

STATE OF NEW YORK  
COUNTY COURT :: BROOME COUNTY

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THE PEOPLE OF THE STATE OF NEW YORK

**DECISION AND ORDER**

-vs-

CLIFTON J. BROOKS,

Ind#03-506

Defendant.  
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**MARTIN E. SMITH, J.**

The above defendant had applied, *pro se* under date of August 27, 2009 for re-sentencing under the newest drug law reform legislation (DLRA) (L. 2009 ch. 56). It appeared to the Court that he might have been in the class of offenders who are now eligible to apply to be re-sentenced under (new) Criminal Procedure Law §440.46. The Court therefore assigned the Broome County Public Defender to represent him in connection with the preparation of and proceedings on a motion pursuant to that section. (CPL §440.46[4].)

By letter-affirmation dated September 22, 2009, the People responded to the defendant's *pro se* application. By notice of motion and affidavit under date of October 13, 2009, counsel for the defendant seeks an order re-sentencing defendant in accordance with Criminal Procedure Law §440.46. The People stand by their submission under date of September 22, 2009. Since an appearance had on December 10, 2009, the People have provided a supplemental response under date of December 21, 2009.

The defendant was sentenced on May 6, 2004 to an indeterminate term of imprisonment of four and one half to nine years in prison upon his conviction by guilty plea to Criminal Sale of a Controlled Substance in the Third Degree under the above indictment as a second felony offender. His predicate felony conviction was for Attempted Criminal Sale of a Controlled Substance in the Third Degree. The defendant alleges that he has been incarcerated since May 2004 on the 2004 conviction and sentence. The defendant provides information regarding his efforts at rehabilitation,

education, work training and his efforts at achieving sobriety during his incarceration, which are commendable. In their initial submission, the People appear to have no dispute with his assertions regarding these efforts, but argue only that because he has already met his parole eligibility date, he is not eligible to be re-sentenced under the provisions of the 2009 DLRA. The Court disagrees.

“Rockefeller Drug Law Reform” (L. 2004 c. 738) had amended the correction law, the criminal procedure law, the penal law and the executive law in relation to controlled substance offenses and indeterminate sentences, and it had also repealed certain provisions of the correction law, the criminal procedure law and the penal law in relation to controlled substance offenses and indeterminate sentences. The purpose of the legislation was to reform the sentencing structure of New York’s drug laws to reduce prison terms for non-violent drug offenders, and to provide retroactive sentencing relief and make related drug law sentencing improvements. The legislation made provisions for people then currently serving state prison sentences for class A1 drug offenses to apply to be re-sentenced.

In 2005, the Legislature addressed drug crime sentencing reform again. That Drug Sentencing Reform Act provided for sentencing relief for A-II felons (L. 2005 c. 643). The 2005 legislation contained limitations regarding eligibility. The goal of that legislation had been to reach those with the lengthiest sentences, who are not near to being released. Thus, in order to be eligible to be considered for re-sentencing under the 2005 legislation, the AII offender must meet certain eligibility criteria. He must, be “more than twelve months from being an ‘eligible inmate’ as that term is defined in subdivision 2 of section 851 of the correction law [Temporary Release]”; and meet[s] the eligibility requirements of paragraph [d] of subdivision 1 of section 803 of the correction law [Merit Time]”.

In *People v. Mills*, 11 NY3d 527, the court of appeals held that “in order to qualify for re-sentencing . . . offenders must not be eligible for parole within three years of their re-sentencing

applications \* \* \* The statutory text is simply not amenable to any other interpretation.” The *Mills* decision was interpreting L.2005, ch 643, §1, the provision of that DLRA that requires that an inmate be “more than twelve months from being an eligible inmate as that term is defined in subdivision 2 of section 851 of the correction law” (to apply for re-sentencing). “Eligible inmate” means an inmate who will become eligible for release on parole or who will become eligible for release on parole or conditional release within two years . . .” Reading the provisions together, as they must be, the court of appeals reached the conclusion stated above: that offenders must not be eligible for parole within three years of their re-sentencing applications.

The *Mills* decision is consistent with how Broome County Court has been determining applications for re-sentencing. See, for example, *People v. Damian Brown*, September 15, 2006; *People v. Terrence Hill*, January 17, 2006; *People v. Richard Salvatierra*, February 16, 2006. See also, *People v. Raymond Powierski*, Cortland County Court, September 26, 2006. These cases were all dealing with class AII offenders.<sup>1</sup> And see, also, *People v. Bautista*, 26 AD3d 230, appeal dismissed, 7 NY3d 838. The cases cited by the People in their response to this motion all involve class AII offenders and treat the 2005 legislation.

In 2009, the Legislature again took up the subject of drug law reform, and under L. 2009 ch. 56 more changes were made to the Penal Law, Criminal Procedure Law and Correction Law, particularly as relates to sentencing for drug crimes defined in Penal Law articles 220 and 221. Additionally, certain defendants who had been convicted of class B felonies could now seek redress under the new laws, which they could not do under the 2004 or 2005 reform acts.

CPL §440.46[3] states, “[t]he provisions of section twenty-three of chapter seven hundred

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<sup>1</sup>To the extent *People v. Rusty Atkinson*, Broome County Court, November 12, 2009, is inconsistent with the conclusion in the instant decision regarding ‘eligibility,’ it should not be followed. See, *People v. Rusty Atkinson*, Broome County Court, November 19, 2009.

thirty-eight of the laws of two thousand four shall govern the proceedings on and determination of a motion brought pursuant to this section . . .” There is no reference, no incorporation by reference, to the 2005 legislation. Thus, this Court finds the eligibility criteria of the 2005 legislation does not apply to inmates whose highest conviction is for a class B felony drug offense, and who seek re-sentencing under CPL §440.46. The only limitation contained in CPL §440.46 is as set forth in subdivision [5] of that section:

“5. The provisions of this section shall not apply to any person who is serving a sentence on a conviction for or has a predicate felony conviction for an exclusion offense. For purposes of this subdivision, an “exclusion offense” is:

(a) a crime for which the person was previously convicted within the preceding ten years, excluding any time during which the offender was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony, which was: (i) a violent felony offense as defined in section 70.02 of the penal law; or (ii) any other offense for which a merit time allowance is not available pursuant to subparagraph (ii) of paragraph (d) of subdivision one of section eight hundred three of the correction law; or

(b) a second violent felony offense pursuant to section 70.04 of the penal law or a persistent violent felony offense pursuant to section 70.08 of the penal law for which the person has previously been adjudicated.”

Under no reading of CPL §440.46 do the ‘eligibility’ limitations of the 2005 legislation apply to the class B offenders seeking re-sentencing under that section.

Turning to the merits of Mr. Brooks’ application, the People now, in their supplemental submission, urge that substantial justice dictates that the application should be denied. The Court disagrees.

The Court finds that the defendant has made efforts at rehabilitation, education, and work training and has made efforts at achieving sobriety during his incarceration. It finds these efforts have been commendable. The Court also finds that the defendant had received several Tier II and Tier III “tickets” while in prison, but that none of them were of egregious conduct. These tickets notwithstanding, the defendant has been released to parole supervision.

The Court had advised the defendant at an appearance on December 10, 2009 that it was its

intention to re-sentence him to a determinate term of four years imprisonment followed by three years of post-release supervision. Given the facts as set forth above, the Court concludes that this proposed sentence is reasonable and appropriate under the circumstances. It recognizes the harshness of the earlier imposed sentence under the former sentencing structure, yet recognizes the need to continue to provide some measure of supervision and stability for the defendant's benefit (and that of the community) given his history of substance abuse, and the burden this has been to him and the community.

Accordingly, the Court hereby vacates the sentence originally imposed, and imposes a sentence of a determinate term of four years in a New York State Correctional Facility followed by three years of post-release supervision.

The Court Clerk is hereby ordered to prepare a new Sentence and Commitment, noting in the "remarks" section of it the following language:

Defendant's supervision by the Division of Parole is hereby recommenced pursuant to CPL §430.20[4][b].

The Court Clerk is further ordered to provide a certified copy of the new Sentence and Commitment to:

Richard de Simone, Esq.  
Office of Sentencing Review  
NYS Department of Corrections  
The Harriman State Campus--Building 2  
1220 Washington Avenue  
Albany, NY 12226-2050

It is so ordered.

DATED: January 8, 2010  
Binghamton, NY

  
MARTIN E. SMITH  
Broome County Court Judge