

Supreme Court of the State of New York
Bronx County, Criminal Division: Part BxTC

THE PEOPLE OF THE STATE OF NEW YORK

-against-

Indictments #781/2003, 2845/2003

STEVE CUELLO,

DECISION

Petitioner.

Hon. Laura Safer Espinoza:

The Petitioner moves pursuant to CPL 440.46 for resentencing under the 2009 Drug Law Reform Act ("DLRA"). For the reasons set forth below, his Petition is denied.

The Petitioner pled guilty on February 10, 2003 to PL 220.39, Criminal Sale of a Controlled Substance in the Third Degree, and was mandated to attend a court-monitored treatment program. In exchange for his plea, the Court promised that upon successful completion of the court's mandate his felony conviction would be reduced to a misdemeanor or dismissed, but that an indeterminate sentence of two to six years incarceration would be imposed if he failed to complete his mandate.

The Petitioner was placed in an out-patient program where he tested positive for illegal substances for two months and had sporadic attendance. He was transferred to a residential program in April, 2003 and was compliant until he left the program against clinical advice on June 4. A warrant was issued on June 6, 2003 and he was returned to court on June 9th with a new felony arrest. On August 1, 2003 pled to PL 220.39, Criminal Sale of a Controlled Substance in the Third Degree. On November 19, 2003, he was sentenced to an indeterminate sentence of two to six years incarceration to run concurrent on both indictments.

He was released to the Division of Parole on May 23, 2005. He was re-incarcerated from January 10, 2008 to December 19, 2008 for violating the conditions of his parole. He was again release to the Division of Parole until he was re-incarcerated May 20, 2009 for violating the conditions of his parole. He is presently housed at Ulster Correctional Facility with a conditional release date of March 14, 2010 and a maximum expiration date of August 22, 2010. He has had two Tier 2 infractions while incarcerated..

The People have opposed this motion on the grounds that the Petitioner is ineligible because “the Petitioner has finished his terms of incarceration.” The Petitioner contends that he falls within the clear language of CPL 440.46 as a person who has been convicted of a class B drug offense with a maximum term of sentence in excess of three years who has not committed an exclusion offence in the past ten years and is “presently in the custody of correctional services.” The statute makes no mention of parole violators as an excludable class and a person returned to prison on a parole violation is “in custody of the DOCS” on his original conviction. The Petitioner argues, therefore, that the fact that a person has been returned to DOCS custody on a parole violation should not affect his eligibility for resentencing because the 2009 DLRA (in contrast to the 2005 DLRA) does not define resentencing eligibility in terms of proximity to parole eligibility. Since the cases relied on by the People apply the eligibility requirements of the 2005 DLRA – specifically the requirement that the defendant not be less than three years from eligibility from parole – he argues that these cases are not dispositive of eligibility under the 2009 DLRA.

In applying the 2005 DLRA, appellate courts consistently held that defendants released to parole supervision after serving part of a sentence and re-incarcerated for parole violations – and thus unable to meet the parole eligibility requirement --were not within the group of “eligible

inmates” contemplated by the statute. See, e.g., People v. Rodriguez, 61 AD3d 1004, (2d Dept 2009); People v. Bustamante, 62 AD3d 1209 (3d Dept 2009); People v. Hernandez, 46 AD3d 1425 (4th Dep’t 2007); People v. Dunham, 46 A.D.3d 1416 (4th Dep’t 2004); People v. Cavallaro, 46 A.D.3d 1024 (3d Dep’t 2007); People v. Smith, 45 AD3d 1418 (4th Dep’t 2007); People v. McCloud, 38 AD3 1056 (3d Dep’t 2007); People v. Bautista, 26 AD3d 230 (1st Dep’t 2006). The Court of Appeals denied resentencing on similar facts in People v. Then, 11 NY 3d 527 (2008). Mr. Then had been paroled on an A-II felony, rearrested and resentenced on a new conviction and was serving a six month time assessment for a violation of parole when he made his motion for resentencing on his first conviction. Since he would be eligible for parole again in two years, he clearly could not meet the parole eligibility prong.

Despite the differences in eligibility requirements under the 2005 and 2009 DLRA’s, however, the public policy considerations addressed in People v. Then are applicable to both laws. The Court of Appeals did not confine itself to examining the “three year” prong but made strong statements against allowing otherwise ineligible defendants to benefit from the amelioration contemplated by drug reform laws by violating the conditions of their parole. In refusing to find that a new conviction and parole violation “revived” Then’s eligibility for resentencing on his original conviction, the Court noted that to do so “would create illogical, if not perverse, results.” supra, at 536. Accord, People v. Bagby, 11 Misc 3d 882 (S. Ct Westchester Co, 2006) (“if followed to its natural conclusion, Defendant’s assertion that parolees incarcerated on a parole violation are eligible for resentencing would result in parolees intentionally violating their parole so that they may reap the benefits of the new sentencing, an illogical result not intended by the Legislature.”) Indeed, the Court of Appeals specifically noted that “if Then had *not* broken the law while on parole, he would clearly be ineligible for

resentencing on his convictions under the 2005 DLRA (*he would not have been in DOCS's custody for one thing*)." supra, at 536 (emphasis added). This language refutes a narrower reading of People v. Then, specifically that, but for the parole eligibility requirement, Then would have become an eligible inmate when he was reincarcerated on his parole violation.

A more logical interpretation of People v. Then is that once a defendant becomes ineligible for DLRA resentencing, he or she cannot "revive" his eligibility by violating the law. In People v. Muniz, 61 AD3d 1004 (1st Dep't 2009), where, unlike the 2005 DLRA cases discussed above, the defendant's actual eligibility date for parole was well beyond the three-year limit,¹ the First Department quoted the Court of Appeals in warning against expanding DLRA eligibility:

Although as a practical matter defendant will not be considered for parole until 2020, when he is due to complete his federal sentence, that fact does not expand his right to be resentenced. It is undisputed that without the federal incarceration defendant would have been ineligible for resentencing because he would not have been more than three years from parole eligibility. The Legislature did not intend the "illogical, if not perverse" result of granting defendant the benefit of resentencing consideration for which he would otherwise be ineligible, merely because he committed additional crimes .

Id.

More directly on point, the First Department recently applied this same reasoning in denying a Petition for resentencing under the 2004 DLRA which parallels the 2009 DLRA in that it does not include the "parole eligibility" prong. People v. Rodriguez, 2009 WL 5125286, Slip

¹ While serving a sentence of 6 years to life, Muniz had become eligible for parole in 1989, at which time he was transferred to federal custody to serve a federal sentence. The court held that for the purposes of 2005 DLRA eligibility, he was neither in the custody of the DOCS nor eligible for parole within more than three years.

Op. 09717 (Dec 29, 2009).² The Court opined, again quoting People v. Then, that “[s]urely the Legislature did not intend fresh crimes to trigger resentencing opportunities.” Thus the Court held that the 2004 “Act ‘was not intended to apply to those offenders who have served their term of imprisonment, have been released from prison to parole supervision, and whose parole is then violated, with a resulting period of incarceration’ (People v. Bagley, 11 Misc. 3 882, 887).” This decision clearly indicates that the appellate courts will not uphold an interpretation that privileges parole violators over those who remain compliant.

Accordingly, this Court finds that once a defendant is no longer “in custody” due to his release on parole, he cannot “revive” his eligibility for resentencing no matter how many times he may be returned to the custody of the Department of Corrections. To hold otherwise would be to achieve the perverse outcome of which the Court of Appeals warned: a parolee released prior to filing a motion for resentencing is ineligible if he remains a law-abiding member of the community but is transformed into an eligible Petitioner if he violates the terms of his parole

In the instant case, when the Petitioner was released to the Division of Parole in 2005, years prior to the effective date of the new legislation, he was no longer “in custody” and ineligible for relief under 2009 DLRA. Had he complied with the conditions of parole and

² The Court is aware of the holding in People v. Gonzalez, 29 A.D.3d 400 (1st Dept. 2006) where the lower court had found that a defendant paroled prior to the eligibility date of the 2004 DLRA and reincarcerated on a parole violation at the time of filing his Petition for resentencing, was an eligible defendant. The First Department did not address the issue of eligibility but held the trial court had “*providently exercised the degree of discretion it possessed*” in denying Mr. Gonzalez’s resentencing application on the grounds that “substantial justice” weighed in favor of such a denial. Id. at 400. While this decision seems to suggest that the lower court’s ruling on eligibility was correct, given its statement that it “possessed” the discretion to decide if substantial justice warranted granting or denying the motion, the First Department’s holding in Rodriguez refutes such a reading. Similarly, the Court is not persuaded by decisions relied upon by the Petitioner and issued by courts of concurrent jurisdiction in motions brought pursuant to 2009 DLRA.

remained at liberty, counsel would concede that petitioner would have remained outside of the class of inmates contemplated by the statute. Based on the foregoing discussion, this Court rejects an interpretation of the statute that would allow Petitioner to “revive” his eligibility solely because he received a second violation for which he was still incarcerated when he filed the instant petition, thereby rewarding him for not complying with the terms of his parole by reducing the amount of time he would remain under state supervision.

Moreover, were the Court to have found the Petitioner “eligible” for resentencing, the facts in this case do not support granting his Petition. The Petitioner had the opportunity to complete treatment and have his felony charge dismissed or reduced, but instead violated his program requirements within a few months after he entered his plea. Even after being given a second chance at treatment, he left the treatment facility and, while at liberty, was arrested on a new felony charge. Despite a jail alternative of two to six years on his original indictment, he had the benefit of a plea agreement allowing him to receive a concurrent sentence on his new indictment. After his release, he twice violated the conditions of his parole and received substantial time assessments. The fact that he is now incarcerated is solely due to his inability to remain law-abiding upon being released twice back into the community under parole supervision. Accordingly, this Court finds that “substantial justice” weighs against granting the Petitioner’s application.

Dated: _____

Bronx, New York



Hon. Laura Safer Espinoza