

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM

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THE PEOPLE OF THE STATE OF NEW YORK

: Indictment No. 9546-93

-against-

:

Motion: Re-sentence

HERBERT LEWIS,

:

Defendant.

:

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Cyrus Vance, Jr., District Attorney, New York County (ADA Samuel Levy, of
counsel) for the People.

Office of the Appellate Defender (Alexandra Keeling, of counsel), for defendant.

Honorable Roger S. Hayes:

Factual and Procedural History

On June 7 1994, defendant was convicted after a jury trial, of Criminal Sale of a
Controlled Substance in the Third Degree (PL § 220.39[1]), a Class B felony, and
Criminal Possession of a Controlled Substance in the Seventh Degree (PL § 220.03), a
Class A misdemeanor.

On July 13, 1994, defendant was sentenced to an indeterminate term of five to ten
years imprisonment for the sale charge, and one year for the possession charge. At the
time of arrest, defendant was on parole for a 1990 Queens County conviction for
Attempted Criminal Possession of a Controlled Substance in the Fourth Degree.
Defendant has two prior felony convictions.

On October 15, 1996, the Appellate Division unanimously affirmed the judgment of conviction (*People v Lewis*, 232 AD2d 239 [1st Dept 1996]) and the Court of Appeals denied leave to appeal (*People v Lewis*, 89 NY2d 865 [1996]).

On August 3, 1999, defendant was released, but violated his parole and was returned to custody. He was released again on December 26, 2000, November 30, 2006, and August 22, 2008, but each time defendant returned to the Department of Corrections for violating his parole. Finally, defendant was paroled on April 21, 2009, but he violated his parole and was returned to the Department of Corrections where he remains today.

Now, defendant moves to be re-sentenced under the 2009 Drug Law Reform legislation, Chapter 56 of the Laws of New York, Section 9, signed by Governor Patterson on April 7, 2009 (hereinafter “DLRA 3”).

As a second, non-violent drug offender convicted of a Class B felony drug offense, defendant would be eligible to be re-sentenced to a determinate prison term with a minimum of two years and a maximum of twelve years under the new Drug Law Reform Act, with a period of post-release supervision period ranging from one and one half to three years.

The People claim defendant is not eligible for re-sentencing.

The Court has reviewed the motion, the response, the sur-reply, and all the documentary evidence submitted by both sides, including defendant’s institutional record of confinement. The Court also heard argument by the Parties on February 11, 2010.

Conclusions of Law

The Drug Law Reform Act of 2009 (hereinafter “DLRA-3”) enacted a Criminal Procedure Law provision, allowing certain prisoners in the custody of the Department of Corrections who were convicted of a Class B Drug Felony offense committed prior to January 13, 2005, and sentenced to an indeterminate term of imprisonment with a maximum period of more than three years, to apply to be resentenced in accordance with PL §§ 60.04 and 70.70 (*see* CPL § 440.46[1]). However, not every defendant serving a Class B drug felony is eligible for re-sentencing.

The DLRA-3, by statute, limits re-sentencing to defendants convicted of a Class B drug offense to those who: (1) committed their crime before January 13, 2005; (2) were sentenced under the indeterminate sentencing scheme; (3) received a sentence with a maximum term of more than three years; and (4) are not serving a sentence for “an exclusion offense” as defined by CPL § 440.46(5).

The Court may consider any facts of circumstances relevant to the imposition of a new sentence, and “the court’s consideration of the institutional record of confinement of such person 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 persons’s disciplinary history” (CPL § 440.46[3]).

Defendant asserts he is a candidate for re-sentencing, and points to his institutional history for support. Though he has received one Tier III ticket and twelve Tier II tickets, all of those infractions occurred more than ten years ago, and defendant has not had a single disciplinary incident since 1999. In addition, defendant has provided evidence of his participation in various rehabilitative programs while incarcerated, including: a 1999 certificate for completing Alcohol and Substance Abuse Treatment Program (ASAT); a 1998 certification for participation in the ASAT Anger Program; a 16-week food service training program in 1996; and a program for parole violation and a three-month program on relapse prevention in 2006. Defendant notes he has been incarcerated for this offense for just over seven years, and that the current minimum sentence for the offense is only two years. Accordingly, defendant seeks to be re-sentenced to two years, or, in light of the years already served, seeks immediate release, with a term of post-release supervision of less than three years.

The People contend defendant is ineligible for re-sentencing pursuant to the DLRA-3 because defendant is only in the Department of Corrections' custody because he violated his parole. But for these violations, he would not be in custody and thus not eligible for ameliorative re-sentencing consideration pursuant to the DLRA-3.

Defendant asserts that the language of the statute does not preclude parole violators from eligibility for re-sentencing, and thus the legislature did not mean to preclude them from consideration.

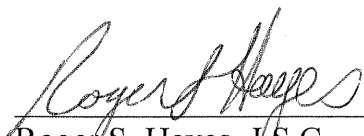
In a case similar to this where defendant applied for re-sentencing pursuant to the Drug Law Reform Act of 2005 (hereinafter “DLRA-2”) the Court of Appeals reasoned a defendant should not be eligible for re-sentencing if he was already released on parole and back in custody only due to a violation of that parole (*see People v Mills*, 11 NY3d 527, 537 [2008]) [“Surely the legislature did not intend fresh crimes to trigger re-sentencing opportunities”]; *see also People v Bagby*, 11 Misc.3d 882 [Westchester Co. 2006]). Recently, the Appellate Division, First Department held the same reasoning applies to defendants seeking re-sentencing pursuant to the Drug Law Reform Act of 2004 (hereinafter “DLRA-1”) when it denied relief to an applicant defendant back in Department of Corrections’ custody because of a parole violation (*see People v Rodriguez*, 68 AD3d 676 [1st Dept 2009]).

The People contend the same logic applies to ameliorative re-sentencing pursuant to the DLRA-3. The Court agrees, and finds the DLRA-3 re-sentencing statute does not extend to those defendants who have already been released to parole supervision and returned to custody for violating their parole. Surely, if the legislature intended this re-sentencing provision to apply to people who had been at liberty on parole, they would have said courts should also consider his activity while on parole. They did not, but did direct courts to consider a defendant’s institutional record. The absence of this direction to the court is additional evidence that the legislature did not intend the re-sentencing provision to apply to people who have been released on parole and violated that parole.

The sentencing court imposed a five to ten year sentence for the offense in 1994, and though he was released on parole five times, defendant was unable to abide by the rules of his parole, and was returned to custody five times. As a result, defendant has served only seven years of this sentence.

The Court finds defendant is not eligible for re-sentencing pursuant to the DLRA-3. The Court recognizes the issue presented is not free from a contrary interpretation, as a number of Justices have concluded. However, for the above stated reasons, the defendant's application to be re-sentenced is denied.

New York, New York
February 11, 2010



Roger S. Hayes, J.S.C.