

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 23

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THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER
SCI.# 2606/03

- against -

DAVID FIGUEROA,

Defendant.

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Laura A. Ward, J.:

On May 6, 2003, the defendant, as part of a cooperation agreement, waived prosecution by indictment and agreed to be prosecuted by way of a Superior Court Information ("S.C.I."). On the same day, the defendant pleaded guilty to the sole count in the S.C.I., criminal sale of a controlled substance in the third degree, in violation of Penal Law ("P.L.") §220.39. Neither the court nor the prosecution promised the defendant that he would receive a particular sentence. The defendant was also adjudicated a second felony offender. On September 24, 2004, as a result of failing to cooperate, the defendant was sentenced to a period of incarceration of eight to sixteen years.

On November 13, 2009, the defendant filed this motion, pursuant to Criminal Procedure Law ("C.P.L.") § 440.46, to be re-sentenced. On November 20, 2009, the defendant was released from prison, The defendant is currently on parole.

C.P.L. § 440.46(1) provides in pertinent part, that

[a]ny person in the custody of the department of correctional services convicted of a class B felony offense defined in article two hundred twenty of the penal law which was committed prior to January thirteenth, two thousand five, who is serving an indeterminate sentence with a maximum term of more than three years, may, except as provided in subdivision five of this section, upon notice to the appropriate district attorney, apply to be resentenced to a determinate sentence

The People argue that because the defendant is no longer in the custody of the

Department of Correctional Services, he is not eligible to be re-sentenced. The defendant asserts that while he is not presently in the custody of the Department of Correctional Services, he was in custody at the time the motion was filed and therefore was eligible to apply to be re-sentenced. In support of his argument, the defendant cites *People v. Price*, 56 A.D.3d 366, 369, *lv. denied*, 12 N.Y.3d 786 (2009), for the proposition that it is the date of the filing of the motion which determines the defendant's eligibility for resentencing. This court does not disagree and finds that the defendant's motion was timely filed while he was in the custody of the department of correctional services. However, it appears that since the defendant is no longer in the custody of the department of correctional services, he is not entitled to be re-sentenced.

The various Drug Law Reform Acts passed over the last several years were enacted for the purpose of reducing harsh periods of incarceration imposed for violation of statutes involving controlled substances. *c.f. People v. Mills*, 11 N.Y.3d 527, 536 (2008); *People v. Rodriguez*, 68 A.D.3d 676 (1st Dept, 2009). In *People v. Rodriguez, id.*, referring to a defendant, incarcerated following a violation of parole for the crime for which he was originally sentenced, was not eligible to be re-sentenced under the 2004 Drug Law Reform Act. The Court, quoting from a lower court decision in a different case, found that the 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. Rodriguez, id ; citation omitted*. The *Rodriguez* court also stated, in pertinent part, that "[i]f defendant had not violated his parole conditions, he would not have been in the custody of the Department of Correctional Services when he moved to be re-sentenced, and he would therefore have been ineligible for resentencing."

It seems clear, that the appellate courts believe that the various Drug Law Reform Acts were ameliorative in that they were enacted to reduce the period of incarceration a person would serve for committing a crime involving the sale or possession of controlled substances. Once a defendant is released to parole and is thus no longer incarcerated, even if re-incarcerated on the original sentence for a parole violation, the defendant is no longer entitled to the ameliorative provisions of the Drug Law Reform Acts.

Therefore, I find that the defendant's motion was timely filed while he was in the custody of the Department of Correctional Services. The defendant, one week later, was released from custody, remains at liberty, and is no longer in need of the ameliorative provisions of C.P.L.

§ 440.46, which would reduce the amount of time he would remain incarcerated. Therefore, the defendant's motion to be re-sentenced pursuant to C.P.L. § 440.46 is denied.

The foregoing is the decision and order of the court.

Dated: New York, New York

March 29, 2010



Laura A. Ward

Acting Justice Supreme Court