

People v Cephas
2011 NY Slip Op 09198
Decided on December 20, 2011
Appellate Division, First Department
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Decided on December 20, 2011
Saxe, J.P., Catterson, Moskowitz, Acosta, Renwick, JJ.

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[*1]The People of the State of New York, Respondent,

v

Herbert Cephas, Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Risa Gerson of counsel), for appellant.
Cyrus R. Vance, Jr., District Attorney, New York (Caleb Kruckenberg), for respondent.

Order, Supreme Court, New York County (Lewis Bart Stone, J.), entered on or about May 19, 2011, which denied defendant's CPL 440.46 motion for resentencing, unanimously reversed, as a matter of discretion in the interest of justice, the motion granted, the order replaced by an order specifying and informing defendant of a proposed sentence of 12 years plus 3 years' postrelease supervision, and the matter remanded for further proceedings.

Substantial justice does not dictate denial of resentencing, and we exercise our discretion to specify an appropriate resentence (*see e.g. People v Milton*, 86 AD3d 478 [2011]). It is undisputed that during defendant's imprisonment on the underlying 2003 conviction, he has been an exemplary prisoner, and has completed several work programs and substance abuse treatment programs.

The court denied the motion primarily on the basis of defendant's long criminal history. The court noted that defendant had completed programs during his prior incarcerations, yet had still relapsed into drugs and a life of crime.

However, in addition to completing the work and substance abuse programs, defendant has received highly favorable evaluations from corrections officials, including a social worker. Moreover, defendant has been accepted into a residential treatment program with a two-year commitment, providing a level of community drug treatment support that he has never had before. Under the circumstances presented, the positive factors cited by defendant outweighed the extent of his criminal history.

The People claim that the court erred, in several respects, when it found defendant statutorily eligible for resentencing. However, the determination of eligibility did not "adversely affect[] the appellant" (CPL 470.15[1]). Therefore, the People's arguments concerning eligibility are not cognizable on this appeal (*see People v Concepcion*, 17 NY3d 192 [2011]; *People v LaFontaine*, 92 NY2d 470 [1998]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST
DEPARTMENT. [*2]

ENTERED: DECEMBER 20, 2011

CLERK