

Supreme Court  
of the  
State of New York

Part 41 - New York County

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The People of the State of New York

INDICTMENT: 01352-2004

vs.

MOTION FOR: CPL §440.46

Melvin Williams,

CALENDAR DATE: January 28, 2010

Defendant  
-----X

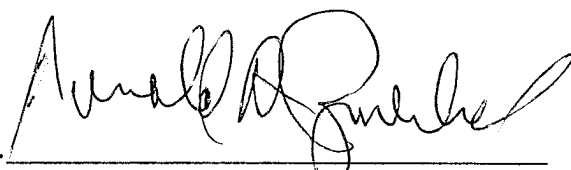
Ordered that upon the papers submitted, this motion is hereby

GRANTED \_\_\_\_\_

DENIED  (see accompanying decision & order)

**MAY 06 2010**

Date \_\_\_\_\_

Hon.  \_\_\_\_\_

HON. RONALD L. STUHLIK

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 41

-----x  
THE PEOPLE OF THE STATE OF NEW YORK :  
Indictment Number 1352/04  
-against- :  
MELVIN WILLIAMS, : Decision & Order

Defendant.:

-----x  
ZWEIBEL, J.:

On September 23, 2004, defendant entered a plea of guilty before this Court to one count of Criminal Sale of a Controlled Substance in the Third Degree (P.L. § 220.39[1] ) in satisfaction of Indictment Number 1352-04.<sup>1</sup> Pursuant to the plea agreement, defendant was permitted to participate in the DAYTOP residential drug treatment program, upon his successful completion of which defendant would be permitted to withdraw his guilty plea to the class B felony and replead to a class A misdemeanor. He would then be sentenced to time served. Defendant failed to complete the drug program. Consequently, on July 12, 2007, judgment was entered by this Court, sentencing defendant to an indeterminate term of imprisonment of from five to ten years. Defendant has now filed a motion for resentencing pursuant to section 440.46 of the Criminal Procedure Law. The People oppose on the ground that defendant is ineligible for resentencing under CPL § 440.46(1)

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<sup>1</sup>Defendant was given an opportunity to make a statement/testify with respect to this application on the last adjourn date.

and substantial justice militates against re-sentencing.

The Court has reviewed the applicable law and the documents supplied by defendant and the People, including all annexed exhibits and the Court file. For the reasons that follow, defendant's motion is denied.

#### Findings of Fact

The following facts are undisputed. After sentencing, defendant was delivered to the custody of the New York State Department of Correctional Services (hereinafter, "DOCS") to serve the indeterminate term of imprisonment imposed by this Court upon his conviction of Criminal Sale of a Controlled Substance in the Third Degree. On December 22, 2009, while still incarcerated on that sentence, defendant was released from a DOCS facility to the New York State Division of Parole (hereinafter, "DOP") and is at liberty at this time.

#### Discussion

Section 440.46 of the Criminal Procedure Law is the codification of the Drug Law Reform Act of 2009 (L 2009, ch 56, pt AAA, § 9), which extends to those convicted of a class B, C, or D drug felony and sentenced under the legislation commonly referred to collectively as the Rockefeller Drug Laws the opportunity to seek a less severe sentence; the Drug Law Reform Act of 2004 (L 2004, ch 738, § 23 [hereinafter, "DLRA/04"] ) and

the Drug Law Reform Act of 2005 (L 2005, ch 643, § 1 [hereinafter, "DLRA/05"] ) extended the same opportunities to those convicted of class A-I and A-II drug felonies, respectively. As with DLRA/04 and DLRA/05, the baseline eligibility requirement for resentencing under CPL § 440.46 is that the applicant be a "person in the custody of the department of correctional services." CPL § 440.46(1); L 2005, ch 643, § 1; L 2004, ch 738, § 23.

Although defendant was "in the custody" of DOCS within the meaning of the drug law reform legislation when he filed his initial application, he is no longer within the custody of DOCS, having been released on parole. He is in the custody of the Department of Parole ("DOP"). There is no definition or explanation of the meaning of the phrase, "in the custody of the department of correctional services," in any of the drug law reform acts. Nor does either side cite, and the Court is unaware of, any reported decision of an appellate court construing the phrase under CPL § 440.46(1) specifically. However, our appellate courts have held that a defendant becomes ineligible for resentencing under DLRA/04 and DLRA/05 once he is released to parole from incarceration on the underlying sentence of imprisonment, and remains ineligible even if he is subsequently re-incarcerated in a DOCS facility for violating the conditions

of that parole (see, e.g., People v. Mills, 11 NY3d 527, 536-537 [2008]) (holding "that once a defendant has been released to parole supervision for a class A-II drug felony conviction, he or she no longer qualifies for 2005 DLRA relief for that particular conviction"); People v. Rodriguez, 68 AD3d 676 [1st Dept. 2009] [applying the *Mills* holding in affirming the denial of a motion for resentencing under DLRA/04 made by a defendant who had been paroled and then re-incarcerated for a parole violation]; People v. McCloud, 38 AD3d 1056 [3rd Dept. 2007] [affirming the denial of a motion for resentencing under DLRA/05 made by a defendant who had been paroled and then re-incarcerated for a parole violation; cited with approval in *Mills*], lv dismissed 8 NY3d 947 [2007]). Therefore, since December 22, 2009, the date on which he was first released from the custody of DOCS to parole, defendant would have been ineligible for resentencing under DLRA/04 and DLRA/05 and remains ineligible.

Nevertheless, despite that the identical "in the custody" requirement appears in all of the drug law reform acts, defendant now contends that his release to parole from incarceration does not render him ineligible for resentencing under CPL § 440.46(1) specifically. Defendant argues that an inmate released to parole does not lose his or her eligibility for resentencing under CPL § 440.46 because (s)he is still "serving" the underlying sentence-

that is to say, DOCS continues to grant credit for time-served against that sentence while he is on parole-and if declared delinquent ... will be returned to the custody of NYS DOCS to continue to serve his ...sentence, thereby implying that a parolee is still "in the custody" of DOCS within the meaning of CPL § 440.46(1) although he is not incarcerated in a DOCS facility. To accept that argument would require a strained and bizarre construction of the language of CPL § 440.46(1) and would create a result at odds with justice and common sense (see People v. Romero, 26 Misc.3d 1218(A), 2010 WL 391281 [Table] [Bx. Co. Sup. Ct. February 4, 2010]).

To have custody of a person entails the exclusive authority of physical control over that person (See, e.g., Ballentine's Law Dictionary 300 [3rd ed. 1969] ["As applied to a person, custody' means physical control of the person, sometimes by imprisonment"]). Thus, even assuming arguendo that imprisonment was not a necessary component of being in custody, a parolee is not in the custody of DOCS because one simply can not be within the exclusive physical control of two different autonomous agencies at the same time (see People v. Romero, *supra*, 2010 WL 391281) . DOP is not the same as or a part of DOCS. and "while on parole [a parolee] is in the legal custody of the Division of Parole" (Matter of Oriole v. Saunders, 66 AD3d 280, 281 [1st

Dept. 2009]).<sup>2</sup> That DOP's sphere of authority routinely touches DOCS's-as when DOCS releases an inmate to parole or when DOP returns that inmate to a DOCS facility for violating the conditions of parole-does not alter the fact that the agencies are autonomous of each other. Therefore, since a parolee is within the exclusive physical control of DOP, (s)he is not in the custody of DOCS (cf. People v. Muniz, 61 AD3d 431 [1st Dept.], lv dismissed 12 NY3d 918 [2009]).<sup>3</sup>

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DOP is a division within the New York State Executive Department (see Exec. L. § 259[1] ), so in a sense a parolee is also in the custody of the Executive Department. But DOCS is itself a distinct department of the State of New York with its own divisions for administering its statutorily-endowed powers and responsibilities (see Corr. L. § 5[1] ).

<sup>3</sup>In order to be eligible for resentencing under DLRA/05, in addition to being in the custody of DOCS, the applicant "may not be eligible for parole within three years" (People v. Bautista, 26 AD3d 230 [1st Dept.], appeal dismissed 7 NY3d 838 [2006]). In Muniz, the defendant was sentenced to six years to life imprisonment in 1984, and first became eligible for parole in 1989. "Rather than being paroled, he was transferred to a federal prison [in 1990] to serve a lengthy federal sentence" (People v. Muniz, 11 NY3d at 431. In 2006, he applied for resentencing under DLRA/05. Technically, Muniz met the three year requirement since he could not be reconsidered for parole on his underlying state sentence until he completed his federal sentence in 2020. Nevertheless, his application was denied because "without the federal incarceration defendant would have been ineligible because he would not have been more than three years from parole eligibility" (Id.). In affirming, the Appellate Division also said: "Defendant is also ineligible for resentencing for the separate reason that he is not in the custody of [DOCS]. Contrary to defendant's contention, jurisdiction and custody are not equivalent" (Id.).

Furthermore, the circumstance that a parolee continues to serve his underlying sentence does not transform being on parole into the equivalent of being "in the custody" of DOCS under the drug law reform legislation. The Appellate Division has held that this is not the case under DLRA/04 (see People v. Rodriguez, supra ) or DLRA/05 (see People v. McCloud, supra ), and there is no reason why the result should be different under CPL § 440.46(1). Indeed, there is an inconsistency between language that appears after the "in the custody" requirement in CPL § 440.46(1) and language that appears after the identical requirement in the prior drug law reform legislation. Under CPL § 440.46 to be eligible for resentencing an applicant must also be a person "who is serving an indeterminate sentence" (CPL § 440.46[1] [emphasis supplied] ), while under DLRA/04 and DLRA/05 an applicant for resentencing must also be a person who was "sentenced ... to an indeterminate term of imprisonment" (L 2005, ch 643, § 1 [emphasis supplied]; L 2004, ch 738, § 23 [emphasis supplied] ); the CPL § 440.46(1) phrase, "serving an indeterminate sentence," appears in neither of the earlier statutes. But these alternate word choices present a distinction without a difference. To be "serving" a sentence under CPL § 440.46(1), one has to have been sentenced. Likewise one who has been "sentenced" and thereupon committed to the custody of DOCS

under the prior legislation is then serving that sentence. Whether the circumstances of an applicant's imprisonment is defined by the language of CPL § 440.46(1) or that of DLRA/04 and DLRA/05, while on parole the person described is still "serving"- i.e., receiving credit for time-served-the underlying sentence. Therefore, just as being on parole is not the equivalent of being "in the custody" of DOCS under DLRA/04 or DLRA/05, it is also not the equivalent of being "in the custody" of DOCS under CPL § 440.46(1) either.

Accordingly, for the foregoing reasons, defendant's motion pursuant to CPL § 440.46 for resentencing on his conviction of criminal sale of a controlled substance in the third degree is denied as he is ineligible to be resentenced.

In any event, even assuming *arguendo* that defendant was eligible to be resentenced, substantial justice does not merit resentencing in this case. Pursuant to subsection (3) of CPL 440.46, "[t]he provisions of section twenty-three of chapter seven hundred thirty-eight of the laws of two thousand four [the Drug Law Reform Act of 2004] shall govern the proceedings on and determination of a motion brought pursuant to this section" (CPL § 440.46[3]). The impetus for the drug law reform acts was the legislature's determination that the Rockefeller Drug Laws' mandated sentences were excessively harsh when applied to street-

level offenders who possessed or sold only small quantities of illegal drugs in order to feed their own addiction. Further, legislators determined that the mandated sentences had proven to be counterproductive, in that incarcerating those low level offenders was hugely expensive and because such lengthy periods of imprisonment were more likely to foil than foster any sincere desire on the part of such an offender to overcome his or her addiction and become a law-abiding member of society.<sup>4</sup> Because the drug law reform acts embody a concerted legislative effort to reverse the deleterious effects of the Rockefeller Drug Laws, the legislature has incorporated into all of the drug law reform acts a presumption in favor of granting motions for resentencing "unless substantial justice dictates that the application should be denied" (L 2004, ch 738, § 23).

CPL 440.46(3) directs that the determination of a motion for re-sentencing pursuant to DLRA III shall be governed by the

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<sup>4</sup>In 2004, the Legislature initiated drug law reform, finding that New York's drug laws "provide inordinately harsh punishment for low level non-violent drug offenders, warehouse offenders in state prison who could more productively be placed into effective drug treatment programs, and waste valuable state tax dollars which could be used more effectively to provide drug treatment to addicts..." (NY Bill Jacket, 2004 A.B. 11895, Ch. 738, at p.6). Clearly, the Legislature's analysis was incorrect in defendant's case as he first had the benefit of an effective drug treatment program and he wasted the opportunity provided to him.. It was only when he received treatment in prison, did defendant appear to receive any benefit from a treatment plan.

provisions of Section 23 of DLRA I (L.2004, c. 738, § 23). As provided in Section 23, after ruling a person eligible for re-sentencing, the court "may consider any facts or circumstances relevant to the imposition of a new sentence which are submitted by such person or the people and may, in addition, consider the institutional record of confinement of such person, but shall not order a new presentence investigation and report or entertain any matter challenging the underlying basis of the subject conviction." Further, the "court shall offer an opportunity for a hearing and bring the applicant before it [and t]he court may also conduct a hearing, if necessary, to determine whether such person qualifies to be resentenced or to determine any controverted issue of fact relevant to the issue of sentencing" (L.2004, c. 738, § 23).

The statute directs that, upon the court's review of the submissions and the findings of fact made in connection with the application, the court shall render its determination with regard to the application for re-sentencing, either granting a re-sentence and setting forth its proposed determinate re-sentence, or denying the application where "substantial justice dictates that the application should be denied" (*id.*). There is a rebuttable presumption in favor of resentencing. However, the presumption is not irrebutable; thus, it means neither that

resentencing motions must be granted automatically, nor as defendant implies, does it require "a finding of extraordinary circumstances in order to deny resentencing" (People v. Gonzalez, 29 A.D.3d 400 [1st Dept.] lv denied 7 N.Y.3d 867 [2006]).

This court has conducted the required review, and, upon due consideration of all of the relevant material, concludes, for the following reasons, that defendant is not the type of individual whose background and history justifies that he be re-sentenced under DLRA III.

To start, the court notes that the defendant's contacts with the criminal justice system dates back to 1981, when defendant was 22 years old, and includes at least three felony and three misdemeanor convictions. Defendant has a 1981 conviction for Criminal Possession of a Weapon in the Fourth Degree for which he was sentenced to a year in jail. In 1996, defendant was convicted for Attempted Criminal Sale of a Controlled Substance in the Third Degree and sentenced to nine months incarceration. In 1999, defendant was convicted of Criminal Sale of a Controlled Substance in the Fifth Degree and sentenced to two to four years' imprisonment. In 2001, defendant was convicted of Criminal Trespass and sentenced to time served. In 2003, defendant was arrested for Criminal Possession of a Controlled Substance in the Seventh Degree and sentenced to time served. According to

defendant's original probation report, he also has a criminal history in Georgia and New Jersey.

In the instant case, on December 29, 2003, defendant was observed by Detective William Atkinson of the Narcotics Division of the New York City Police Department exchanging one glassine of heroin to a separately charged defendant, John Ford, for United States currency within 100 feet of a public school. Following his arrest, defendant was searched and was found to be in possession of nine zip lock bags containing cocaine, which weighed more than one-eighth of an ounce and one hundred and fifty-three dollars (\$153). The separately charged defendant was also arrested and found to be in possession of the glassine of heroin.

The defendant was indicted for three B felony offenses and one C felony offense. Specifically, defendant was charged with Criminal Sale of a Controlled Substance in or near School Grounds (PL § 220.44[2]), Criminal Sale of a Controlled Substance in the Third Degree (PL § 220.39[1]), Criminal Possession of a Controlled Substance in the Third Degree (PL § 220.16[1]) and Criminal Possession of a Controlled Substance in the Fourth Degree (PL § 220.09[1]). Because defendant appeared to be an addict, the People and the Court entered into a written D-Tap agreement so that defendant could receive treatment for his

addiction and have an opportunity to improve his life. On September 23, 2004, pursuant to a plea agreement, defendant was permitted to plead guilty to one count of Criminal Sale of a Controlled Substance in the Third Degree (PL § 220.39[1]), and was promised that if he entered and successfully completed a residential drug treatment program administered by DAYTOP, he would be allowed to withdraw his plea to the B felony and re-plead to an A misdemeanor and receive a sentence of time served. However, if defendant failed to complete the program, he would be sentenced to four and one-half to nine years of imprisonment and if he absconded from the program, defendant would be sentenced to five to ten years imprisonment.

Unfortunately, defendant squandered the opportunity he was given. Defendant entered DAYTOP where he committed multiple violations of the plea agreement and ultimately absconded from the program. More specifically, while at DAYTOP, defendant tested positive for opiates in December of 2005, April 2006 and January of 2007. Defendant also left the program without approval in April of 2006 and January of 2007. Ultimately, defendant was apprehended in June of 2007 on a warrant that was issued when he absconded from the program in January of 2007. On July 12, 2007, pursuant to the plea agreement, defendant was sentenced to five to ten years of imprisonment. Thus, defendant

not in the custody of DOC until July of 2007 and he was released to the DOP in December of 2009.

Also, defendant's argument to the contrary notwithstanding, the fact that he absconded from the proceedings which culminated in the sentence he seeks to modify, is a factor which a court may consider in the determination of a motion under CPL § 440.46 (see People v. Aguirre, 47 AD3d 489 [1st Dept. 2008] lv dismissed 10 N.Y.3d 761 [2008]; People v. Ciriaco, 46 A.D.3d 374 [1st Dept. 2007]; People v. Marte, 44 AD3d 442 [1st Dept. 2007], lv dismissed 9 NY3d 991 [2007]). But the act of absconding itself is less relevant to the determination of the instant motion than are both the practical consequence of that act and the defendant's conduct subsequent to absconding. Because defendant fled, the sentences imposed for the crimes of which he was convicted could not be executed. Thus, no overlong period of imprisonment impeded any sincere desire defendant may have harbored to overcome his alleged addiction and become a law-abiding member of society. Indeed, he had the opportunity to do just that by abiding by the rules of the treatment program he was in (see People v. Flores, \_\_ N.Y.S.2d \_\_, 2010 WL 1293795 [Bx. Co. Sup. Ct. April 5, 2010]).

There is no showing herein that while a fugitive defendant took steps to overcome his purported addiction or lead a law-

abiding life. For example, defendant does not allege that during the months after he absconded from DAYTOP until the date he began serving the sentences imposed by this court he tried to enter any other hospital, rehabilitation facility or substance abuse program, or that he ever sought, trained for, or held any form of honest employment. Rather, the record establishes that he successfully sought and received help with his alleged addiction and participated in educational and vocational training programs only after he was involuntarily returned on a warrant and compelled to begin serving the sentence promised if he absconded from his treatment program. Nor does defendant allege why he did not return to Court voluntarily after absconding from DAYTOP.

Defendant's behavior by continuing to test positive for opiates and absconding from DAYTOP unambiguously distinguish him from the category of persons intended to be beneficiaries of the drug law reform acts and provides further evidence that to grant his application for resentencing would be unjust. Moreover, the Court notes that had defendant successfully completed DAYTOP he would not have been incarcerated.

Ironically, it seems defendant benefitted from being imprisoned as he had more success with treatment inside than outside prison. Indeed, according to defendant's papers, he successfully attended classes and programs in prison prior to

being released on parole something, defendant was apparently unable to do while not incarcerated. Defendant states that he successfully completed two drug treatment Programs: CASAT (which had been ordered by this Court at the time of sentencing), a six month residential program and Veteran's Residential Therapeutic Program, a six-month therapeutic program designed to address the reentry needs of incarcerated military veterans who suffer from substance abuse and other disorders. The Court does not know of any disciplinary violations during the two years and four months defendant was in prison. Therefore, while considered by the Court, defendant's lack of any disciplinary history in the last two years does not outweigh the other factors on which the Court has based its determination that substantial justice dictates that defendant's application for resentencing should be denied (see, e.g., People v. Curry, 52 AD3d 732 [2nd Dept.], lv denied 11 NY3d 735 [2008]; People v. Soler, 45 AD3d 499 [1st Dept.], lv dismissed 9 N.Y.3d 1009 [2007]; People v. Marte, 44 AD3d 442 [1st Dept. 2007], lv dismissed 9 N.Y.3d 991 [2007]).


Moreover, resentencing defendant at this point does not serve the stated purpose of DLR3 which is to resentence defendants serving lengthy prison terms for selling or possessing a small amount of drugs so that they may be released back into society. Because defendant is currently on parole, he is not

serving a lengthy prison term and has been released back into society. The Court notes that defendant has the same benefit of support from his family members and volunteer organizations on parole as he would have if resentenced.

Accordingly, the motion to resentence defendant pursuant to CPL 440.46 is denied.

This constitutes the decision and order of this Court.

ENTER:



Hon. Ronald A. Zweibel, JSC

Dated: May 6, 2010