

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART 13

FILED
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SUPREME COURT CLERK OFFICE
BRONX COUNTY

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

SCI No.

LUIS MONTANEZ,

59335 C/04

Defendant.

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Marcus, J.:

The defendant has applied for resentencing pursuant to CPL §440.46, part of the third in a series of reforms of the Rockefeller drug laws (“DLRA III”), which establishes a mechanism by which non-violent drug offenders convicted of class B felonies may seek resentence from indeterminate to determinate sentences. L. 2009, ch. 56, § 9. For the reasons set forth below, his motion for resentence is denied.

The defendant was charged with Criminal Sale of a Controlled Substance in the Third Degree, based on conduct he engaged in on November 10, 2004. On November 22, 2004, he entered a plea of guilty to that crime in the Supreme Court of Bronx County (Sonberg, J.).¹ As part of a plea agreement, the defendant, a prior felony offender,² was released to TASC with the understanding that if he completed a residential drug treatment program, he would

¹ The defendant’s motion was randomly assigned to this Court because Judge Michael Sonberg, who accepted the defendant’s plea of guilty under this SCI, and Judge Robert Sackett, who imposed the sentence, no longer sit in Bronx County.

² The defendant had two prior felony convictions: on August 18, 1995, he was convicted of Attempted Criminal Sale of a Controlled Substance in the Third Degree and Criminal Sale of a Controlled Substance in the Third Degree and was sentenced to a term of imprisonment of one to three years; and on May 15, 2000, he was convicted of Criminal Sale of a Controlled Substance in the Third Degree and was sentenced to an indeterminate term of imprisonment of two to four years.

be allowed to withdraw his plea of guilty, enter a plea of guilty to a misdemeanor, and receive a sentence of time served. Although the defendant was later discharged from TASC for medical reasons, he was approved for an out-patient program and was directed to report back to TASC. After he failed to do so, a warrant was issued for his arrest.

While at liberty, the defendant was arrested under the name Luis Rodriguez and charged in the Supreme Court of Bronx County (Sackett, J.) under SCI No. 47889C/05 with Criminal Sale of a Controlled Substance on or near School Grounds [Penal Law §220.44]. He entered a plea of guilty to that crime, and on November 18, 2005, Judge Sackett sentenced the defendant as a second felony offender to a determinate sentence of three and a half years and imposed a period of post-release supervision of two years. Judge Sackett also sentenced the defendant on the instant case to the then minimum sentence available: a concurrent indeterminate term of imprisonment of four and a half to nine years.

The defendant was eligible for release on parole on January 10, 2010.³ He appeared before the Parole Board that day and was released on parole the following day. The maximum expiration date of his sentence is set at July 10, 2014. On December 30, 2009, less than two weeks before his parole hearing, the defendant filed this motion for resentencing

³ As a non-violent drug offender, the defendant was eligible for merit release on April 6, 2009, Correction Law §803(1)(d); Penal Law § 70.40(1)(a)(i), and for supplemental merit release on July 2, 2008. Correction Law §803(1)(d); L. 2005, ch. 644, § 1. He was, however, not released on either of these earlier dates, apparently because of a disciplinary infraction based upon a finding that, after being temporarily released from the Fulton Correctional Facility, he returned to the facility under the influence of a controlled substance.

pursuant to CPL §440.46. In his motion, the defendant seeks imposition of the new statutory minimum sentence for a second felony drug offender, §§ 70.06 (1); 70.70(1)(b), a determinate term of incarceration of two years to be followed by a period of one and a half years post-release supervision. Penal Law §§ 70.70 (3)(b)(i); 70.45(2)(d).

The criteria for the resentencing defendant seeks are set forth in CPL §440.46(1), which became effective on October 7, 2009. It provides that:

[a]ny person in the custody of the department of correctional services convicted of a class B felony offense defined in article two hundred twenty of the penal law which was committed prior to January thirteenth, two thousand five, who is serving an indeterminate sentence with a maximum term of more than three years, may ... upon notice to the appropriate district attorney, apply to be resentenced to a determinate sentence in accordance with sections 60.04 and 70.70 of the penal law in the court which imposed the sentence.

At the time the defendant filed his motion, he met each one of these criteria: he was still in prison, and thus was in the custody of the Department of Correctional Services; the sentence he was serving was imposed upon his conviction of Criminal Sale of a Controlled Substance in the Third Degree, a class B felony offense defined in Article 220 of the Penal Law; the crime of which he had been convicted was committed on November 10, 2004, i.e., prior to January 13, 2005; and he was serving an indeterminate sentence upon his conviction with a maximum term of nine years, i.e, more than three years.

The threshold question presented by the defendant's motion is whether, following his release on parole, he remains eligible for resentencing. In this case, the motion was served

on the District Attorney's Office on December 30, 2009, before the defendant's January 11, 2010, release. The defendant argues because he "appl[ie]d to be resentenced," that is, he filed his motion, when he was still in the custody of the Department of Correctional Services, he is eligible for resentencing. In support of his argument, he points to CPLR 2211, which provides that "[a] motion on notice is made when a notice of the motion ... is served."

The Criminal Procedure Law applies "exclusively to ...[a]ll criminal actions and proceedings ... and all appeals and other post-judgment proceedings relating or attaching thereto." CPL § 1.10(1)(a). "The civil practice law and rules," in contrast, "govern the procedure in civil judicial proceedings in all courts of the state and before all judges." CPLR 101. Thus, "the CPLR has no application to criminal actions and proceedings." People v. Silva, 122 A.D.2d 750 (1st Dept. 1986), see People v. Knobel, 94 N.Y.2d 226, 230 (1999). Indeed, the First Department has consistently ruled the provisions of the CPLR do not control in proceedings under the CPL. People v. Crisp 268 A.D.2d 247 (1st Dept. 2000); People v. Holden, 260 A.D.2d 233, 234 (1st Dept. 1999).

The defendant relies on People v. Price, 56 A.D.3d 366 (1st Dept. 2008), a case concerning whether a defendant could move for resentencing under the 2005 reform of the Rockefeller drug laws [DLRA II]. That reform permitted a defendant convicted of a class A-II felony drug offense to move for resentencing if, inter alia, the defendant was more than twelve months from being an "eligible inmate" as defined by Correction Law § 851(2).

Because Price filed his motion long before the effective date of the statute, the Court held that his motion was untimely, and made reference to CPLR 2211 in determining when Price's motion was filed. However, the defendant's argument in this case fails because neither Price, nor CPLR 2211, governs on the question presented here.

The Legislature has specifically provided that when a motion for resentencing is brought pursuant to CPL §440.46(1), "the proceedings on and determination of [the] motion" are to be governed by the provisions of L. 2004, ch. 738, § 23 [the original Drug Law Reform Act, or DLRA I]. CPL §440.46(3). In pertinent part, § 23 provides that "[n]otwithstanding any contrary provision of law, any person in the custody of the department of correctional services ... may, upon notice ... apply to be resentenced" The First Department construed this language in People v. Rodriguez, 68 A.D.3d 676 (1st Dept. 2009), a case in which the defendant was released to parole supervision, violated the conditions of parole, and applied for resentencing under DLRA I only after he was incarcerated on the parole violation. The First Department found the defendant ineligible for resentencing because he had already received the benefit of release from incarceration. In reaching that conclusion, the Court relied in part on People v. Bagby, 11 Misc.3d 882, 887 (Sup. Ct. Westchester Co. 2006), which observed that "... the purpose of the Rockefeller Drug Law Reform Act is to provide those defendants who presently are serving their original prison sentence with a mechanism for resentencing." But see People v. Rivera, N.Y.L.J., February 16, 2010, p. 18, col. 1 (Sup.

Ct. Bronx Co.) (Benitez, J.) (previously paroled defendant now in custody for parole violation eligible for resentencing under DLRA III pursuant to CPL § 440.46).

Significantly, the Court in Rodriguez also held the defendant ineligible for resentencing under the plain language of the statute because “[i]f the defendant had not violated his parole conditions, he would not have been in the custody of the Department of Correctional Services when he moved to be resentenced and he would therefore have been ineligible for resentencing.” For this proposition, the Court cited People v. Mills, 11 N.Y.3d 527, 537 (2008), in which the Court of Appeals held 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.”⁴ See also People v. Roman, 12 Misc.3d 1197(A), *2 (Sup. Ct. N.Y. Co. 2006)(“it is clear from the plain language of the Drug Law Reform Act [DLRA II] that the legislature contemplated re-sentencing for those inmates serving their original sentence and who were not yet paroled”).

From the decision in Rodriguez, and its reliance on Mills, it is clear that in this case, too, once the defendant was released to parole supervision, his eligibility for resentencing under CPL §440.46 (1) ceased. See People v. Romero, 26 Misc.3d 1218(A), 2010 WL 391281(Sup. Ct. Bronx Co. 2010) (defendant paroled from service of sentence on B drug

⁴ Indeed, it is evident from Mills that the defendant’s reliance on People v. Price, *supra*, would be misplaced even if he had been sentenced for an A-II felony, rather than for a B felony, and even if, as Price states, CPLR 2211 governs in determining when an inmate serving a sentence for a class A-II felony filed his motion for DLRA II purposes. Given the holding in Mills, an inmate released on parole is simply no longer eligible for resentencing, even under DLRA II.

felony is, for purposes of DLRA III in the custody of the Department of Parole and not the Department of Correctional Services). Accordingly, the defendant's motion is summarily denied.

This constitutes the order and decision of the Court.

Dated: February 22, 2010



MARTIN MARCUS
J.S.C.