate meeting its eligibility requirements. Accordingly, the People have the burden of demonstrating that considerations of "substantial justice" warrant the denial of resentencing in a particular case. (See People v. Beasley, 47 AD3d 639, 640 [2d Dept. 2008][resentencing court erred in placing burden of persuasion on "substantial justice" issue on defendant]).

In making the "substantial justice" determination, this court has previously ruled that a court must examine whether the aggravating factors submitted by the People substantially outweigh any mitigating factors proffered by the defendant. (People v. Orlando Rodriguez, Ind. No. 884/2003, 2006 WL 5110996 [Sup. Ct. NY Co. Mar. 23, 2006], aff'd, 41 AD3d 334 [1st Dept. 2007]). Absent such a showing, resentencing should be granted.

This court identified the following factors relevant to the "substantial justice" determination: the nature and extent of defendant's prior and subsequent criminal history; defendant's age, both at the time of the crime and the time of the resentencing application; defendant's rehabilitative progress while incarcerated, including participation in vocational and educational training and substance abuse programs and completion of any such programs; the defendant's disciplinary record while incarcerated; community and family support upon release from

prison; the defendant's criminal conduct in the instant case; any reliable and accurate evidence of any uncharged crimes; the length of time defendant has been incarcerated; whether or not the defendant was part of an organized criminal enterprise which engaged in violence; whether defendant employed others in the drug-related activities; and whether defendant has accepted responsibility or expressed remorse for his crime. (See People v. Orlando Rodriguez, supra).

C. Findings of Fact

In accordance with the requirements of section 23 of the DLRA as incorporated by reference into CPL §440.46, this court has considered defendant's application (Affirmation of Rosemary Herbert, Esq. dated Feb. 17, 2010 [Def. Mot.]) and exhibits annexed thereto; the People's Response, and exhibits annexed thereto; defendant's reply (Reply Affirmation of Rosemary Herbert, Esq. in Support of Motion for Resentencing Pursuant to CPL §440.46, dated Apr. 12, 2010); and the prior proceedings and court file in the case. This court has reviewed each of these submissions in light of the applicable Rodriguez factors in considering whether "substantial justice" dictates denial of defendant's resentencing application in this case, and has brought the defendant before it for the oral argument on the motion. The findings of this court with respect to each relevant factor are as follow.

1. Criminal History

In the instant case, defendant was involved in a one-time \$10 drug transaction, selling one twist of cocaine. There is no evidence that defendant possessed a stash of cocaine for sale, was involved in any criminal enterprise or organization or possessed any large quantity of drugs. In all, defendant has a record of eight convictions in this state, including the following five felonies: a December 12, 1985 conviction of criminal possession of a controlled substance in the third degree (PL §220.16); a November 4, 1987 conviction of attempted criminal possession of a weapon in the third degree (PL §§110/265.02); a September 18, 1989 conviction of criminal sale of a controlled substance in the fifth degree (PL §220.31); a January 4, 1995 conviction of attempted criminal sale of a controlled substance in the third degree (PL §§110/220.39[1]); and the instant case. His crimes have all been related to his substance abuse history, and none are violent felony offenses.

Defendant also has two misdemeanor convictions in other states, one for shoplifting in Florida in 1981 and another in New Jersey in 1984 for making a terroristic threat by threatening to kill a woman while possessing a handgun. For the latter offense defendant was sentenced to three years' probation.

2. Age

Defendant was 50 years old at the time of the commission of the instant crimes and is 56 years of age presently.

3. Length of Incarceration

Defendant has been incarcerated on these charges for more than four years. His next hearing before the Parole Board is set for April 2011. His conditional release date is February 15, 2011 and his maximum expiration date is February 15, 2014.

4. Rehabilitative Progress

Defendant has completed the alcohol and substance abuse (ASAT) program, in which he received positive evaluations and assessments of "satisfactory." (Def. Mot., Exh. D). He has also taken English as a second language (ESL) classes (Id., Exh. E) and vocational instruction in custodial maintenance. (Id., Exh. E).

5. Inmate Disciplinary History

Defendant's inmate disciplinary history while incarcerated during the past four and one-half years includes four Tier 2 infractions and one Tier 3 infraction. The Tier 3 violation occurred on April 26, 2008, when he received a package and exchanged the contents with another inmate. The contents were sneakers, t-shirts and food, and did not include contraband. Defendant received three months in a special housing unit as punishment for this infraction. He has had no infractions since

December 2008, when he committed a Tier 2 violation by not following a direct order, and has never lost any good time as a result of any infraction throughout his incarceration. (Id., Exh. G).

6. Psychiatric History

As noted above, defendant is a long-term substance abuser with a history of suffering from mental illness. (Def. Mot., Exh. C-E). According to reports of evaluations ordered by this court pursuant to CPL §730.30 to determine defendant's competency for sentencing, defendant was found unfit to proceed and in need of psychiatric treatment. (Def. Mot., Exh. C [Report of Murray A. Gordon, M.D., Qualified Psychiatrist, Bellevue Hospital Center, dated June 6, 2005 (Gordon Report), at 5; Report of Nancy Nichols-Goldstein, Psy.D., Senior Psychologist, Bellevue Hospital Center, dated June 8, 2005 (Goldstein Report), at 4][collectively, the 730 reports]). One of the 730 reports states that defendant was diagnosed with "major depressive disorder, severe with suicidal and psychotic features." (Gordon Report, at 5). The 730 reports further reflect that defendant had attempted suicide by cutting his wrist while at Rikers Island in 2005 (Gordon Report, at 2) and suffered from paranoid thinking as well as severe depression. (Gordon Report, at 3-5; Goldstein Report, at 2). Based upon the recommendations of the 730 reports, this court found that defendant was unfit to

proceed and ordered that he be remanded to the New York State Office of Mental Health (OMH) for treatment, where he remained until August 30, 2005.

Defendant has also had a longstanding problem with substance abuse, which has contributed to his mental illness. For this reason, at his sentencing on August 30, 2005, this court ordered that he be enrolled in the comprehensive alcohol and substance abuse treatment (CASAT) program and that he be provided with services for inmates suffering from mental illness and chemical abuse (MICA). He has apparently done better at managing his mental illness while in state prison.

7. Community and Family Support

Defendant has the support of his sister, Lisa Alvarez, and his aunt, Tracy Alvarez, both of whom live in Freeport, New York. Defendant's mother and two brothers reside in Cuba, from which defendant came involuntarily, on the Mariel boat lift. In addition, the Office of the Appellate Defender would, through its social work unit, provide defendant with a variety of needed social services.

D. Entitlement to Resentencing

In this case, defendant was involved in a single sale of one twist of cocaine in exchange for \$10. There is no evidence that defendant participated in any criminal enterprise or

organization or any activity beyond selling drugs on the street as a low-level seller, no evidence that he possessed a large quantity of drugs, nor that pre-recorded buy money was recovered from him.

Further, defendant's criminal history is attributable to his longstanding problems with substance abuse and mental illness, which he has begun to address by completing the ASAT program. Although defendant's disciplinary record includes four Tier 2 infractions and one Tier 3 infraction, he has committed no disciplinary infractions since December 2008 and has lost no good time during his incarceration in this case. Even assuming that a defendant's disciplinary record during prior incarcerations is among the matters the DLRA §23 contemplates that the court consider in weighing a resentencing application, as the People urge, in this case defendant's infractions in prior incarcerations are so remote in time as not to be relevant.

While defendant's inmate programmatic record does not demonstrate that he is highly motivated to improve himself, he has made some effort to participate in programs while in prison, notably the ESL program and vocational training, and has received positive evaluations. Defendant has received pledges of support from his sister and his aunt and the Office of the Appellate Defender, which has offered him assistance in any

needed social services. On this record, therefore, the People have failed to satisfy their burden of demonstrating that aggravating factors substantially outweigh mitigating considerations sufficiently to overcome the strong presumption in favor of resentencing under the statutory scheme.

Accordingly, the court will offer defendant the opportunity for resentencing to a determinate term with respect to his drug conviction in the instant case. Because defendant has not demonstrated motivation to pursue more than limited involvement in programs that would have benefitted both him and society, he will not be offered the minimum sentence allowed by law, however.

This court proposes to resentence defendant on his class B drug felony conviction to four years' incarceration, followed by two years of post-release supervision.

IV. THE PROPOSED SENTENCE

For the reasons stated, defendant is entitled to be resentedenced on the drug felony conviction in this case.

Accordingly, pursuant to the requirements of section 23 of the DLRA, as incorporated by reference into CPL §440.46, based on the facts of this case as set forth above, this court hereby notifies defendant of its intention to vacate the sentence imposed on him on August 30, 2005 for his conviction for

criminal sale of a controlled substance in the third degree (PL §220.39[1]) and to resentence him, nunc pro tunc to August 30, 2005, in accordance with PL §70.70, to four years' incarceration, followed by two years of post-release supervision.

Upon resentencing, defendant will receive credit for the time he has already served on the sentence. Such re-sentence will be imposed unless defendant Enrique Alvarez advises this court of his intention either to withdraw his application or appeal the court's proposed re-sentence.

V. CONCLUSION

For all of these reasons, defendant's application for resentencing pursuant to CPL §440.46 is granted to the extent that defendant is hereby notified that it is the court's intention that defendant's sentence of four and one-half-to-nine years' imprisonment, previously imposed on August 30, 2005 with respect to defendant's conviction for criminal sale of a controlled substance in the third degree (PL §220.39[1]) will be vacated and he will be re-sentenced nunc pro tunc to August 30, 2005, to four years' incarceration, followed by two years of post-release supervision. The mandatory surcharge, DNA databank fee and crime victim assistance fee imposed on August 30, 2005 will remain unaffected by this decision and order.

The foregoing constitutes the decision and order of the court.



Marcy L. Kahn, J.S.C.

Hon. Marcy Kahn

Dated: New York, New York
June 4, 2010

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : CRIMINAL TERM : PART 44

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THE PEOPLE OF THE STATE OF NEW YORK,

Ind. No. 6210/04

-against-

ENRIQUE ALVAREZ,

Defendant.

FINAL
ORDER ON
DEFENDANT'S
MOTION FOR
RESENTENCING ON
CLASS B DRUG
FELONY OFFENSE

-----X
MARCY L. KAHN, J.:

On April 28, 2005, defendant Enrique Alvarez was convicted after a jury trial of one count of criminal sale of a controlled substance in the third degree (PL §220.39[1]), a class B drug felony. On August 30, 2005, he was sentenced as a second felony offender to an indeterminate term of four and one-half-to-nine years' imprisonment.

Upon defendant's application filed February 17, 2010 for resentencing under the Drug Law Reform Act of 2009 (L.2009, ch. 56, Part AAA [DLRA-3], §9 [codified at CPL §440.46]), this court held a hearing with defendant present on June 4, 2010 pursuant to section 23 of the Drug Law Reform Act of 2004 (L.2004, ch. 738, §§1-41 [DLRA]) and CPL §440.46 to determine whether he qualified to be re-sentenced under PL §70.70.

This court has considered the affirmation of Rosemary Herbert, Esq. and attached exhibits, filed February 17, 2010, in

support of the motion; the Affirmation of Christopher Edel, Esq. in Support of People's Response to Petitioner's Motion for Resentencing and attached exhibits, dated March 29, 2010, in opposition to the motion; the Reply Affirmation of Rosemary Herbert, Esq., dated April 12, 2010, in further support of the motion; and the oral arguments of the parties.

A hearing having been held as indicated, this court granted defendant's application and, for the reasons stated in the court's written proposed decision and order dated June 4, 2010, proposed to resentence defendant to four years' incarceration, followed by two years of post-release supervision.

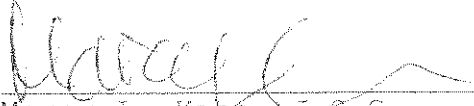
As defendant has not withdrawn his application or indicated a desire to appeal from the court's proposed order, the sentence proposed in this court's written proposed decision and order dated June 4, 2010 will be the sentence of this court. Accordingly, the sentence imposed on August 30, 2005 of four and one-half-to-nine years' imprisonment is vacated and defendant is hereby resentenced, nunc pro tunc to August 30, 2005, to four years' incarceration, followed by two years of post-release supervision. Defendant will receive credit for the time he has already served on the sentence imposed.

The mandatory surcharge, DNA databank fee and crime victims' assistance fee previously imposed on August 30, 2005

are not affected by this order.

The foregoing constitutes the decision and the order of this court.

E N T E R



Marcy L. Kahn, U.S.C.

Dated: New York, New York
June 4, 2010

Hon. Marcy Kahn

PT. 46 JUN 04 10

DATE: JUN 07 2010
I hereby certify that the foregoing
paper is a true copy of the original
thereof, filed in my office



County Clerk and Clerk of
Supreme Court, New York Co.
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