

COUNTY COURT

COUNTY OF ONONDAGA

STATE OF NEW YORK

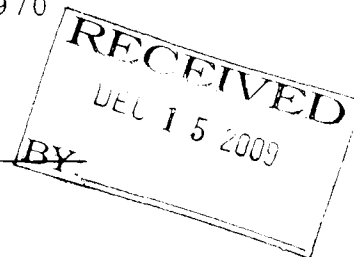
THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff,

-vs-

Indictment # 2004-0888-1
Index # 04-0970

ERIC FLOYD,

Defendant.



HON. WILLIAM D. WALSH

DECISION/ORDER

The defendant has moved pursuant to *Section 440.46 of the Criminal Procedure Law (the Rockefeller Drug Law Reform Act)* for an order vacating the indeterminate sentence of 2-6 years imposed upon the judgment of conviction entered against for the crime of *Criminal Possession of a Controlled Substance in the Third Degree*, and re-sentencing him in accordance with the provisions of *Penal Law 60.04 and 70.70*. The People have opposed the motion on the grounds that the defendant is not an eligible inmate who qualifies for the relief sought.

Criminal Procedure Law § 440.46 (1), which became effective on October 7, 2009, sets forth the eligibility requirements for B drug felons who may apply to be resentenced, as follows:

Any 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 in accordance with sections 60.04 and 70.70 of the penal law in the court which imposed the sentence.

The defendant entered a plea of guilty to one count of *Criminal Possession of a Controlled Substance in the Third Degree* before this court on October 12, 2004 and was originally sentenced to an agreed upon indeterminate sentence of 2-6 years on December 15, 2004. He was received by the Department of Correctional Services on December 23, 2004, released to parole supervision in 2006, and returned to the custody of the Department of Correctional Services as a parole violator on October 16, 2008. His present application for resentencing was received by the court on June 8, 2009 and deferred until October 7, 2009, the effective date of the *Criminal Procedure Law* § 440.46, at which time counsel was assigned to represent him. An initial appearance was made by the defendant, his attorney and the People on November 2, 2009, and the matter adjourned to November 30, 2009 for the court's written decision. On November 6, 2009 the defendant was again released from the custody of the Department of Correctional Services to parole supervision.

Initially, the court finds that the defendant was never an eligible inmate for resentencing under the *Rockefeller Drug Law Reform* because he had already been paroled in 2006, prior to the

enactment of reform for those convicted of B drug felonies going into effect on October 7, 2009. The Court of Appeals has determined that once an inmate has been paroled he is no longer in the custody of Department of Correctional Services and does not qualify for such relief (*People vs. Mills*, 11 N.Y.3d 527, 537.)

Furthermore, the appellate courts have uniformly held that the *Rockefeller Drug Law Reforms* were never intended by the Legislature to apply to those defendants who have been paroled, violated parole and been returned to prison. This is true of both A-I drug felons (*People vs. Bagby*, 11 Misc. 3d 882 [Supreme Ct., Westchester Co. 2006]) and A-II drug felons (*People vs. Mills, supra*; *People vs. Bustamante*, 62 A.D.3d 1209 [3rd Dept. 2009; *People vs. McCloud*, 38 A.D.3d 1056 [3rd Dept. 2007]; *People vs. McCurdy*, 11 Misc. 3d 757 [Supreme Ct, Kings Co. 2006]), and this court can find no rational basis for holding otherwise with respect to B drug felons.

Indeed, this court is in full agreement with the Court of Appeals that deeming an inmate eligible for relief they did not originally qualify to receive simply by virtue of the fact of having been returned to state prison for reoffending is contrary to sound public policy. As noted by the Court of Appeals in *People vs. Mills, supra* at 537, to hold otherwise "... would create illogical, if not perverse, results." For example, defendants convicted of B drug felonies prior to January 13, 2005, otherwise ineligible by virtue of having been released to parole supervision prior to the

effective date of the statutory reform, could conceivably be given an incentive to violate parole in order to return to the custody of the Department of Correctional Services prior to the maximum expiration of their original indeterminate sentence in order to apply for resentencing pursuant to the *Rockefeller Drug Law Reform Act*.

Accordingly, the defendant's motion is in all respects DENIED.

This shall constitute the Decision and Order of the Court.

Dated: December 9, 2009



HON. WILLIAM D. WALSH

ENTER

To: Eric Floyd
Linda M. Campbell, Esq.
Michael E. Ferrante, Esq.