

SUPREME COURT, BRONX COUNTY, CRIMINAL DIVISION
PART - T29

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PEOPLE OF THE STATE OF NEW YORK,

-against-

Indictment No.: 5776/98

TRACY FRAZIER,

MOTION TO RESENTENCE
PURSUANT TO
2009 DLRA

Petitioner.

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HON. NICHOLAS IACOVETTA:

The petitioner (hereinafter defendant) moves for resentencing under the Drug Law Reform Act of 2009 (hereinafter DLRA 3) which in part, as relevant to the sentencing of class B felony drug offenders, became effective on October 7, 2009 (see L. 2009, ch. 56, §9).

Defendant's motion is denied because her previous release to parole supervision made her ineligible for resentencing under DLRA 3.

The crime underlying defendant's conviction occurred on August 7, 1998.¹ Defendant pled guilty on September 11, 2008 to the crime of Criminal Sale of a Controlled Substance in the Third Degree, P.L. §220.39[1], a class B felony.

¹At the time of her arrest on August 7, 1998, defendant was already on parole supervision for two separate prior felony drug convictions under Indictments 513/96 and 575/96 for which she received concurrent sentences of one to three years on March 13, 1996. She was discharged from parole on the latter convictions on her maximum parole expiration date of January 13, 1999.

On May 18, 2000, after failing to complete a residential drug treatment program required by the above plea, as more fully detailed in the affirmations of both parties, defendant was sentenced to an indeterminate term of imprisonment having a minimum of four and a half years and a maximum of nine years.

Defendant was released to parole supervision on November 23, 2003. Since her release to parole supervision on November 23, 2003 defendant has been rearrested on drug related offenses on four separate occasions. On September 23, 2004, defendant, under the alias of Barbara Frazier, was arrested for possessing a pipe with crack cocaine residue. She pled guilty to P.L. §240.20 in exchange for a fifteen day sentence. On May 16, 2006, under the alias Tiffany Brown, defendant was arrested for the same offense, and again pled guilty to P.L. §240.20 in exchange for a ten day sentence. On May 30, 2007 she was again arrested for the same offense, and again pled guilty to P.L. §240.20 in exchange for a fifteen day sentence. On January 12, 2008, under the alias of Barbara Frazier, she was arrested for Criminal Trespass for being in a NYCHA Clean Halls building without permission, and again she pled guilty to P.L. §240.20 in exchange for a one day sentence. Since her release to parole supervision on November 23, 2003, defendant has also been returned to custody on parole violations on four separate occasions. The last violation occurred on April 29, 2009. Defendant was released back to parole supervision on November 13, 2009 and currently is not in the custody of DOCS. Her maximum parole expiration date is July 8, 2011 not counting any further merit time adjustments.

The eligibility criteria for resentencing under DLRA 3 are contained in newly added

C.P.L. §440.46 (see L. 2009, ch. 56, §9). Certain class B felony offenders in the custody of DOCS may apply for resentencing (see C.P.L. §440.46[1]).

Under defendant's view she would be eligible for resentencing despite the fact that she was previously released to parole, violated, returned to custody, and then released again to parole supervision. However, other drug offenders released to parole supervision, who were never violated and returned to custody, and who are still on parole, would not be eligible for resentencing. Surely the legislature did not intend such an anomalous result when it authored DLRA 3. It is a well settled rule that a statutory interpretation which is "contrary to the dictates of reason or leads to unreasonable results is presumed to be against the legislative intent" regardless of the language of a statute or any evidence that the legislature actually intended the result reached by a court (see McKinney's Consolidated Laws of New York, Statutes [McKinney's Statutes] §143 [2009]). A defendant should not be able to exact a sentencing dividend denied other similarly sentenced offenders predicated on a failure to abide by the requirements of parole. But, as seen below, that is precisely what would occur if defendant's motion is granted.

Defendant's motion asserts that "no further prison time or period of PRS is warranted" (see defense affirmation, 11/2/09, pg. 17). It requests that this court resentence defendant "to the minimum determinate term and term of parole release supervision available under the law (id. at pg. 19).

The new minimum determinate sentence for a class B prior non-violent drug offender is 2

years (see, P.L. §70.70[3][b][I]; L. 2009, ch. 56 eff. 4/7/09) plus a minimum post release supervision period of 1½ years (see P.L. §70.45[2][d] eff 4/7/09). A period of post release supervision shall commence upon the person's release from imprisonment to supervision by the division of parole and shall interrupt the running of the determinate sentence... (see P.L. §70.45[5][a]).

Defendant, as noted earlier, has already served more than three years under her current sentence. The period of incarceration that defendant has already served on her current sentence would be credited against both any new period of incarceration and additional post release supervision period imposed by this court if defendant is resentenced. If, as requested, the court resentenced defendant to the minimum determinate sentence available, two years, her determinate sentence would be completed. No remaining portion of her determinate sentence would remain to be held in abeyance until any period of post release supervision is completed (see P.L. §70.45[5][a]). Yet other similarly sentenced defendants currently on parole who were never violated would still remain under parole supervision.

The Drug Law Reform Acts of 2004, 2005 and 2009 successively enlarged the category of offenders eligible for sentencing relief who were serving lengthy minimum sentences without any opportunity for parole in the near future. A new, successively less harsh determinate sentencing scheme for new offenders was also included in each reform (see, L. 2004, ch. 738, §23; L. 2005, ch. 643, §1; L. 2009, ch. 56, §9). There is nothing in DLRA 3 or its legislative history to suggest that it was intended to afford resentencing to offenders who were previously

released to parole supervision. DLRA 3 was intended to relieve new offenders from lengthy mandatory minimum sentencing provisions, create drug treatment programs administered by drug court judges and to provide additional relief to some offenders who still “remain incarcerated under the old laws” (see Letter of David A. Patterson, Governor, Bill Jacket, L. 2009, ch. 56).

The language in newly added C.P.L. §440.46[3] under DLRA 3 incorporates by reference the provisions of the 2004 DLRA which shall govern the proceedings on and determination of a motion brought pursuant to this section (see L. 2009, ch. 56, §9; L. 2004, ch. 238, §23). Since defendant was previously released to parole supervision before she was violated and subsequently returned to custody before filing her motion, defendant is not eligible for resentencing under DLRA 3 (see People v. Rodriguez, 68 A.D.3d 676 [First Dept. 2009], citing People v. Bagby, 11 Misc.3d 882, 887 [2006], interpreting the resentencing provision of the 2004 DLRA, as “... not intended to apply to those offenders who have served their term of imprisonment, have been released to parole supervision, and whose parole is then violated with a resulting period of incarceration..”; see also People v. Hardy, 49 A.D.3d 779, [Second Dept. 2008], lv dismissed, 10 N.Y.3d 935; People v. McCloud, 38 A.D.3d 1056, 1057 [Third Dept. 2007], lv dismissed, 8 N.Y.3d 947, interpreting the 2005 DLRA stating “we do not believe that the drug reform laws were intended to apply to offenders who have served their term of imprisonment, been released to parole supervision, violated their parole, and, as a result , were subject to a subsequent period of incarceration”; People v. Hernandez, 46 A.D.3d 1425, 1426 [Fourth Dept. 2007], lv dismissed, 9 N.Y.3d 1034). In this court’s view the latter result is the same whether a defendant’s parole violation is the result of a new arrest or only a technical

violation. Otherwise thousands of parolees who have been released from custody to parole supervision, whose parole may in the future be violated for technical reasons, would become eligible for resentencing.

Since a determination of a motion brought under DLRA 3 is governed by the same provisions that govern a determination of a motion brought under the DLRA of 2004 (see C.P.L. §440.46[3]), this court is constrained to follow the latter pronouncement of the First Department (see Mountain View Coach Lines v. Storms, 102 A.D.2d 663, [Second Dept. 1984]; People v. Brisotti, 169 Misc.2d 672, App Term, First Dept. [1996]).

The court will not address the People's alternative arguments that defendant's motion should not be granted solely because she is no longer in custody of DOCS or because substantial justice dictates otherwise.

This opinion shall constitute the decision and order of this court.²



Nicholas Iacovetta, AJSC

DATED: February 28, 2010
Bronx, New York

²On February 11, 2010 this court informed both bounsel on the record that it would issue a written decision denying defendant's motion.