COUNTY COURT
COUNTY OF ONONDAGA STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK

v.

Indictment No 2003-0035-1
Index No 03-0013

TIMOTHY LOFTIN,

Defendant.

APPEARANCES: WILLIAM J. FITZPATRICK, ESQ.
Onondaga County District Attorney
MICHAEL E. FERRANTE, ESQ., Of Counsel

EDWARD W. KLEIN, ESQ.
217 Montgomery Street- Suite 1200
Syracuse, New York 13202

FAHEY, J

DECISION/ORDER

Defendant moves herein pursuant to pursuant to *CPL§ 440.46*, the Rockefeller Drug Law Reform Act of 2009, (Chapter 56 of the Laws of 2009), for an Order vacating the sentence imposed; re-sentencing Defendant; and requesting that counsel be assigned.

On or about June 17, 2003 Defendant entered a plea of guilty pursuant to Count One of this Indictment charging Criminal Sale of a Controlled Substance in the Third Degree, in violation of *PL §220.39(1)*, a class B felony offense committed on October 10, 2002

On August 19, 2003 Defendant was sentenced as a second felony offender to an indeterminate term of 4 ½ to 9 years in prison. The predicate offense referenced on the predicate felony statement is "Assault with intent cause physical injury with weapon", committed on February 25, 1993 with a conviction date of May 4, 1993. Upon sentencing Defendant was remanded to the custody of the Department of Correctional Services.

At some time in January of 2007 after serving the minimum portion of his sentence, Defendant was released to the supervision of the Division of Parole. Having been found to have violated a condition of that release, Defendant was returned to DOCS custody in June of 2007. Defendant was subsequently re-paroled in May of 2008 and was subsequently re-violated. On January 8, 2010 Defendant was again, released to the supervision of the Division of Parole. The Department of Correctional Services identifies the Maximum Expiration Date of Defendant's sentence as August 10, 2012.

On or about March 27, 2009 Defendant filed this Pro Se "Petition for Re-Sentence" seeking an Order vacating the sentence imposed and re-sentencing Defendant pursuant to *PL §60.04* and *70.70*

On June 15, 2009 the Court corresponded with Defendant and assigned counsel.

This matter was calendared, at counsel's request for October 9, 2009 and at that appearance counsel submitted a letter-memorandum in support of Defendant's motion. On October 16, 2009 counsel submitted an Affirmation in Support of Motion For Resentencing. Oral arguments were heard at both appearances and on October 26, 2009 the People filed an Answering Affidavit in opposition to the motion.

As noted, Defendant is currently out of custody under the supervision of the Division of Parole.

CPL §440.46(1) states:

"Any person in the custody of the department of correctional services convicted of a class B felony....committed prior to [1/13/05], who is serving an indeterminate sentence with a maximum term of more than three years, may, except as provided in *[CPL §440.46(5)]*, upon notice to the appropriate district attorney, apply to be resentenced to a determinate sentence in accordance with [*PL §60.04 and 70.70*] in the court which imposed the sentence."

The People's opposition to this motion is based on the following grounds:

(I) Defendant is not eligible for re-sentencing because he is "an excluded defendant in accordance with *[CPL §440.46(5)(a)]* ", i.e. Defendant was a violent predicate felon at the time of commission of this offense and the ten year "look back" period should be interpreted to run from the date of the commission of the subject offense;

(II) Defendant is not eligible for re-sentencing because "he is currently not in the custody of the Department of Correctional Services, is not serving a sentence for a Class "B" drug felony, and is not serving a sentence in excess of three (3) years." The People base these contentions of the fact that "...on February 9, 2009 the defendant was returned to jail for a violation of parole" and "having been released Defendant is now in the custody of the Division of Parole and...is not eligible."

(People's Answering Affidavit)

As to (I): *CPL §440.46(3)* states that the provisions of *Ch 738 §23* of the laws of 2004 shall govern and does not contain any language comparable to that portion of the Drug Law Reform Act of 2005 which limited eligibility to defendants who were more than three years from their earliest parole date. This Court interprets this to mean that eligibility for re-sentencing is defined in terms of DOCS custody, (*People v Haulsey,* Sup Ct, NY County, 11/20/09; *People v Gonzales,* 29 AD3d 400*),* and finds that this Defendant is "not precluded from obtaining relief under the Drug Law Reform Act of 2009, "...merely because he was previously paroled on that conviction" *People Williams,* Sup Ct, NY County, 12/23/09, citing *People v Haulsey,*

As to (II): *CPL §440.46(5)* states that "[t]he provisions of this section shall not apply to any 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 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 the commission of the previous felony and the time of the commission of the present felony, which was (i) a violent felony offense as defined in *[PL §70.02*]...."

The parties agree that Defendant was convicted of Assault in the Second Degree, a class D violent felony offense, on August 19, 1993; AND that between February 25, 1993 and December 10, 2002 Defendant was incarcerated for a period of approximately 5 1/4 years, which period of time would be excluded from the 10 year "look back" calculation .*(Defense Affirmation p3*; *People's Answering Affidavit, p3*)

In determining whether this prior violent felony offense is in fact, an exclusion offense the Court is charged to determine whether it is, first, "...a crime for which the person was previously convicted within the preceding ten years...".

The People argue that the "preceding ten year[s]" or "ten...year look back goes from the date of the commission of the violent felony and the commission of the present offense"; and that this Defendant is "excluded from re-sentencing by virtue of the fact that he was a violent predicate felon..." when he committed the instant offense on December 10, 2002. *People's Answering Affidavit* The People contend that if the "preceding ten years" is measured from the date of Defendant's commission of the "present" narcotics offense, December 10, 2002, then Defendant's May 5, 1993 conviction of a violent felony offense would be "within the preceding ten years" (when we exclude the 5 1/4 years Defendant was incarcerated between the commission of those felonies) .

Defendant argues that the 10 year period should be measured back from "the date of the resentencing application". *Defense Affirmation,p2*

The statute however, "does not qualify the term 'within the preceding ten years' with reference to any time frame. Instead this very significant enactment was included in a 157 page omnibus bill dealing with a wide variety of disparate subjects. While one would expect that the Legislature might have provided the Judiciary with some guidelines concerning its intent in matter of this importance, no legislative memoranda accompanied the bill which would have shed some light on what the Legislature intended. Thus, the various Courts confronted with the task of applying this statute are additionally required to interpret the law so as to divine the Legislature's intent.

The governing rule of statutory construction is that courts are obliged to interpret a statute to effectuate the intent of the Legislature, The legislature however, "is presumed to mean what it says...[and] [t]he language of a statute is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction." *McKinney's Statutes §94*

When statutory language is clear and unambiguous, it should be construed as to give effect to the plain

meaning of words used. *People v Roman*, Sup Ct, Bronx County, 12/2/09, citing *People v Finnegan*, 85 NY2d 53, see also *Carney v Philippone*, 1 NY3d 333.

This Court is inclined to agree with an increasing number of other trial courts who have ruled that the statute, by its plain meaning, contemplates eligibility determinations from the present date, (*People v Reed*, Sup Ct, Onon County, 2/ /10 ; *People v Brown*, Sup Ct, NY County, 1/4/10 ; *People v Williams*, Sup Ct, NY County, 12/23/09; *People v Roman*, Sup Ct, Bronx County, 12/2/09), and that the most natural construction of the law is to read [the] reference point ...[for the ten year look back period] as the date of a resentencing application." *People v Brown*.

As Judge Mogulescu opined in *Roman*,

> "..to adopt the position put forth by the People would be to deny a court the ability to reevaluate the propriety of an otherwise draconian sentence meted out under the former sentencing structure for drug offenses. The entire purpose of the 2009 Drug Law Reform Act, and its predecessor2004 and 2005 drug law reform acts, is to ameliorate the lengthy sentences given to defendants for selling or possessing a small amount of drugs. To this end the statute imposes a presumptive applicability, stating that once a defendant is otherwise eligible for resentencing a court shall not deny the application *unless*, "substantial justice dictates that the application be denied." *Roman*, citing *L. 2004, Ch738, sect. 23.*

See also People v Quinones, 11 Misc3d 582

Although this Defendant filed his initial application seeking resentence in March of 2009, the Court will measure the ten year "lookback" period from October 7, 2009, the date the re-sentencing provisions of the 2009 DLRA became effective.

Under this interpretation, the Defendant's prior violent felony conviction for Assault Second (conviction date May 4, 1993) is NOT a crime for which Defendant was previously convicted within the preceding ten years, even when we exclude the 5 1/4 year period of incarceration.

Accordingly, this Court finds that Defendant was not convicted of any crime within the ten year period preceding the application and that the May 4, 1993 Assault in the Second Degree, violent felony offense conviction shall not be construed to be an "exclusion offense".

A review of Defendant's submissions demonstrates that Defendant has served between six and seven years in prison for the subject crime. The Resentencing Memorandum submitted in support of Defendant's application further demonstrates that Defendant has twice completed the DOCS ASAT program, once in 2006, and again in May of 2008. While in DOCS custody Defendant has also completed Phase I of a Transitional Services Program; a 16 week Food Services training program; Phase III of Transitional Services; computer and safety training, and a General Business program,. Defendant also earned merit time; supplemental merit time and a Certificate of Earned Eligibility before his 2007 release to parole. Although Defendant was released to parole and subsequently revoked in 2007 and 2008, it appears that these revocations were based on "technical violations resulting from his ongoing struggles with addiction". Defendant appears to have recently participated in a "Return Parole Violator" program offered by DOCS which focused on "relapse prevention through behavior modification". *Resentencing Memo, Exhibits B;C;E and F*. Defendant's DOCS disciplinary history consists of "two minor disciplinary infractions, both Tier 2 tickets", one in 2005 and another in 2009.*Resentencing Memo, Exhibit G*

This Court has considered the parties' submissions and arguments as well as the Department of Corrections records and hereby determines that substantial justice dictates that Defendant must be re-sentenced as a second felony offender in accordance with the revised sentencing provisions of *PL §60.64 and 70.70* .

This constitutes the Decision and Order of this Court.

DATED: March 2, 2010
Syracuse, New York

HONORABLE JOSEPH E. FAHEY, J. C. C.