

SUPREME COURT OF THE STATE OF NEW YORK
SPECIAL NARCOTICS COURT
CITY OF NEW YORK
COUNTY OF NEW YORK: PART N

-----x
THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER
IND. 5704/2008

-against-

Alejandrina Jaen,

Defendant.
-----x

ELLEN M. COIN, J.:

Defendant moves for an order (1) pursuant to Criminal Procedure Law Section 216.00(1) confirming that she is eligible for judicial diversion; and (2) pursuant to CPL Section 216.05(1) for an alcohol and substance abuse evaluation. The People oppose the motion, contending that (1) defendant has unreasonably delayed in seeking diversion; (2) she is not here legally and may be unable to finance treatment; and (3) there is no evidence of alcohol or substance abuse or dependence or that such abuse or dependence is a contributing factor to her criminal behavior.

While defendant, who was indicted prior to enactment of the diversion statute, could have sought diversion more promptly, the Court notes that she has been represented by three different attorneys, *seriatem*, in the course of this case. In regard to timeliness, the statute provides that an eligible defendant may request an evaluation "[a]t any time after the arraignment...but

prior to the entry of a plea of guilty or the commencement of trial...." CPL §216.05(1). Here, within less than two weeks after assignment, defendant's third and latest attorney sought to advance this case for consideration for diversion.

It is preferable that a request for evaluation be made as early as possible in the case in order to avoid the problems attendant to delay: possible prejudice to the People's case (e.g., loss of witnesses, failure of memory) and waste of prosecutorial and judicial resources. However, in the circumstances here, newly-appointed defense counsel sought evaluation within a few short weeks of her assignment. Given the expansive statutory language regarding evaluation, the Court would not preclude consideration of this defendant for evaluation because of the delay in such request.

However, before the question of timeliness may be considered, the Court first must determine whether defendant is an "eligible defendant," a defined term under the judicial diversion statute. An "eligible defendant" is any person who stands charged with (1) a class B, C, D or E felony offense defined in articles 220 or 221 of the Penal Law or (2) any other specified offense as defined in CPL §410.91(4).¹ CPL §216.00(1).

¹Reference to subsection 4 is apparently erroneous. That subsection was repealed upon enactment of Article 216, and subsection 5, which contains the "specified offense[s]," has not been renumbered.

The definition of "eligible defendant" excludes certain categories of prior cases: predicates for (1) violent felony offenses as defined in PL §70.02, (2) offenses for which merit time is not available under Correction Law §803(1)(d)(ii), or (3) class A felonies under PL §220 [CPL §216.00(1)(a), (b)]. Another subparagraph excludes a defendant who has previously been adjudicated a second violent felony offender or a persistent violent felony offender. CPL §216.00(1)(b).

Finally, the definition excludes a defendant "who also stands charged" with a violent felony offense or an offense for which merit time allowance is not available, while such charge is pending, absent the prosecutor's consent. CPL §216.00(1).

Defendant is charged with the felonies of Criminal Possession of a Controlled Substance in the Third Degree (PL §220.16) and Criminal Possession of a Controlled Substance in the Fourth Degree (PL §220.09). However, she also stands charged with two misdemeanor counts of Unlawfully Dealing with a Child in the First Degree (PL §260.20). Were defendant, who has no prior criminal record, charged solely with the said felonies, she would be an "eligible defendant" under CPL §216.00(1). The issue before this Court is whether the presence of the misdemeanor charges renders defendant ineligible for diversion.

Defendant contends that no misdemeanor charge qualifies as an exclusionary crime under Article 216. However, the converse

is equally true: the only offenses under which a defendant is eligible for diversion are the felony offenses defined in article 220 or 221 of the Penal Law and Criminal Procedure Law Section 410.91(5).

The memorandum in support of the legislation noted as its purpose: "To significantly reduce drug-related crime by addressing substance abuse that often lies at the core of criminal behavior."² In the summary of specific provisions, the memorandum states, "In response to a request from the prosecution or defense, the court may order that a defendant charged with a drug crime (Penal Law Article 220 or 221) submit to an alcohol or substance abuse assessment."³

In regard to sentencing, the memorandum notes that the statute returns to judges "the discretion to sentence certain non-violent defendants charged with first and second class B, C, D or E felony controlled substance offenses to a local jail, probation or a 'split' sentence...."⁴ In the section on justification for the legislation, the memorandum states: "Expanding the number of nonviolent drug offenders that can be court ordered to drug abuse treatment will help break the cycle

²Memorandum in support of legislation, Bill Nos. A6085, S2855 (emphasis added).

³Id.; emphasis added.

⁴Id.; emphasis added.

of drug use and crime and make our streets, homes and communities safer...This bill reforms New York's drug sentencing laws by giving judges appropriate discretion to tailor the penalties of the Penal Law to the facts and circumstances of each drug offense."⁵

The legislative history's repeated references to defendants "charged with a drug crime," charged with "controlled substance offenses," and "each drug offense" does not suggest the expansive reading of the statute defendant posits. Indeed, the statute is explicit in listing the offenses that will render a defendant "eligible" under CPL Section 216.00.

Here defendant's misdemeanor charges of Unlawfully Dealing with a Child are the direct product of the felony charges. It was the presence of her children in an apartment in which she was alleged to possess felony weight cocaine that formed the factual basis for the misdemeanors counts. Did the Legislature intend to bar an otherwise eligible defendant from consideration for Diversion under circumstances such as these, where as a factual matter the misdemeanors are inextricably intertwined with the felonies?

The principles governing statutory construction provide that statutory language should be interpreted according to its natural meaning. Statutes Sec. 94. Thus, when statutory "language is

⁵Id.; emphasis added.

clear and unambiguous, it should be construed so as to give effect to the plain meaning of [the] words" used. *People v Finnegan*, 85 NY2d 53,58 (1995) (citing *People ex rel. Harris v Sullivan*, 74 NY2d 305 and related cases). "Equally settled is the principle that courts are not to legislate under the guise of interpretation." *Id.*

Had the Legislature chosen to include misdemeanors among the offenses rendering a defendant "eligible" for Judicial Diversion, it could have so specified. In the absence of legislative action, the Court cannot expand the provisions of the statute.

The motion is accordingly denied. This is the decision and order of the Court.

DATED: NEW YORK, NEW YORK
March 19, 2010



JSC