

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : CRIMINAL TERM : PART 44

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THE PEOPLE OF THE STATE OF NEW YORK,

Ind. No. 5695/00

-against-

CHERYL DRAYTON,

FINAL DECISION AND
ORDER ON
DEFENDANT'S
MOTION FOR
RE-SENTENCING
PURSUANT TO
CPL §440.46

-Defendant-

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MARCY L. KAHN, J.:

Defendant, Cheryl Drayton, was convicted of criminal possession of a controlled substance in the third degree (PL §220.16) by plea of guilty on December 8, 2000. On January 16, 2001, the defendant was sentenced as a second felony offender to an indeterminate sentence of four and one-half to nine years of imprisonment. Defendant now moves for re-sentencing pursuant to CPL §440.46 and PL §70.70 to a determinate sentence of two years in prison followed by one and one-half years' post-release supervision.

Section 23 of the Drug Law Reform Act (DLRA), which is incorporated by reference into CPL §440.46, requires the court to hold a hearing, with defendant present, to determine whether she qualifies to be re-sentenced under PL §70.70. (L.2004, Ch. 738, §23). The court is then required to submit a written order, including findings of fact, specifying the new term of determinate sentence of imprisonment it would impose upon

defendant. (Id.).

On December 15, 2009 this court held a hearing on defendant's motion for re-sentencing. In an oral decision of that date, incorporated into a written decision dated December 18, 2009 (collectively, the proposed order), which included findings of facts, this court proposed a re-sentence of a determinate sentence of four years' imprisonment to be followed by two years of post-release supervision.

Defendant has declined either to withdraw her application or appeal from the proposed order as permitted by DLRA §23. Accordingly, the sentence the court offered in its proposed order will be the sentence of this court.

Pursuant to CPL §440.46 and PL §70.70, defendant's January 16, 2001 sentence of four and one-half-to-nine years' imprisonment is vacated and defendant is hereby re-sentenced nunc pro tunc to January 16, 2001 to a determinate term of four years' incarceration, to be followed by two years of post-release supervision.

The foregoing constitutes the decision and the order of this court.


Marcy L. Kahn, J.S.C.

Hon. Marcy Kahn

Dated: New York, New York
December 18, 2009

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THE PEOPLE OF THE STATE OF NEW YORK

Ind. No: 5695/00

-against-

PROPOSED DECISION
AND ORDER ON
DEFENDANT'S
MOTION FOR
RE-SENTENCING ON
CLASS B DRUG
FELONY

CHERYL DRAYTON,

Defendant.

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MARCY L. KAHN, J.:

On December 8, 2000, defendant Cheryl Drayton was convicted by plea of guilty before this court of criminal possession of a controlled substance in the third degree (PL §220.16), a class B felony offense, committed on August 22, 2000. Ms. Drayton was adjudicated a second felony offender and on January 16, 2001, received a sentence of four and one-half-to-nine year's imprisonment.

By notice of motion dated October 26, 2009, defendant, by her counsel, Paul Wiener, Esq. of The Legal Aid Society, has moved pursuant to the Drug Law Reform Act of 2009 (L.2009, ch. 56, Part AAA [DLRA-3], §9 [codified at CPL §440.46]) for an order vacating the originally imposed sentence and re-sentencing her to a determinate sentence of two years of incarceration followed by one and one-half years of post-release supervision. The People declined to submit any papers in opposition to re-

sentencing. At the re-sentencing hearing held on December 15, 2009, the People made an oral recommendation that the defendant be re-sentenced to a determinate term of five years followed by three years of post-release supervision. The People did not make any arguments with regard to their resentencing recommendation.

For the reasons stated in this opinion, the motion for re-sentencing is granted and the court's proposed terms of re-sentencing are set forth accordingly.¹

I. APPLICABLE LEGAL STANDARDS UNDER THE DLRA-3

The DLRA-3 was enacted as the third in a series of statutory reforms by the New York State Legislature to alleviate some of the more Draconian aspects of the Rockefeller drug laws first promulgated in 1974. The first of those acts, the Drug Law Reform Act of 2004 (L.2004, ch. 738, §§1-41) (DLRA), permitted those convicted of class A-I drug felonies to apply for elimination of the life sentences to which they had been sentenced and to be re-sentenced to determinate sentences. The enactment the following year of the Drug Law Reform Act of 2005 (L.2005, ch. 643, §1) (DLRA-2) was a further effort by the Legislature to extend the new ameliorative policies to defendants serving life sentences for conviction of A-II felony

¹ The court set forth its decision on the motion, including findings of fact and the proposed sentence, in an oral ruling on December 15, 2009. This written decision incorporates that oral ruling.

drug offenses. Similar to the DLRA and DLRA-2, DLRA-3 comprises a complex scheme of significant revisions to the penal, criminal procedural, correction and executive laws relating to felony level drug offenders.

The statutory changes effected by DLRA-3, including the addition of a new statute, CPL §440.46, were specifically designed to ameliorate the harsh sentences previously mandated for non-violent drug offenders convicted of class B drug felonies.

Under the new law, a defendant is eligible for re-sentencing upon satisfying the following five criteria: 1) the defendant must be in the custody of the New York State Department of Correctional Services (DOCS); 2) the defendant must stand convicted of a class B drug felony offense under Article 220 of the Penal Law; 3) the offense for which the defendant was convicted must have been committed before January 13, 2005; 4) the defendant must have received a sentence to an indeterminate term of imprisonment, the maximum term of which exceeds three years; and 5) the defendant must not be currently serving a sentence for an exclusion offense or have a predicate felony conviction for an exclusion offense as that term is defined under CPL §440.46(5).

The applicable procedure for a CPL §440.46 re-sentencing motion is the same as that provided for in section 23 of the

DLRA, which is incorporated by reference into CPL §440.46(3). Upon the filing of a motion for re-sentencing under CPL §440.46, the court "shall offer an opportunity for a hearing" and bring the defendant before it. (DLRA §23). The court may also hold a hearing to determine a defendant's eligibility for re-sentencing or to determine any controverted issue of fact. (Id.).

The statutory standard for review of a CPL §440.46 motion is identical to the DLRA standard. (CPL §400.46[3]; DLRA §23). An eligible defendant's motion for re-sentencing must be granted unless the court "[u]pon its review of the submissions and the findings of fact made in connection with the application" determines that "substantial justice dictates that the application be denied." (Id.). In reaching its determination, the court "may consider any facts or circumstances relevant to the imposition of a new sentence," including "the institutional record of confinement." (Id.). Moreover, CPL §440.46(3) provides that "the court's consideration of the institutional record of confinement of [an eligible] person shall include but not be limited to such person's participation in or willingness to participate in treatment or other programming while incarcerated and such person's disciplinary history," although inability to participate in treatment or other programming despite the "person's willingness to do so shall not be considered a negative factor in determining" a CPL §440.46

motion. (CPL §440.46[3]).

Upon review of the parties' submissions, and after holding any hearing and making its findings of fact, the court, unless denying the application, "shall . . . specify and inform [the defendant] of the term of determinate sentence of imprisonment it would impose" (Id.). The defendant may then do any of the following: (1) appeal the order specifying and informing the defendant of the term of the determinate sentence the court would impose; (2) proceed with re-sentencing, with a right to appeal; or (3) withdraw the re-sentencing motion, in which case the original sentence would remain in effect. If the order denies the re-sentencing motion, the defendant may appeal such an order.

Pursuant to CPL §440.46, a second felony drug offender, such as defendant, who stands convicted of a class B felony after having been convicted of a non-violent felony may be re-sentenced to a determinate sentence ranging from a minimum term of two years' incarceration to a maximum term of twelve years' incarceration (PL §70.70[3][b][i]), followed by a period of one and one-half to three years' post-release supervision. (PL §70.45[2][d]).

II. PARTIES' CONTENTIONS

Defendant seeks re-sentencing to the minimum sentence of two years' incarceration followed one and one-half years of

post-release supervision.² She alleges that she is eligible for re-sentencing because she is currently serving her sentence in a state correctional facility in the custody of DOCS; she stands convicted of a class B drug felony offense under Article 220 of the Penal Law; the crime for which she was convicted in this case was committed prior to January 13, 2005; the maximum term of her sentence exceeds three years; and she is not precluded from re-sentencing because she is not presently serving a sentence for, nor does she have a predicate felony conviction of, an exclusion offense under CPL §440.46(5) (a) or (b).

The People concur that defendant satisfies all of the five criteria for CPL §440.46 re-sentencing and make no argument that substantial justice dictates that defendant should not be re-sentenced.

III. ANALYSIS

A. Eligibility

This court must first address the threshold issue of defendant's eligibility for re-sentencing under the statute. Upon review of the materials before the court and the court file, this court agrees that defendant satisfies the five eligibility requirements for re-sentencing: 1) defendant is in

² At the December 15, 2009 hearing held on defendant's motion, counsel for defendant expressed defendant's willingness to accept a sentence of up to five years of incarceration followed by a period of three years of post-release supervision.

the custody of DOCS; 2) she stands convicted of a class B drug felony offense under Article 220; 3) the offense was committed prior to January 13, 2005; 4) defendant's four and-one-half-to-nine year indeterminate sentence contained a maximum term in excess of three years; and 5) defendant is not ineligible due to a conviction for any exclusion offense (CPL §440.46[5] [a], [b]).

Accordingly, I find the defendant eligible for DLRA-3 re-sentencing.

B. Findings of Fact

In accordance with the requirements of section 23 of the DLRA as incorporated by reference into CPL §440.46, this court has considered defendant's moving papers and attached exhibits as well as a letter written by the defendant to the court (Defendant's Hearing Exh. "A"); the People's oral recommendation as to re-sentencing; defendant's criminal record; the institutional records of defendant's confinement including her participation in treatment and other programs and her prison disciplinary record, and the prior proceedings and court file in the case.

1. Criminal and Substance Abuse History

This conviction was the defendant's fifth felony conviction. All of her felony convictions have been drug-related. Her criminal record reflects Ms. Drayton's long struggle with substance abuse, stemming from a difficult

childhood and adolescence. Ms. Drayton's parents were both addicted to heroin, resulting in her having been removed from her parents' custody as a young child and raised by her grandmother. (Petition for Resentencing, Exh. E [Letter from Kevin O'Brien, LCSW]). Indeed, her own children were placed in foster care due to her own drug addiction. (Id.)

2. Age

The defendant was 31 years old at the time of the instant crime and is now 40 years of age. She has been incarcerated continuously for the last nine years.

3. Rehabilitative Progress

During her incarceration for this offense, Ms. Drayton completed the Alcohol and Substance Abuse Treatment program (ASAT). She was deemed an excellent ASAT student who completed all of her program assignments. In March of 2004, the ASAT staff found her to be strongly motivated to change her behavior. She also completed aggression replacement training while incarcerated.

She has worked as a wall cleaner, a window and carpet cleaner and a light fixture cleaner and floor maintainer, among other assignments. She received positive work evaluations, especially while working as a custodian in the Albion Correctional Facility.

4. Inmate Disciplinary History

The defendant does have a large number of disciplinary infractions, 52 in all. However, Ms. Drayton has not had a tier three violation, the most serious form of prison disciplinary infraction, since 2003. A large number of her violations occurred in 2002 and 2003, around the time of her grandmother's death. Defendant has also received four tier two violations this year, however suggesting that she still struggles with behavioral issues and needs continued supervision.

5. Community and Family Support

Defendant's family, including her older brother and two adult children, a daughter age 25, and a son age 21, are in contact with her and will be supportive to Ms. Drayton and involved in her life upon her release from custody. Ms. Drayton has already been accepted into Project Greenhope, a two-year residential rehabilitation program specifically for women, which will address her substance abuse, mental health, and other behavioral issues.

C. Entitlement to Re-sentencing

On January 16, 2001, this court sentenced Ms. Drayton to the minimum sentence allowed by law for a predicate offender convicted of a B drug felony, a sentence of four and-one-half to nine years' imprisonment. At that time, the court was aware of defendant's criminal history, which included four prior felony

drug convictions. I find the defendant's long history of substance abuse makes re-sentencing highly appropriate and in accord with the Legislature's intent under DLRA-3. The DLRA-3 reflects the Legislature's shift towards addressing drug-related offenses through community treatment rather than incarceration. Upon her release from custody, the defendant will receive appropriate supervision and treatment through her participation in Project Greenhope, as well as through post-release supervision. This, along with the support of her family, will facilitate her transition from incarceration back into society. For all of these reasons, the court will grant defendant's motion for re-sentencing.

IV. THE PROPOSED SENTENCE

Nonetheless, the defendant does not merit a re-sentence to the minimum term of two years' incarceration she requests, given her disciplinary record and criminal history. On the other hand, the five-year prison term requested by the People is too harsh, given the legislative intent to ameliorate excessive sentencing in class B drug felony cases such as this one.

Accordingly, in accordance with the requirements of section 23 of the DLRA, as incorporated by reference into CPL §440.46, based on the facts of this case as set forth above, this court hereby notifies defendant of its intention to vacate the sentence imposed on her on January 16, 2001 for the crime of

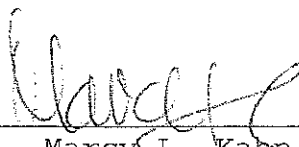
criminal possession of a controlled substance in the third degree (PL §220.16), a class B felony offense, and to re-sentence her nunc pro tunc to January 16, 2001, in accordance with PL §70.70, on the count of criminal possession of a controlled substance in the third degree (PL 220.16), to a determinate term of four years' imprisonment, to be followed by two years of post-release supervision.

Such re-sentence will be imposed unless defendant Cheryl Drayton advises this court of her intention either to withdraw her application or appeal the court's proposed re-sentence.

V. CONCLUSION

For all of these reasons, defendant's motion for re-sentencing based on CPL §440.46 is granted. Defendant is hereby notified that it is the court's intention that defendant's sentence of four and one-half-to-nine years' imprisonment previously imposed on January 16, 2001, will be vacated and that, she will be re-sentenced nunc pro tunc to January 16, 2001 to a determinate term of four years' incarceration, to be followed by two years of post-release supervision.

The foregoing constitutes the decision and order of the court.



Marcy L. Kahn, J.S.C.

Hon. Marcy Kahn

Dated: New York, New York
December 18, 2009

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