
THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER

-vs-

CLEON D'OLIVEIRA,

Ind#98-708

Defendant.

MARTIN E. SMITH, J.

On or about June 11, 2003, defendant was sentenced to an indeterminate term of incarceration with a minimum of twelve years and a maximum of twenty-four years upon his plea of guilty to Criminal Possession of a Controlled Substance in the Third Degree. Defendant now moves for re-sentencing pursuant to Criminal Procedure Law §440.46. Conceding the defendant appears to be eligible for re-sentencing, the People argue that substantial justice dictates that the application should be denied. They point to the underlying conduct of the crime committed (while on probation), the defendant's failure to return for sentencing when granted a "furlough" before sentence had been imposed, and his involvement in further criminal conduct before being taken back into custody. They urge that the defendant's conduct in the case demonstrated the sentence imposed had been appropriate under the circumstances. They also point out that while in prison, he has received two Tier III violations and several Tier II violations.

The defendant does qualify for re-sentencing pursuant to CPL §440.46. Upon review of the arguments set forth by the People as well as the defendant's submissions that included this defendant's institutional record, together with the original pre-sentence investigation report, this Court grants defendant's application for re-sentencing.

While the Court acknowledges those factors pointed out by the district attorney, the Court

is also mindful of defendant's efforts while in prison. Upon entering prison in 2003, he began preparing for his eventual return to the community. He completed phase I of the transitional services program in 2003; he began acquiring work skills; he successfully completed RSAT (residential substance abuse treatment) in 2005; he received his General Equivalency Diploma in 2007. He enrolled in a food service program in 2007, and is now a cook.

When the Court is called upon to make a decision such as this, it is always acutely aware of the risks-both *to* the community and *for* the defendant-that his release or early release portend. Accepting, as it does, Mr. D'Oliveira's more recent acknowledgments¹ of his drug and alcohol addiction, the Court recognizes that regardless of his efforts and successes while in prison, Mr. D'Oliveira will face tremendous stressors in the community, despite his best efforts. Indeed, Mr. D'Oliveira himself, seems to understand the relationship of such stressors to addictive behavior. In a letter to the Court of February 26, 2003 he told the Court that he had begun a Narcotics Anonymous and Alcoholics Anonymous program while in Florida (where he had fled to in 1999). He relapsed, he said, in 2002, and again broke the law. The Court is naturally concerned not only with Mr. D'Oliveira's sincerity and stated intent to remain 'clean and sober' upon release, but also with the reality of his life, as he has made it,² and also the harsh reality of the job and housing market. The latter are formidable hurdles for everyone, and will be higher yet for Mr. D'Oliveira.

¹In his interviews for the 1996 and 1996 pre-sentence investigation reports, Mr. D'Oliveira denied any drug or alcohol abuse or addiction. In the 2003 PSI interview, he said he was cross-addicted. At sentencing, the People discredited his claims of addiction, arguing he was a drug dealer, not a drug user. The Court itself was not convinced that Mr. D'Oliveira was being truthful about his addictions. See, Sentencing minutes, June 11, 2003.

²For example, according to the 2003 pre-sentence investigation report, Mr. D'Oliveira has seven children, then ranging in ages from six months old to ten years old.

Addicts in recovery know only too well that the stressors that non-addicts address with healthy and non-criminal strategies are often too overwhelming for addicts to face without relapsing, falling back into old-and criminal-behaviors.

The newest legislative reforms, however, clearly contemplate acknowledging the harshness of the 'old' sentencing parameters, and also recognize the connection between substance addiction and criminal drug dealing. With that in mind, the Court seeks to impose a sentence that still recognizes that part of the 'enhanced' sentence Mr. D'Oliveira had received was due to the consequences of his own behavior-fleeing, breaking his promise. He has asserted to the Court in various correspondences, that he had recognized this fact. Thus, while the Court can appreciate that addiction drove his behavior in 1999-when he failed to keep his part of the bargain by absconding-it believes that for therapeutic reasons more so than punitive-Mr. D'Oliveira cannot be rewarded for that behavior.

Based upon the foregoing, upon re-sentencing, this Court would impose a determinate sentence of nine years, to be followed by three years post release supervision pursuant to Penal Law §§60.04 and 70.70.

This matter will be scheduled for re-sentencing, March 12, 2010, unless the defendant appeals this Decision and Order or withdraws the present application.

This constitutes the Decision and Order of the Court.

It is so ordered.

DATED: February 10, 2010
Binghamton, NY


MARTIN E. SMITH
Broome County Court Judge