

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART K-7

THE PEOPLE OF THE STATE OF NEW YORK X BY: ROBERT CHARLES KOHM, J.

-against-

DATE: March 15, 2010

INDICTMENT:#QN10614/98

Terry Degrafinreid a/k/a
Terry Samuels

DEFENDANT.

X

By motion, dated December 17, 2009, the defendant has moved for an order sentencing him to a determinate sentence in accordance with Penal Law §§60.04 and 70.70, pursuant to the 2009 Drug Law Reform Legislation ("DLRA 3") as codified in Criminal Procedure Law §440.46.

The People have submitted an affirmation in opposition, dated February 23, 2010 and the defendant has submitted a reply memorandum in support of resentencing, received by the Court on March 11, 2010.

Findings of Fact

As will be set forth herein, this Court concludes that this defendant is ineligible for resentencing under Criminal Procedure Law §440.46(1). Therefore, these findings of fact will be strictly limited to those facts and circumstances upon which the Court's holding is predicated.

After a jury trial held before this Court, the defendant was found guilty of the crime of Criminal Sale of a Controlled Substance in the Third Degree (Penal Law §220.39(1)). On July 8, 1999, the defendant was adjudicated a second felony offender and he was sentenced to an indeterminate term of imprisonment of from 8-16 years.

On April 4, 2006, the defendant was granted parole and was released from custody. However, due to certain violations of the conditions of his release, the defendant's parole was subsequently revoked and he was returned to custody on July 31, 2007. He remains incarcerated with a conditional release date of November 20, 2011.

Conclusions of Law

In pertinent part, the 2009 Drug Law Reform Act (see Criminal Procedure Law §440.46(1)) provides 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 13, 2005, who is serving an indeterminate sentence with a maximum term of more than three years, may, ... apply to be resentenced to a determinate sentence in accordance with sections 60.04 and 70.70 of the penal law in the court which imposed sentence."

Upon a plain reading of subd. 1 of Criminal Procedure Law

§440.46 it would appear that the defendant is within the class of persons eligible to move for resentencing under "DLRA 3." At the time that he moved for resentencing he was back in the actual custody of "DOCS", based upon his parole violation; the crime for which he had originally been convicted (Criminal Sale of a Controlled Substance in the Third Degree - Penal Law §220.39(1)) is defined in Article 220 of the Penal Law and was committed prior to January 13, 2005; he had been sentenced to an indeterminate sentence (8-16 years) with a maximum term of more than three years; and, he was not disqualified by virtue of any "exclusion offense" (Criminal Procedure Law §440.46(5)(a)(b)).

However, in the opinion of this Court the defendant, Terry Degrafinreid, was not "in the custody" of "DOCS" within the meaning of "DLRA 3" when this motion was filed and was, therefore, ineligible to move for resentencing pursuant to Criminal Procedure Law §440.46(1). The Court's reasoning is based upon the fact that the defendant had already served his term of imprisonment, having been released to parole on April 4, 2006, and was only then incarcerated by virtue of a parole violation. This very issue concerning the proper interpretation of the term "in custody" has been addressed by appellate courts, including the Court of Appeals, in cases emanating from the Drug Law Reform Act of 2004 (providing an opportunity for resentencing of defendants convicted of A-1 drug felonies) and the Drug Law Reform Act of 2005 (providing an opportunity for resentencing of defendants convicted of A-II drug felonies).

In People v Mills¹, 11 NY3d 527, the Court of Appeals held that Then "no longer qualified for 2005 DLRA relief" on a 1999 Class A-II drug felony conviction once he had "been released to parole supervision", despite the fact that he had been re-incarcerated due to a parole violation (People v Mills, supra, at 537; citing People v Hardy, 49 AD3d 779-780 [2d Dept. 2008]; People v McCloud, 38 AD3d 1056, 1057 (3d Dept. 2007), 1v dismissed 8 NY3d 947 [2007]; People v Hernandez, 46 AD3d 1429, 1426 (4th Dept. 2007), 1v dismissed 9 NY3d 1034 [2008]. In reaching its determination the Court of Appeals concluded: "Surely the Legislature did not intend fresh crimes to trigger resentencing opportunities."

A similar result was reached by the Appellate Division - First Department in People v Rodriguez, 68 AD3d 676 (Dec. 29, 2009) wherein the court held that Rodriguez was not eligible to be resentenced under the 2004 Drug Law Reform Act. The Appellate Division 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, supra, quoting People v Bagby, 11 Misc3d 882, 887 (2006); see also People v Mills, 11 NY3d 527, 537). Again, the court's reasoning was based upon the common sense view that the Legislature did not intend "fresh crimes" to trigger resentencing

¹Mills was a consolidated appeal also involving a second defendant named Jose Then. The issue involving the interpretation of the tem "in custody" was discussed in that portion of the decision dealing with Mr. Then. (11 NY3d 527, 537).

opportunities.

This Court is not aware - either by its own research or through the submissions by the parties - of any appellate authority on the resentencing/custody issue at bar with respect to "DLRA 3." There have been several trial level courts which have rendered decisions, both reported and unreported, analyzing the rights of incarcerated parole violators to apply for resentencing; including People v Matthews, 26 Misc3d 1217 (A) and People v Romero, 1010 NY Slip Op 50170U (both holding against the right to be re-sentenced, in accord with the Mills - Rodriguez line of cases) and People v Figueroa, 2010 WL454919 (holding that an offender who returns to "DOCS" custody following a parole violation is not, by virtue of that fact, statutorily barred from resentencing consideration under the 2009 DLRA). In Figueroa, the Court wrote that ". . . in the 2009 DLRA the Legislature created a long list of offenders who were statutorily ineligible for resentencing² because of their previous criminal histories." The Court further opined that "(t)his detailed listing creates a strong inference that the Legislature intended those offenders and not others to be barred from the statute."

This Court does not share a similar opinion regarding the Legislature's intentions. True, the Legislature specifically highlighted those class of persons who were barred or ineligible for applying for resentencing under "DLRA 3", including certain

²Referring to the class of persons designated under Criminal Procedure Law § 440.46(5)(a)(5)

violent felony offenders, those offenders convicted of merit time ineligible offenses, and all second and persistent violent felony offenders; however; the hierarchal placement of the subject language, as contained in subd. 5 of the statute, compels the conclusion that before any consideration to disqualification can be entertained by the Court, the potential applicant for resentencing has to first establish strict compliance with the four condition precedents set forth in subd.1 of Criminal Procedure Law §440.46, to wit: "custody", "conviction of an Art. 220 class "B" felony offense", "commission of the offense prior to January 13, 2005", and an "indeterminate sentence with a maximum term of more than three years."

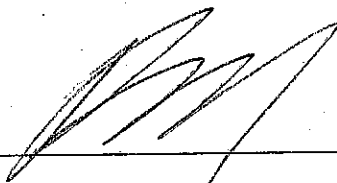
The first so-called condition precedent; namely custody by "DOCS" was present under both "DLRA 1" and "DLRA 2" and has been consistently held by the appellate courts not to be compatible with situations wherein the defendant's "subsequent" custody was the product of a parole violation of the underlying conviction. Finding no legitimate factual distinction between the custody requirements under "DLRA 1" and "DLRA 2", and now set forth under the recently enacted "DLRA 3", and cognizant of the manner in which this particular requirement has been treated under the Mills-Rodriguez line of cases, this Court holds that the defendant is ineligible for resentencing under Criminal Procedure Law §440.46(1).

Accordingly, the defendant's motion for resentencing is

denied.³

This constitutes the decision and order of the Court.

The Clerk of the Court is directed to mail a copy of this decision and order to the attorney for the defendant and to the District Attorney.



ROBERT CHARLES KOHM, J.

³Having determined that the defendant was ineligible for resentencing, the Court has not addressed the issue of whether "substantial justice dictates" against resentencing in the case of Mr. Degrafinreid.