

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX: PART 32

x

THE PEOPLE OF THE STATE OF NEW YORK

DECISION

Indictment No. 1213-04

-against -

Lawrence Mudd,

Petitioner.

x

For the People: Nikki Harding  
For the Petitioner: Rosemary Herbert

VILLEGAS, J.

The Lawrence Mudd hereinafter, Petitioner, filed a motion requesting re-sentencing pursuant to the Drug Law Reform Act of 2009 reflected in the Criminal Procedure Law (hereinafter C.P.L.) § 440.46. The People oppose that motion. This court after having reviewed the court file, the motions submitted and conducting a hearing grants the Petitioner's motion.

Procedural History

On August 16, 2004 Petitioner pled guilty to one count of criminal sale of a controlled substance in the third degree in violation of Penal Law (hereinafter P.L.) § 220.39(1), a class B felony, in full satisfaction of indictment # 1213-04. As part of his plea agreement the Petitioner was to complete a drug program. Failure to complete the program would result in a sentence of 2 - 6 years incarceration.

After not successfully completing the drug program nearly one year later on August 8, 2005 the Petitioner moved to withdraw his plea. This motion was denied. On October 6, 2005 the Petitioner was sentenced to 2 - 6 years incarceration. In November of 2008 the Petitioner was released to the Division of Parole. One year later in November 5, 2009 the Petitioner was violated by the New York State Division of Parole. He remains incarcerated since then.

The Petitioner is before this court requesting a re-sentencing on indictment # 1213-04

respectively pursuant to Criminal Procedure Law § 440.46. The People oppose this motion on two grounds. The People allege that this is a matter that should be addressed by the Division of Parole since the Petitioner was violated on those matters. Secondly, the People state that substantial justice dictates that the Petitioner's application be denied.

### Legal Analysis

This Court does not agree with the People's contention that the Petitioner is no longer incarcerated on the present matter and must apply to the Division of Parole for his requested relief. The Petitioner is in on a parole violation and in on the underlying case. The terms on these are running consecutively. However the parole violation is due to the case at bar, thus the Petitioner is still incarcerated on that case. Also, Criminal Procedure Law § 440.46 specifically grants the authority to the court to re-sentence a Petitioner who meets the requirements set forth in the statute. This authority was not granted to the Division of Parole, therefore the People's argument is misplaced.

Pursuant to Criminal Procedure Law § 440.46 certain Petitioners who are serving indeterminate sentences for class B drug felonies may apply for re-sentencing under the new scheme. This Court relies on the plain language in the statute. The Petitioner is eligible for the re-sentencing as Criminal Procedure Law § 440.46 (1) makes clear eligibility is based on the

- Petitioner being in the Department of Correctional Services
- serving an indeterminate sentence with a maximum term of more than three years
- for a class B felony
- committed prior to January 13, 2005

Here the Petitioner is in the custody of Department of Correctional Services. He is serving an indeterminate sentence of 2 - 6 years, which is greater than a maximum term of three years. He pled guilty to a class B felony, that being criminal sale of a of a controlled substance in the third degree in violation of § 220.39. That crime was committed on February 6, 2004, which is prior to January 13, 2005. This Court finds that the Petitioner meets all the eligibility requirements set forth in C.P.L. § 440.46 (1). The Court is mindful of Criminal Procedure Law § 440.46 (5),

which sets forth criteria that make a Petitioner ineligible. The Court has reviewed those factors and finds that they do not apply to the Petitioner herein. Therefore, the Petitioner is eligible for the re-sentencing.

The People's second argument is that the Petitioner's motion should be denied due to substantial justice. The People cite the Petitioner's re-arrests and disciplinary history while incarcerated as reasons that substantial justice disqualifies him. This court disagrees. The points that the People raise are relevant in this court's determination of what the appropriate re-sentence should be. This Court does not extend that to mean the Petitioner should be denied re-sentencing entirely. The Petitioner concedes that the Petitioner has had disciplinary action taken against him while incarcerated. The Petitioner also cites many of the Petitioner's accomplishments such as the many vocational training classes he has completed. This Court also notes and is mindful that the Petitioner is incarcerated for the sale of one \$5 bag of crack-cocaine.

#### Proposed Re-Sentence

In considering the appropriate re-sentence this Court understands that the Petitioner, as both the People and the Defense note, has a significant misdemeanor record. Pursuant to C.P.L. 440.46(3) the court should consider the institutional history and participation and progress that the Petitioner has made. While this Petitioner does not have an impeccable record, this court is mindful of and understands that this Petitioner's record is consistent with that of someone struggling with a drug addiction. In reviewing all motions submitted, the Petitioner's record and the sentencing guidelines, this Court proposes that the Petitioner be sentenced to 2 years followed by 1 1/2 years of post release supervision on indictment # 1213-04

The foregoing constitutes the Decision of the Court.

Date: May 26, 2010

Bronx, New York



George R. Villegas,

Justice Supreme Court

HON. GEORGE R. VILLEGAS