

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 5

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THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER
SCI# 1975/01

-against-

EUGENE DENNIS,

Defendant,

----- X
SHERYL L. PARKER, J.S.C.

By papers dated October 7, 2009, defendant moves this court for an Order vacating his sentence imposed on August 8, 2002, and for a resentencing of defendant in accordance with the 2009 Drug Law Reform Act (“DRLA”) Penal Law §70.70 and Criminal Procedure Law § 440.46. The People have taken the position that the defendant is not eligible for resentence. The following is the court’s decision.

Findings of Fact

Defendant was arrested on March 7, 2001 pursuant to a narcotics sale to a New York City Police Department undercover officer in front of 190 York Street in Kings County. He was charged with one count each of criminal sale of a controlled substance in the third degree (P.L. §220.39[1]), criminal possession of a controlled substance in the third degree (P.L. §220.16[1]) and criminal possession of a controlled substance in the seventh degree (P.L. §220.03).

On April 11, 2001 defendant plead guilty to criminal sale of a controlled substance in the third degree on the instant Superior Court Information in exchange for an opportunity to participate in the Kings County "DTAP" program. If the defendant were to complete the program his charges would be dismissed. The alternative sentence, were the defendant to fail to complete the program, was four and one half to nine years incarceration. Defendant had 11 misdemeanor convictions and three non-violent felony convictions prior to his conviction on this offense.

After two opportunities to succeed in drug treatment over a period of approximately one year, on August 8, 2002 the defendant was sentenced to the alternative period of incarceration.

The New York State Department of Corrections (DOCS) has a tiered system of punishment for infractions. Tier I is the lightest form of discipline. Tier II infractions are punished by up to 30 days of keeplock, which means an inmate is confined to their cell for up to 23 hours a day and loses many privileges. Tier III is the highest level of discipline, for which keeplock can exceed 30 days and an inmate can be placed in isolation in the Special Housing Unit (SHU), in addition to the loss of other privileges.

It is agreed among the parties, that while in prison defendant received three Tier II infractions and one Tier III infraction. Defendant participated in the Department of Corrections Alcohol and Substance Abuse ("ASAT") Program. Additionally, defendant sought to further his education while in prison.

After his release on parole, defendant was convicted on five misdemeanors and, after warranting on several occasions, was sentenced to a period of 90 days incarceration. Additionally, defendant's parole was revoked. During his period of incarceration on the revocation defendant filed the instant motion. Defendant was later released, however is currently incarcerated on a new

pending arrest.

Conclusions of Law

In 2004 and 2005 the legislature enacted the DLRA I and II under the Laws of 2004 and 2005 Chapters 738 and 643 permitting defendants incarcerated on a class A-I or A-II drug felony offense to apply to the sentencing court to be resentenced pursuant to P.L. §70.71. This reform was intended to give inmates serving excessive prison sentences an opportunity to apply to the court for resentence under the new guidelines, and to take into consideration during sentencing the aim of the legislature to promote rehabilitation before incarceration on many types of drug offenses. It is evident from the legislative history of these two statutes that their primary goal was to ameliorate the unreasonable sentences imposed under the previous law.

In April of 2009 C.P.L. §440.46 and P.L. §70.70 became effective, allowing defendants who are incarcerated on a class B, C, D and E felony drug conviction to apply to the court for resentence pursuant to P.L. §60.04 and §70.70. The statute is similar in nature to the 2004 and 2005 Drug Law Reform Act. In fact, section three of §440.46 states that the “provisions of section twenty-three of chapter seven hundred thirty-eight of the laws of two thousand four shall govern the proceedings on and determination of a motion brought pursuant to this section.” The courts were given the discretion to divert class B, D, C and E felony drug offenders to drug treatment programs as an alternative to state prison. (Press Release, Assembly Speaker Sheldon Silver, March 27, 2009).

Eligibility

The DRLA I and II have been interpreted by the courts as not intended to apply to offenders who have been re-incarcerated on a new offense after parole on the original underlying felony. (*People v. Mills/Then*, 11 NY3d 527 [2008]; *People v. Rodriguez*, 2009 Slip Op 09717; *People v. McCloud*, 38 AD3d 1056 [2007], *appeal dismissed*, 8 NY3d 947; *People v. Cavallaro*, 46 AD3d 1024 [2007], *appeal dismissed*, 10 NY3d 762).

Defendant attempts to distinguish the instant matter from sentences on class A-I and A-II felonies, in that the DRLA of 2004 and the DRLA of 2005 statutorily required a defendant to be more than three years away from release on his or her sentence to be eligible for resentencing under the new guidelines. The 2009 DRLA does not have that requirement. Most likely because the sentencing guidelines for class B felonies were much less severe than those of the class A felonies, and the minimum sentences were generally more modest. Also, as the Court in *Mills/Then* pointed out, the Executive Director of the New York State Defenders Association stated in a letter to the Governor regarding the 2005 reform,

[t]he bill is narrowly tailored to offer the possibility of relief to inmates who are most desperately in need of sentence review: those non-violent drug offenders who are serving sentences for Class A-II drug offenses with *relatively long minimum terms* who were overlooked in the 2004 Drug Law Reform Act. (Emphasis in original).

In *People v. Bagby*, 11 Misc3d 882 (2006), the Westchester Supreme Court took steps to lay out the legislative intention of the Drug Law Reform Act in its decision denying resentencing to a defendant who had been re-incarcerated on a violation of parole and was applying for resentencing under the DLRA. It is evident from the statutes of 2004, 2005 and 2009 that a defendant must be incarcerated to apply for relief. The courts in *Mills/Then* and *Bagby* pointed out that a defendant who is at liberty on parole, may be incited to commit an infraction to violate parole for the sole

purpose of applying for resentencing. “Surely the legislature did not intend fresh crimes to trigger resentencing opportunities.” (*Mills/Then, Supra*).

Although the 2005 DRLA specifically mentions the remaining period of time a defendant must be serving in order to be eligible for relief and the 2009 statute remains silent, the reasoning behind the courts’ denial to parole violators who are re-incarcerated does not turn on the language of the statute. It turns on the purpose. As the Appellate Division, First Department clearly stated in *People v. Rodriguez*, 2009 Slip Op 09717, citing *People v. Bagby*, 11 Misc3d 882 (2006), 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”.

The 2009 law was intended to alleviate the mandatory sentences that judges were faced with when presiding over defendants charged with felony drug offenses. Additionally, drug treatment became a priority for those in need and the treatment options were expanded and funded by the state budget. Further relief is provided to some offenders who remain incarcerated under the old sentencing guidelines. (Executive release from the Governor, April 24, 2009. Emphasis added.). The law was not intended to apply to those who reoffended and were returned to incarceration. Accordingly, Court finds that the defendant is not eligible for resentence under the 2009 DRLA.

Substantial Justice

Even were the Court to find the defendant eligible under the 2009 statute, substantial justice dictates that the defendant not be resentenced. (C.P.L. §440.46(3); 2004 C. 738 §23). The defendant was convicted in the instant matter upon a plea of guilty on April 11, 2001. On August 22, 2001 he was released to an inpatient Drug Treatment Program. On October 26, 2001 a bench

warrant was issued for the defendant. On December 19, 2001 the defendant was returned on the warrant and remanded. On March 25, 2002 the defendant was released for a second opportunity at inpatient drug treatment. On April 9, 2002 a second bench warrant was issued as the defendant had absconded from treatment. On June 27, 2002 the warrant was vacated and the defendant was remanded. On August 8, 2002 the defendant was sentenced to state prison. Additionally, the People have provided the Court with the defendant's NYSID sheet as of September 3, 2009. Following his release from prison on the instant matter, and while on parole, the defendant sustained what appear to be five misdemeanor arrests and convictions:

<u>Arrest Date</u>	<u>Conviction Date</u>	<u>Crime of Conviction</u>
March 26, 2008	July 11, 2008	P.L. §165.15
April 17, 2008	April 18, 2008	P.L. §220.03
April 25, 2008	July 11, 2008	P.L. §220.03
October 19, 2008	November 20, 2008	P.L. §140.10
March 10, 2009	April 21, 2009	P.L. §140.10


From the outset the defendant was given the opportunity that the 2009 DRLA specifically aims to provide: drug treatment. He failed to take advantage of that chance. Upon his release he sustained five new convictions. Based on the aforementioned, the Court finds that substantial justice dictates that the defendant not be granted resentencing under the new sentencing guidelines.

The defendant is hereby advised pursuant to 22 NYCRR § 671.5 of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York 11201 for a certificate granting leave to appeal from this determination. This application must be made

within 30 days of service of this decision. Upon proof of his financial inability to retain counsel and to pay the costs and expenses of the appeal, the defendant may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Application for poor person relief will be entertained only if and when permission to appeal or a certification granting leave to appeal is granted.

The foregoing opinion shall constitute the Decision and Order of this Court.

Dated: January 13, 2010
Brooklyn, New York



SHERYL L. PARKER
Justice of the Supreme Court