

COUNTY COURT
STATE OF NEW YORK COUNTY OF ONONDAGA

CRIMINAL DIVISION
Index # 09-0347
Indictment No. 2009-0813-1

PEOPLE OF THE STATE OF NEW YORK

vs.

DECISION
AND ORDER

AMIR KITHCART,

Defendant.

DECISION after argument before HON. JEFFREY R. MERRILL, Acting
County Court Judge, on the 22nd day of December, 2009.

APPEARANCES:

For the People:

William J. Fitzpatrick, Esq.
Onondaga County District Attorney
4th Floor, Criminal Courts Building
Syracuse, New York 13202
By: Brian J. Counihan, Esq.

For the Defendant:

Linda Gehron, Esq.
333 E. Onondaga Street
Syracuse, New York 13202

Defendant is charged in a four count indictment with criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fifth degree, tampering with physical evidence and resisting arrest. Defendant requested participation in the judicial diversion program pursuant to article 216 of the CPL. The court found defendant eligible for acceptance into the judicial diversion program over the People's initial objection.

The People contended that the non-drug related charges divested defendant of

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his eligibility for the judicial diversion program. No legal authority was cited for this contention.

The defendant argued that he was an "eligible defendant" for the judicial diversion program as defined by CPL 216.00(1). He further argued that the enumerated statutory conditions under which an otherwise eligible defendant would be excluded from the program, absent the consent of the People, were not applicable (see CPL 216.00[1] [a], [b]). The defendant concluded, therefore, that the additional non-drug related crimes charged in the indictment did not render him ineligible for judicial diversion. The court concurs with this conclusion. There is no such exclusionary language in article 216.

To qualify as an "eligible defendant" for the judicial diversion program the defendant must be "charged in an indictment or a superior court information with a class B, C, D or E felony offense defined in article two hundred twenty or two hundred twenty-one of the penal law or any other specified offense as defined in subdivision four of section 410.91 of" the criminal procedure law (CPL 216.00[1]). The defendant here is charged in an indictment with a class B and a class D felony as they are defined in Penal Law article 220 and, therefore, is an eligible defendant. None of the exceptions listed in CPL 216.00(1) (a), (b) requiring the People's consent to judicial diversion are applicable to the defendant.

In interpreting statutes, the court's "role is to discern and implement the will of the Legislature and attempt – by reasonable construction – to reconcile and give effect to all of the provisions of the subject legislation" (Carney v. Philippone, 1 NY3d 333, 339; McKinney's Cons Laws of NY, Book 1, Statutes, §92). From a plain reading of the language contained within CPL article 216 this court is inexorably led to conclude that

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the intent of the Legislature is to divert certain defendants from incarceration to the treatment provided by the judicial diversion program.

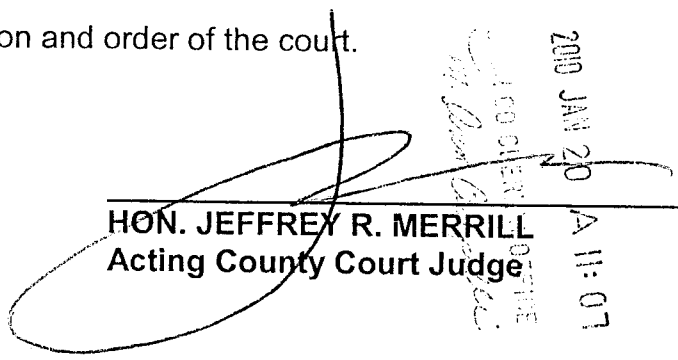
Article 216 is silent regarding defendant's eligibility consequences where non-qualifying offenses are included with qualifying offenses in an indictment or superior court information. This court finds that the non-qualifying offenses do not act as a bar to defendant's eligibility. That statutory "construction is to be preferred which furthers the object, spirit and purpose of the statute" (McKinney's Cons Laws of NY, Book 1, Statutes, §96). The court's interpretation furthers the legislative purpose of emphasizing and encouraging the drug treatment disposition as an alternative to a straight prison sentence. To hold otherwise would allow the People to thwart that purpose by inclusion of tangential offenses in an indictment or superior court information.

Accordingly, it is the determination of this court that the inclusion of non-drug related offenses with qualifying drug offenses in an indictment or superior court information does not preclude an otherwise eligible defendant from participation in the judicial diversion program of CPL article 216.

This constitutes the decision and order of the court.

ENTER

Dated: January 19, 2010
Syracuse, New York


HON. JEFFREY R. MERRILL
Acting County Court Judge

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