

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART C

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THE PEOPLE OF THE STATE OF NEW YORK

Indictment Number 5796/ 2000

-against-

VICTOR CALDERON,

Defendant.

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PRESENT: HON. JOHN P. COLLINS

Defendant, after his conviction for one count of criminal sale of a controlled substance in the third degree (Penal Law § 220.39(1)), seeks, by motion, re-sentencing in this matter pursuant to Penal Law § 440.46, Drug Law Reform Act of 2009.

Defendant's conviction stems from an arrest on December 1, 2000. Defendant was arrested for selling an undercover officer a quantity of cocaine.

On March 15, 2001, the defendant pled guilty on Indictment Number 5796/2000. The plea to one count of criminal sale of a controlled substance in the third degree (Penal Law § 220.39(1)).

As part of the agreed upon sentence, defendant was placed under the supervision Fortune Society and ordered to enter and complete a six to twelve month out-patient drug treatment program. If petitioner successfully completed the terms and conditions of his plea, he would be allowed to withdraw his felony plea and re-enter a plea to a misdemeanor, with the final sentence of time served. If petitioner failed to complete any of the terms of the plea, including the drug treatment program, petitioner faced an alternative jail sentence of fifty-four months to nine years incarceration. On that date petitioner was released into the custody of the Fortune Society to begin treatment.

On May 3, 2001 the court received information from Fortune Society that the petitioner violated the terms and conditions of the plea and a warrant was issued for his arrest. On May 6, 2001 the petitioner was returned on the warrant. The court considered giving the petitioner a second opportunity and awaited the availability of a bed at a treatment facility.

On October 16, the court granted petitioner a second opportunity to complete the terms and conditions of the plea.

On October 22, 2001, petitioner relapsed on crack cocaine and Fortune Society, without informing the Office of the District Attorney or the Court, gave petitioner a third opportunity to complete the terms of the program and plea agreement. On November 8, 2001, petitioner failed to show up for placement at his residential drug treatment program.

On November 15, 2001, petitioner was re-arrested (2001BX061374) for Criminal Possession of a Controlled Substance in the Seventh Degree. On December 11, 2001, petitioner warranted on this misdemeanor case.

On December 13, 2001, petitioner was re-arrested in New York County (2001NY091236) for Criminal Trespass in the Second Degree.

Based upon his case history, the length of time petitioner absented himself from treatment and the circumstances of his involuntary return a fourth opportunity to complete a drug treatment program was denied.

On September 17, 2002, Petitioner was sentenced to his jail alternative of fifty-four months to nine years incarceration.

Defendant, now seeks, by motion, re-sentencing pursuant to Penal Law ("PL") § 440.46,

Drug Law Reform Act of 2009.

The people oppose the motion.

The Court has carefully reviewed the plea minutes along with all papers submitted and makes the following findings of fact and conclusions of law.

This case represented petitioner's third felony conviction in the State of New York at the time of his plea and sentence.

On December 12, 1979, petitioner was convicted of Attempted Sodomy in the First Degree.

On September 11, 1996, petitioner was convicted of Attempted Criminal Possession of Stolen Property in the Third Degree.

In addition, petitioner accumulated 13 misdemeanor convictions prior to his plea and sentence on this matter.

A review of the Petitioner's institutional records indicates he has forty-nine disciplinary incidents during his incarceration.

The petitioner was given the benefit of a very favorable plea negotiation. As stated previously it was agreed, as part of the agreed upon sentence, defendant was placed under the supervision Fortune Society and ordered to enter and complete a six to twelve month out-patient drug treatment program. If petitioner successfully completed the terms and conditions of his plea, he would be allowed to withdraw his felony plea and re-enter a plea to a misdemeanor, with the final sentence of time served. If petitioner failed to complete any of the terms of the plea, including the drug treatment program, petitioner faced an alternative jail sentence of fifty-four months to nine years incarceration. The petitioner was given three separate opportunities to

avail himself of the benefit of the plea. He failed.

The purpose of the 2009 Drug Law Reform Act of 2009, was to dramatically change the “Rockefeller” Drug Laws and provide for substantial amelioration of their harshest provisions.

The use of diversion to drug treatment is a significant component of this legislation. It is also clear, without a defendant’s facing a “real and substantial” alternative incarceratory sentence, their placement in a diversion alternative program undermined and much less effective.

In exercising it’s discretion the court finds, the Reform Legislation and CPL §440.46, was not intended to apply in a case presenting these facts and circumstances. The notion that this court should exercise it’s discretion in granting relief to this petitioner seems to this court to be diametrically opposed to purpose of this statute.

This petitioner was released to a diversion drug treatment program and was given multiple opportunities to avoid incarceration. The petitioner continued to violate the conditions of the plea and ultimately receive the promised alternative sentence. In addition to petitioner’s failure to engage in treatment on three separate occasions the court considers the petitioner’s substantial prior criminal record and subsequent misdemeanor convictions.

“Clearly the Legislature did not intend to foster lawlessness when it enacted laws to address the perceived harsh sentencing consequences of the 1973 Rockefeller Drug Laws.”(See People v Bagby, 11Misc 3d 882).

Clearly the Legislature wishes to see the new diversion legislation succeed.

The court finds that the promised alternative sentence imposed on September 17, 2002, was

not unduly harsh and does not require modification by the court.

In addition, the motion is denied in its entirety because defendant has failed to allege, or sufficiently demonstrate, the required showing that the sentence imposed in this matter is “unauthorized, illegally imposed or otherwise invalid as a matter of law.”(CPL § 440.20[1]).

Defendant’s application in all other respects is denied.

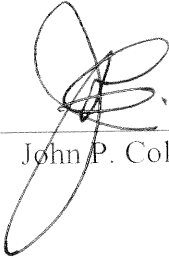
The Clerk of the Court is directed to forward a copy of this decision to the defendant at his current place of confinement.

This constitutes the decision and order of this Court.

Dated:

Jan. 13, 2010

Bronx, New York



John P. Collins, J.S.C.