SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 80

THE PEOPLE OF THE STATE OF NEW YORK

-against-

ROBERT HAIRSTON,

Defendant

DECISION & ORDER
Re: Defendant's Motion For Re-sentencing
Ind. Nos. 2404/04
1181/04

ALVARADO, J.:

PROCEDURAL BACKGROUND

Defendant entered a plea of guilty to Criminal Sale of a Controlled Substance In Or Near School Grounds [P.L. Sec 220.44)], a Class B felony, and was thereafter sentenced to an indeterminate period of incarceration of 3 and 1/3 years to ten years on December 6, 2004 to cover all of the charges contained in Ind. No. 2404-04. At the same time, defendant also entered a plea of guilty to Criminal Sale of a Controlled Substance in the Third Degree [P.L. Sec 220.39(1)], a Class B felony, and was thereafter sentenced to an indeterminate period of incarceration of 2 years to 6 years to cover all of the charges contained in SCI No. 1181-04. Both sentences ran concurrently to each other.

Defendant now seeks to be re-sentenced pursuant to the re-sentencing provisions of the Drug Law Reform Act of 2009 ("DLRA -III")(Chapter 56 of the Laws of 2009).

In an effort to facilitate and simplify the re-sentencing process, the New York State Department of Correctional Services has prepared a list of those defendants who meet the qualifications for re-sentencing outlined in DLRA -III. Defendant appears on the aforementioned NYSDOCS list. Furthermore, in the instant motion defense counsel establishes that defendant meets the basic DLRA -III eligibility requirements[1]; this is not controverted by the People.

DLRA -III provides that an eligible defendant shall be resentenced pursuant to Penal Law Sec. 60.04 & 70.70

unless 'substantial justice dictates' that resentencing be denied. CPL 440.46, subdivision (3), referencing § 23 of chapter 738 of the laws of 2004 (the 'Drug Law Reform Act of 2004').(footnote omitted) In making a resentencing determination, the Court may consider 'any facts or circumstances' relevant to the imposition of a new sentence which are submitted by the Defendant or the People and in addition shall consider a defendant's institutional confinement record. Such a review shall include a petitioner's disciplinary history and participation or willingness to participate in correctional treatment or programming.

People v. Brown, 26 Misc.3d 1204(A), 2010 WL 9928 (Sup.Ct. N.Y. Co., January 4, 2010).

The term "substantial justice" is not defined by DLRA -III but jurists have staked out its boundaries in the context of the prior DLRA statutes. Even if a defendant satisfies the minimum thresholds for resentencing

...resentencing is not mandatory. Courts rather have a "measure of discretion" in determining whether or not to grant a resentencing application.*People v. Vasquez*, 41 AD3d 111 (1st Dept 2007), *lv dismissed*, 9 NY3d 870. It is also obvious that the statute is not neutral in guiding courts as to how to exercise that discretion. Rather, "there is a

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[1] Defendant was convicted of a B felony drug offense committed before January 13, 2005, and was sentenced to an indeterminate term; defendant is still in NYSDOCS custody, and his maximum term exceeds three years. Defendant is not serving a sentence for an "exclusion offense" nor does he have a predicate felony conviction for an exclusion offense. See C.P.L. Sec. 440.46.

strong presumption in favor of granting a resentencing application for all eligible defendants". *People v. Lopez,* 10 Misc 3d 1056(A) (New York County 2005).

People v. Brown, supra

FINDINGS OF FACT

The Court notes that there is no dispute about the relevant facts in the record regarding this motion. Each side agrees that Mr. Hairston is eligible to be resentenced. The parties, however, were unable to reach a mutually agreeable result prior to the formal filing of the instant motion.

Defendant was born on August 13, 1986. It is admitted by defense counsel that defendant dropped out of high school after his freshman year. Defense counsel avers that defendant's mother then sent defendant to live with a close friend in Ohio. Allegedly, defendant found steady employment and began preparing to obtain a G.E.D. According to defense counsel, defendant's mother brought defendant back to live in the Bronx so as not to continue to burden her friend. According to defense counsel and defendant's mother, upon defendant's return to the Bronx he could not find work and began, as another older generation might say, to hang out with the wrong crowd. Defendant's first arrest followed a few months later.

It is uncontroverted that defendant was adjudicated a Youthful Offender on March 4, 2004, as a result of his guilty plea for the crime of Assault in the Second Degree.[2] for an assault committed on February 8, 2004.

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[2] The record on this motion reveals that defendant along with other defendants punched the complainant. There is no evidence that defendant used a weapon although another defendant did use a sharp object. The complainant received minor injuries as did a police officer who was injured as a result of his chase and

The court notes that although defendant entered a plea of guilty to only one felony in regard to Indictment No. 2404-04, he was actually charged with nine separate "undercover" sale counts. These sales occurred between December of 2003 and May of 2004. The record reveals that defendant was alleged to be a major player in what is colloquially called a "long term buy operation".

The initial accusatory instrument which resulted in SCI No. 1181-04 charged defendant with participating with other individuals in another sale of drugs to an undercover police officer on March 18, 2004, this time within the vicinity of a school.

Defendant has one other criminal history event in his past. It is uncontroverted that on December 6, 2004 defendant pleaded guilty to Criminal Possession of a Controlled Substance in the Seventh Degree, a class "A" misdemeanor. On December 6, 2004, defendant was sentenced to a determinate sentence of one year (Alvarado, J.) with this sentence to run concurrently with the felony sentences that are the subject of the instant motion.

Defendant was more than eighteen years old when he began to serving his sentence and thus he was legally an adult. There are *some* indications in the record on this motion that defendant seemed intent on using his incarceration to better himself and increase his ability to be a productive and responsible member of society upon his eventual release from prison. Defendant completed the NYSDOCS ASAT (Alcohol and Substance Abuse Treatment) program. Annexed as exhibits to defendant's motion are monthly ASAT staff evaluations of defendant; from November of 2007 to April of 2008.

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apprehension of defendant.

Most striking to the Court is the fact that his ASAT evaluations state "[Mr. Hairston] demonstrates an attitude that is *less than serious*, He has not addressed *any* issues of concern thus far".(emphasis added). He has problems with "impulsvity[*sic*]" and doesn't like to hear the word, "no". While the final evaluation indicates that he has completed the program, Mr. Hairston received only a "satisfactory grade" in the numerous areas evaluated and higher grades were available if the participant merited them.

The instant motion also establishes that Mr. Hairston completed a NYSDOCS Aggression Replacement Treatment program at Five Correctional Facility from 12/15/08 to 3/01/09. That is the only information the Court has with regard to defendant and his participation in that program.

Defendant's program record during incarceration does indicate that he has received some training in plumbing & heating, masonry, electrical trades, how to be a porter and painting. However, *he never completed any of those programs.* Mr. Hairston ended each of those programs voluntarily for an unknown reason or because his name came up on the wait list for another program or because of serious disciplinary issues noted below.

Initially, upon evaluation of this case, it appeared that in the entire time of incarceration, Mr. Hairston had not earned a GED. However, as of February 2, 2010, the Court has received confirmation in the form of a copy of a GED certificate, that as of December 2009, Mr. Hairston has indeed earned his GED.

The remainder of Mr. Hairston's institutional record does not leave much room for optimism. It is undisputed by the parties that during his NYSDOCS incarceration

defendant was found guilty of disciplinary violations after disciplinary hearings regarding 15 separate incidents. Those incidents included conduct of the defendant that ranged from refusing to follow orders of correctional officers and interference with NYSDOCS employees to even more serious conduct such as possession of letters that contained gang-related writing, several incidents of fighting, one incident of marihuana possession, possession of contraband in the SHU ("Segregated Housing Unit"[3]),one incident of possession of a weapon, and another incident involving an assault on his cell mate.

Mr. Hairston's disciplinary record indicates that although Mr. Hairston was frequently acquitted of a portion of the charges with regard to any of the aforementioned 15 occurrences, *he was never completely exonerated with regard to any of the incidents several of which are quit serious.*

In addition to the suspension or revocation of certain institutional privileges while he has been in NYSDOCS custody, defendant's disciplinary history has resulted in his being confined in SHU for a total of approximately two years during his incarceration.

It is also relevant that defendant has been denied parole once and that he committed one of his Tier-3 (*e.g.* serious) disciplinary violations even after the aforementioned denial of parole.

According to defense counsel, defendant's mother (a youth counselor for a group home) has informed her that defendant can reside with her in the Bronx upon his release from incarceration. Defense counsel avers that defendant's mother informed

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[3] *E.g.* "Solitary confinement".

her that defendant now understands that he took the wrong path and that it has cost him.

In an unsworn letter to the Court, another party identifying himself as defendant's uncle, states that he is a District Manager for seven Wendy's restaurants in New Jersey, and will help defendant obtain a job.

Defense counsel avers that defendant has informed her that he is an avid athlete who plays basketball while he has been in prison and is a practicing Christian.

CONCLUSIONS

In sum, defense counsel contends that defendant is "entitled" to resentencing because

1) Defendant meets the minimum eligibility requirements;

2) There is a strong presumption in favor of resentencing ;

3) Defendant is not a hardcore criminal but rather someone who, as an adolescent had an uncertain upbringing. Defendant had poor impulse control because of his still developing adolescent brain;

4) Defendant was not a drug-kingpin, but rather a street level seller selling to support a drug habit;

5) Defendant's disciplinary record was partially caused by the harmful prolonged SHU confinement; and

6) There is reason for optimism regarding defendant's future because defendant continues to attempt to improve himself, and has prospects regarding employment and residence.

In sum, the People contend that there is nothing in the record to establish, either prior to or during defendant's incarceration that defendant was, or is, an addict. (Thereby diminishing the importance of completion of the ASAT program and placing defendant in the "seller for profit category".)The People contend that the record clearly establishes that defendant was one of several sellers who sold small quantities of drugs from the same inside and outside locations. Furthermore, defendant has a significant disciplinary history while incarcerated with only minimal progress, if any, to show at this point. Consequently, it is the People's position that "substantial justice" weighs against granting defendant's motion

The Court reaches the following conclusions: Nothing presented to the court definitively proves defendant was an addict at the time of the commission of the crimes in question[4]; it is, however, clear that he was a seller of drugs who accepted a favorable plea bargain offered by the People.

While it is true that defendant has taken steps to *attempt* to improve himself he has never *completed* much of what he attempted.

There is no way that this Court can discount defendant's disciplinary record. Defense counsel concedes it is "not good". However, there is nothing in case law or DLRA-III (or its predecessors) that establishes that an inmate's disciplinary history is *the* dispositive factor in deciding whether to offer re-sentence.

Defendant's upbringing may not have been a perfect one. Implicit in defense

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[4] The court does not state that defendant did not use drugs "recreationally". As most parties working in the court system for any length of time know, there is a fine line between addiction and recreational use, and as judicial diversion has shown, the most difficult cases to assess are those in which the claim of addiction is self reported.

counsel's motion papers is the unstated fact that defendant was raised in a single parent home. It *must* be said, however, that tens of thousands of individuals raised in Bronx County have faced and have overcome even more serious challenges than defendant and have prospered in all areas of their lives without committing felonies.

Lastly, the assurances and averments made by defendant's mother and uncle regarding defendant's attitude and future while positive signs, must be at least partially discounted by the Court. The statements reflect positively on the parties themselves, not on defendant and represent hopes, not guarantees for the future.

Lastly, the court must be cognizant of and give weight to the fact that not only has defendant accomplished very little in his time in custody, but what he has accomplished pales in comparison with his disciplinary record as previously reviewed.

A considerable portion of the oral presentation for this case involved whether or not this court should offer a re-sentence option to this defendant. Each side presented various cases and opinions on this issue. This issue, quite frankly, would have been one which this court would have addressed, but for the fact that Mr. Hairston has completed his GED. In this court's view, this factor merits serious consideration.

The final factor to which the court gives great weight is that Robert Hairston was relatively young at the time of his conflicts with the criminal justice system. He had one youthful offender adjudication, but was then and remains now a first time offender.

Accordingly, because of the strong presumption in favor of resentence, and because Mr. Hairston has shown through the completion of the GED program, that he is motivated to take positive action in his own behalf, this Court would grant defendant's motion for re-sentence to the extent of specifying and informing defendant that the

Court would impose a determinate sentence of incarceration of 6 years with regard to Ind. No. 2404-04 and a determinate sentence of 2 years incarceration with regard to Ind. No. 1181-04, with both sentences to run concurrently with each other. Additionally these sentences would each involve a two year period of post release supervision.

This constitutes the Decision and Order of the Court.

Dated: February 8, 2010
Bronx, N.Y.

EFRAIN ALVARADO, A.J.S.C.