

Short Form Order

SUPREME COURT -- STATE OF NEW YORK
CRIMINAL TERM -- K-17 -- QUEENS COUNTY
125-01 Queens Boulevard, Kew Gardens, N.Y. 11415

P R E S E N T:

HON. EVELYN L. BRAUN, JUSTICE

-----:
THE PEOPLE OF THE STATE OF NEW YORK

IND. NO. N10596/04

-against-

MOTION: for resentence
pursuant to CPL 440.46

SHARON LASHLEY,

Defendant.

-----:
The following papers numbered
1 to submitted in this motion

Paul Skip Laisure, Esq.
FOR THE MOTION

Danielle Fenn, ADA
OPPOSED

Papers
Numbered

Notice of Motion and Affirmation Annexed _____
Affirmation in Opposition and Exhibits _____
Transcripts _____

Defendant's motion for resentence is granted only to the extent indicated in
the attached memorandum decision.

See memorandum decision attached hereto.

Dated: April 5, 2010

EB

J.S.C.

MEMORANDUM

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART K-17

-----:
THE PEOPLE OF THE STATE OF NEW YORK

- against -

SHARON LASHLEY,

Defendant.

BY EVELYN L. BRAUN, J.S.C.

DATED: April 5, 2010

IND. NO. N10596/04

-----:
On April 18, 2005, defendant entered pleas of guilty to the class "B" felonies of Criminal Sale of a Controlled Substance in the Third Degree, (PL § 220.39 - 1), and Criminal Possession of a Controlled Substance in the Third Degree, (PL § 220.16 - 1), in connection with an incident which occurred on April 21, 2004.

On May 10, 2005, pursuant to Penal Law § 70.06, she was sentenced to concurrent indeterminate terms of imprisonment of four and one-half to nine years for each crime in accordance with the prior plea negotiations. As of the date of the filing of the instant motion, defendant has been in custody for almost six years pursuant to that judgment of conviction.

Defendant now moves for resentencing pursuant to the 2009 Drug Law Reform Act (hereinafter referred to as "DLRA"), Chapter 56 of the Laws of New York, section 9, codified under CPL 440.46. She asserts that she is eligible to be resentenced under the statute and in particular, that her 1991 conviction for attempted robbery does not render her ineligible for such relief.

CPL 440.46 (1) permits defendants who have been convicted of class "B" felony

drug offenses committed before January 13, 2005, and who were sentenced to indeterminate terms of imprisonment under the sentencing statutes in effect at that time, to apply to the sentencing court for resentencing in accordance with sections 60.04 and 70.70 of the Penal Law.

However, CPL 440.46 (5) renders ineligible for resentencing an otherwise eligible person "who is serving a sentence on a conviction for or has a predicate felony conviction for an exclusion offense"

An exclusion offense is defined, in relevant part, as:

"a crime for which the person was previously convicted within the preceding ten years, excluding any time during which the offender was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony, which was: (i) a violent felony as defined in section 70.02 of the penal law"

In opposition to defendant's motion, the People contend that defendant herein is not eligible to be considered for resentencing under the statute since she was previously convicted of a prior violent felony within the preceding ten years. They argue that the ten year "look back" period in the statute is to be measured from the date of the commission of the present drug offense for which a defendant is seeking to be resentenced back to the date of the commission of the violent felony, excluding any time during which said defendant was incarcerated. Thus, when the ten year "look back" period is applied to the instant matter, only five and one-half years separate defendant's conviction for the present offense and her prior violent felony conviction.¹

¹ The People's calculation is based on Department of Correction records which indicate that during the thirteen year period between her conviction on the prior violent felony and her conviction on the present offense, defendant was incarcerated for a total of approximately seven years and five months.

In response, defendant urges the Court to reject any interpretation of the statute which requires the ten year “look back” period to be measured from the date of the commission of the current offense, and asks it to conclude that such period is intended to be calculated from the time of the filing of the motion for resentencing. Such interpretation would result in a finding that defendant’s prior violent felony conviction is not an exclusion offense and therefore she is eligible to apply for the relief requested.

When a defendant has moved to be resentenced pursuant to the 2009 DLRA, the Court, as a threshold matter, must determine whether such defendant is, in fact, eligible for resentencing. In seeking to resolve the issue presented here, this Court has reviewed the principles governing the rules of statutory construction. According to Statutes § 94, statutory language is generally “construed according to its natural and most obvious sense, without resorting to an artificial or forced construction.” When statutory language is clear and unambiguous, “it should be construed as to give effect to the plain meaning of the words used” (*People v. Finnegan*, 85 NY2d 53, 58; see also *Carney v. Phillipone*, 1 NY3d 333).

Additionally, it is well settled under New York law that “words having a precise and well-settled legal meaning in the jurisprudence of the state are to be understood in such sense when used in statutes, unless a different meaning is plainly indicated” (*People v. Brown*, 26 Misc3d 1204(A), citing McKinney’s Cons. Laws of NY, Book 1, Statutes, § 233; *People v. Reed*, 265 AD2d 56, 66, lv denied 95 NY2d 838). Words will not be expanded so as to enlarge their meaning to something which the Legislature could easily have expressed but did not and a court will not strain the clear language of a statute to produce an unintended and inequitable result (Statutes § 230; see also *Glasser v. Price*, 35 AD2d 98).

In this case, the particular language of the statute in issue speaks of a crime for which a person was previously convicted “within the preceding ten years.” It does not qualify the term “within the preceding ten years” or otherwise specify the point from which the ten year “look back” period is to be considered. By omitting language which would direct the Court to consider the “look back” period from the time of the current offense, which direction is included in other recidivist sentencing statutes, (see e.g. Penal Law §§ 70.04; 70.06), this Court must conclude that such omission was intentional. Thus, the plain meaning of the phrase “within the preceding ten years,” unadorned as it is by any limiting language, appears intended to run from the time immediately preceding the application made under CPL 440.46.

Assuming *arguendo* that such language is subject to different interpretations, the conclusion of this Court would be the same. Rules of statutory construction mandate that where an ambiguity exists, the courts should seek to divine “the general spirit and purpose underlying [the] enactment” of the statute by the Legislature and interpret it in a way “which furthers the object, spirit and purpose of the statute” (Statutes § 96). In this regard, the Court is mindful that each version of the DLRA promulgated in recent years has, as one of its primary purposes, relieving drug offenders of the unduly harsh effects of the former drug sentencing guidelines.

To measure the “look back” period from a date other than the date of the resentencing application would be detrimental to furthering the goals of the current legislation. It would clearly have the unintended effect of excluding an otherwise worthy defendant who has made concerted efforts toward rehabilitation during his or her period of incarceration because of a remote exclusionary crime.

Thus for this reason as well, this Court, after considering the rules of construction with regard to ambiguous statutory language, the ameliorative purposes of the reform laws and the existing case law from courts of concurrent jurisdiction, and in the absence of legislative history and appellate authority with respect to the “look back” period, finds that the term “within the preceding ten years” means the ten year period immediately preceding the date that the resentencing application was filed (see *People v. Loftin*, 26 Misc3d 1229A [County Ct., Onondaga Co.]; *People v. Reed*, unreported decision, [Sup. Ct., Onondaga Co.]; *People v. Danton*, __ NYS2d __, 2010 WL 424920 [Sup. Ct., New York Co.]; *People v. Brown*, 26 Misc3d 1204 A [Sup. Ct., New York Co.]; *People v. Roman*, 889 NYS2d 922 [Sup. Ct., Bronx Co.]).

Accordingly, in this case, the Court finds that defendant’s 1991 felony conviction is not an exclusion offense which would preclude her from being considered for resentencing under CPL 440.46.

Turning next to the issue of whether the Court’s discretion should be exercised in favor of defendant, the Court notes at the outset, that there is a strong presumption in favor of granting a resentencing application for all eligible defendants, (*People v. Lopez*, 10 Misc3d 1056 [A]), and that a court should not deny the application unless “substantial justice dictates that the application be denied” (L. 2004, ch. 738, sec. 23). In making its determination, the statute directs the Court to consider any facts and circumstances relevant to the imposition of a new sentence which are submitted by the defendant or the People. In addition, the Court may “consider defendant’s ‘institutional record of confinement’ which shall include, but not be limited to, such person’s participation in or willingness to participate in treatment or other programming while incarcerated and such

person's disciplinary history" (CPL 440.46 [3]).

Defendant asks this Court to resentence her to a determinate term of imprisonment within the parameters of the 2009 drug law reform legislation. In support of her application, she contends that her background, rehabilitative efforts while incarcerated and her prospects upon her release justify the reduction of her sentence to the "low end of [the] applicable sentencing schedule" specified in the current statute. Under the new sentencing guidelines of the DLRA, defendant would be subject to a determinate term of incarceration, the minimum of which is three and a half years and the maximum of which is twelve years, to be followed by a period of up to three years post-release supervision, for each of the crimes to which she pled guilty.

In seeking the relief requested from this Court, defendant reports the following, proof of which is annexed to her motion papers:

1. In the present case, she was convicted of participating in a single sale of a small amount of cocaine to an undercover officer. Although conceding that she has prior convictions for attempted robbery, criminal sale of a controlled substance in the third degree and six misdemeanor convictions, most of which were for petit larceny, she explains that her previous criminal conduct was motivated by her own past problems with drug abuse.

2. She has completed eight training courses offered through the New York State Office of Alcoholism and Substance Abuse Services and states that she intends to become certified as an Alcohol and Substance Abuse Counselor.

3. She is pursuing her GED. A favorable progress report reflects above-average grades and effort. Further, she passed a portion of her GED examination on November 19, 2009.

4. She has earned Certificates of Achievements or Completion in a number of rehabilitative programs.

5. She has participated in several vocational programs to prepare herself for employment once she is released, with a concentration in the field of custodial maintenance. She received excellent and above-average ratings for her job performance.

6. She admits to having committed Tier II infractions, primarily involving receiving unauthorized packages and sporadically creating disturbances during the period of her incarceration. A Tier III infraction was committed in 2005, when she first entered the prison system, but has not been repeated.

7. She has a stable environment awaiting her upon her release. She intends to reside with her mother in Jamaica, N.Y. She will also receive support from her daughter and sister, as well as a close friend. Additionally, she will be offered mental health counseling, vocational training, addiction treatment and assistance in obtaining housing or other needed benefits, as a client of Appellate Advocates.

The People do not dispute the information provided by defendant in support of her application. Nevertheless, they ask the Court to deny her motion for resentencing in the event it finds that defendant is eligible for resentencing. In the alternative, the People propose that she be resentenced to a determinate term of imprisonment of eight years to be followed by a period of three years post-release supervision.

The People contend the following:

1. Defendant committed the instant crime while on parole for a prior drug offense and is not the type of drug abuser toward whom the ameliorative relief provided by the 2009 DLRA was directed.

2. She was discharged in July, 2008 from the Alcohol and Substance Abuse Treatment Program (ASAT) because of poor program performance and behavioral problems. She did not further participate in the ASAT program.

3. She was cited for a number of infractions while incarcerated, the most recent of which occurred in November, 2009. She had a Tier III infraction in 2005.

4. She was denied parole in June, 2008. In denying her application for parole, the Parole Board noted that defendant's instant offense occurred while she was on parole release and that she is presently serving her third state prison sentence.

This Court has reviewed the court file, motion papers and exhibits attached thereto. Despite her acknowledged past difficulties, it appears that at this point in time, serious and successful steps have been taken by defendant in an effort to rehabilitate herself. Such efforts demonstrate an increased potential for her to re-enter society as a law-abiding and productive citizen. Further, it should be noted that additional psychological, vocational and educational support from the Office of the Appellate Advocates will be available to assist her upon her release.

Therefore, after considering the respective positions of the parties herein, all of the relevant factors under the 2009 DLRA, including its ameliorative purposes, and all of the facts and circumstances of this particular matter, it is the judgment of this Court that concurrent determinate terms of imprisonment of seven years to be followed by a period of three years post-release supervision for the crimes of Criminal Sale of a Controlled Substance in the Third Degree and Criminal Possession of a Controlled Substance in the Third Degree, respectively, would be appropriate and the Court is prepared to impose such sentence upon resentencing.

In accordance with the statute, prior to the date set for resentencing, defendant may withdraw her application or appeal this order. Otherwise, the parties are directed to appear at 11:00 a.m. on April 28, 2010 in Part K-17 of the Supreme Court, Queens County, at which time defendant will be afforded the opportunity for a hearing as mandated by law (CPL 440.46; see also *People v. Figueroa*, 21 AD3d 337). In the event defendant does not request a hearing on that date, the Court is prepared to vacate the previous sentence and resentence her, *nunc pro tunc*, in accordance with the foregoing on April 28, 2010.

The District Attorney is directed to prepare an Order to Produce defendant on that date.

Order entered accordingly.

This constitutes the decision and order of the Court. The Clerk is directed to forward a copy of this memorandum and order to the attorney for the defendant, to defendant at her place of incarceration and to the District Attorney.

Dated: April 5, 2010



J.S.C.