

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CRIMINAL TERM: PART 93

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THE PEOPLE OF THE STATE OF NEW YORK,

— against —

JEFFREY BANKS,

Defendant.

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**Supplemental Decision
On Motion for
Resentencing under
CPL 440.46**

Ind. No. 7170/1995

EDWARD J. MCLAUGHLIN, J.:

This opinion supplements this court’s oral decision on January 15, 2010, denying defendant’s motion for resentencing pursuant to CPL 440.46. In 1996, defendant was convicted of a class B felony drug offense under Penal Law article 220 and sentenced to an indeterminate prison term of from five and one-half to eleven years. He was paroled in 2003 and 2004, but each time violated parole and was incarcerated. Defendant was incarcerated when he filed his motion for resentencing.

This court ruled that defendant was ineligible for resentencing because he had violated parole after being release from prison to parole supervision on the class B drug felony offense. In finding defendant ineligible, this court relied on *People v Rodriguez* (68 AD3d 676 [1st Dept 2009]). This court thereafter granted defendant permission to submit a supplemental memorandum of law about whether *Rodriguez* applies to parole violators seeking resentence under CPL 440.46. This court has received and read that supplemental memorandum of law, and will now explain its reliance on *Rodriguez* in finding the defendant ineligible for resentencing.

In *Rodriguez* (68 AD3d 676), the Appellate Division, First Department, ruled that parole violators are ineligible for resentencing under the Drug Law Reform Act of 2004, the

statute that governs resentencing of defendants convicted of class A-I felony drug offenses (*see* L 2004, ch 738, § 23). The Court concluded that the Legislature did not intend for the resentencing provision of that statute to be applied to defendants who were in the custody of the Department of Correctional Services for a parole violation after having been released from prison to parole supervision (*see People v Rodriguez*, 68 AD3d at 676). As the Court found: “‘Surely the Legislature did not intend for fresh crimes to trigger resentencing opportunities’” (*id.*) (quoting *People v Mills*, 11 NY3d 527, 537 [2008]).

The statutory language of CPL 440.46 establishes that the Legislature intended class B felony drug offenders to share the same custodial eligibility requirement as class A-I felony drug offenders under the Drug Law Reform Act of 2004. Each statute contains language requiring that a defendant be “in the custody of the department of correctional services” to be eligible for resentencing (*compare* L 2004, ch 732, § 23 *and* CPL 440.46 [1]). The use of identical statutory language reveals the Legislature’s intent to treat the two groups of drug offenders identically on that eligibility requirement, notwithstanding that CPL 440.46 creates additional eligibility requirements for class B felony drug offenders that do not exist for A-I felony drug offenders (*see* CPL 440.46 [5]).

Because the Legislature intended to treat the two groups of drug offenders the same on the custodial eligibility requirement, this court concludes, in accordance with *Rodriguez*, that parole violators are not eligible for resentencing under CPL 440.46. It is not for this court to second-guess *Rodriguez* and its finding of legislative intent. Moreover, granting eligibility to parole violators would lead to incongruous and unjust results: parolees who violated parole would be eligible for resentencing but parolees who did not violate parole would not be eligible


for resentencing. The Appellate Division, First Department, thus, interpreted the custodial eligibility requirement to avoid unjustly rewarding parolees for violating parole (*see People v Kramer*, 92 NY2d 529, 539 [1998] [interpreting statute to avoid “absurd and fundamentally unfair results”]).

The First Department’s decision in *People v Gonzalez* (29 AD3d 400 [1st Dept 2006]), which affirmed the denial of motion for resentencing filed by a parole violator under the Drug Law Reform Act of 2004, does not support a different conclusion. In *Gonzalez*, the Court ruled that the trial court had “providently exercised the discretion it possessed” when it denied the defendant’s motion for resentencing (29 AD3d at 400). The procedural posture of the case on appeal was that the trial court had found the defendant to be eligible for resentencing but had ruled, in the exercise of its discretion, that substantial justice dictated that the motion be denied (*compare People v LaFontaine*, 36 AD3d 474, 475 [1st Dept 2007] [ruling that “Supreme Court erred in denying defendant’s resentencing motion on the ground of ineligibility, and we reverse and remand for Supreme Court to exercise its discretion in determining ‘whether substantial justice dictates that the application should be denied’”]). As far as the opinion in *Gonzalez* reveals, the Appellate Division decided that case without ruling on whether the defendant’s status as a parole violator made him ineligible for resentencing. Thus, the decision in *Gonzalez* does not contradict the decision in *Rodriguez*.

This constitutes the supplemental decision and order of this court.

Dated: January 26, 2010

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J.  EDWARD J. McLAUGHLIN