

which the person was previously convicted with the preceding ten years . . . which was: (I) a violent felony offense as defined in section 70.02 of the Penal Law” CPL § 440.46(5)(a).

The defendant has a prior youthful offender adjudication, in 1997, stemming from a guilty plea to second-degree weapon possession. He was sentenced to five years’ probation on that case and was on probation when he committed both of the instant felony drug cases. For the instant crimes, the defendant was originally placed in a residential drug treatment program after his guilty pleas with the promise that the felony pleas would be vacated if he completed drug treatment.¹ He absconded from the treatment program on January 7, 2001 and fled to Pennsylvania, where he committed additional crimes. On September 9, 2003 he pled guilty to possessing stolen property and engaging in a criminal conspiracy to distribute drugs and was sentenced to concurrent terms of imprisonment of nine to eighteen months on each count. The defendant was also convicted on his guilty plea, on February 9, 2004 of attempt to commit a homicide, aggravated assault, aggravated assault with a weapon, and reckless endangerment for an incident on May 3, 2002, in which the defendant shot a firearm at his nephew, who was riding a motorcycle on the street, missed the nephew and instead, hit a seven-year-old girl in the arm. The defendant was sentenced to an indeterminate term of five to ten years for the attempted homicide count and not sentenced on the other counts as they merged with the attempted homicide conviction. The defendant was paroled from this conviction on February 13, 2009 and returned on a warrant to New York, where he was sentenced on March 19, 2009 for the instant class B drug felony convictions.

While incarcerated in Pennsylvania, the defendant incurred three infractions: On May 18, 2003, disobeyed an instruction to return to his cell; on August 16, 2003, he was late to

¹He was to a conditional discharge on a misdemeanor count if successful in treatment.

headcount; and on November 15, 2003, he got into a fight with another inmate, for which he received a sentence of more than one month of “lockin.” During this time, the defendant also took part in educational programs, worked in the kitchen, obtained his GED, and successfully completed a drug and alcohol treatment program and violence prevention program, without any conduct problems. Since entering the New York State prison on April 2, 2009, he has had no disciplinary infractions and has completed an alcohol abuse program and an aggression replacement training program.

The People concede that the defendant is eligible for resentencing under the 2009 DLRA but oppose the motion, citing the defendant’s criminal history and his conduct while incarcerated. Particularly, the People argue that while the Pennsylvania attempted murder conviction does not meet the requirements of a violent felony offense in New York because the Pennsylvania statute contains *mens rea* elements which are excluded from any New York violent felony, The People argue that substantial justice requires that the defendant’s application be denied due to the violent nature of the Pennsylvania offense and the violent nature of the underlying acts of the 1997 youthful offender adjudication, and due to his continued involvement with drugs and drug sales in Pennsylvania after he absconded from drug treatment in New York.

An application for resentencing under CPL § 440.46 shall be granted “unless substantial justice dictates that the application should be denied.” CPL § 440.46 (3), referencing L.2004, Ch. 738 & 23. While courts have discretion with respect to resentencing applications, “case law indicates a presumption in favor of granting a motion for resentencing....” *People v. Beasley*, 47 A.D.3d 639, 641 (3d Dept., 2008). The defendant’s generally good prison record, with only one serious infraction for which he received a period of “lockin,” lack of any infractions over the last two years of incarceration in New York, coupled with his completion of educational and drug,

alcohol and anger management programs militate for resentence. While the court has taken into consideration the defendant's criminal history, including the attempted murder conviction, substantial justice does not dictate the denial of the motion for resentence.

Accordingly, it is the judgment of this Court that the following sentences are appropriate upon resentence, *numc pro tunc*: Under Kings County Indictment Number 8059/1999, conviction of criminal sale of a controlled substance in the third degree, a determinate term of four years to be followed by a term of three years post release supervision. Under Kings County Indictment Number 4850/200, conviction of criminal possession of a controlled substance in the third degree, a determinate sentence of three years to be followed by a term of three years post release supervision. Both sentences are to be imposed to run concurrently.

The defendant may withdraw his application for resentence or appeal this order. Otherwise, the defendant is to appear before the court on July 20, 2011, where he will be afforded a hearing as mandated by law to place any additional matter before the court. In the event that the defendant chooses to rely on the submissions already before the court, this Court shall vacate the defendant's previous sentences and shall resentence him in accordance with the above stated sentences.

This constitutes the decision and order of the court.


HON. ALBERT TOMEI, J.S.C.