

1. People v Neely

2010 NY Slip Op 50875(U)

Decided on May 17, 2010

Supreme Court, New York County

Conviser, J.

**Published by New York State Law Reporting Bureau pursuant to
Judiciary Law § 431.**

**This opinion is uncorrected and will not be published in the printed
Official Reports.**

Decided on May 17, 2010

Supreme Court, New York County

The People of the State of New York

against

Corey Neely, a.k.a. Corey Everette, Defendant.

8212-02

Center for Appellate Litigation (Sarah R. Weinman, of counsel) for the Defendant.

Bridget G. Brennan, Special Narcotics Prosecutor (Patrick Scruggs, of counsel) for the People.

Daniel P. Conviser, J.

The Defendant moves to be resentenced under the Drug Law Reform Act of 2009 (the "2009 DLRA", Chapter 56 of the Laws of 2009, codified at CPL 440.46). That motion is opposed by the People. As explained in more detail *infra*, the Court finds that by virtue of the First Department's decision on May 6, 2010 in *People v. Orta*, 2010 WL 1791222, 2010 NY Slip Op. 03836, this Court is compelled to deny Defendant's motion. Defendant's motion is therefore denied.

STATEMENT OF FACTS

The Defendant was convicted after a jury trial of Criminal Sale of a Controlled Substance in the Third Degree (Indictment #

2100-03) in 2003 and according to the People was originally sentenced to an indeterminate prison term of 8 ½ to 17 years on May 24, 2004. In that case, the Defendant sold two zip-lock bags of crack cocaine to an undercover police officer. That conviction was vacated, for reasons which are not clear on the record, and the Defendant was resentenced to a 5 to 10 year indeterminate prison term on June 16, 2006. Defendant also pled guilty to Criminal Sale of a Controlled Substance in the Third Degree (Indictment #

8212-02) and Criminal Possession of a Controlled Substance in the Fourth Degree (Indictment #

4317-03) and was sentenced upon those convictions to concurrent indeterminate prison sentences of 5 to 10 years on April 17, 2004. Defendant's commitment records indicate that these two concurrent sentences were also ordered to run concurrent to Defendant's earlier sentence under Indictment #

2100-03 which was later modified to also be an indeterminate 5 to 10 year term. Defendant has a previous conviction for Criminal Sale of a Controlled Substance in the Third Degree in 2000.

Mr. Neely was released to parole supervision on February 28, 2007. His parole was revoked and he was returned to state prison on October 26, 2007. This followed his conviction for Criminal Sale of a Controlled Substance in the Fifth Degree. He was also convicted of [*2]Criminal Possession of Marijuana, a Class B misdemeanor, in 2010. According to State Department of Correctional Services ("DOCS") records, Defendant's maximum sentence expiration dates with respect to the three convictions at issue here is July 25, 2013. When the Class D felony sentence which was imposed subsequent to these convictions is additionally considered, his maximum sentence expiration date is March 12, 2014. According to the People, although the Defendant was incarcerated at the time his motion was filed, he was subsequently released from prison and again placed on parole supervision during the pendency of this motion, on March 10, 2010.

The Defendant completed the Alcohol and Substance Abuse Treatment ("ASAT") program in July of 2008. He also completed phases I and II of the Transitional Services Program. In January of 2010, he was assigned the position of "Group Leader Assistant" for the Transitional Services Program. While incarcerated, he has worked as an industrial food service worker, a maintenance laborer and a porter. He has received seven disciplinary violations during his incarceration, all for Tier II infractions. These violations were for delays in getting to a count, smoking, violations of direct orders and not putting property in the correct place. Defendant's counsel indicates that Mr. Neely will be living with his grandparents upon release and that his grandparents reside next to his sister. The Center for Appellate Litigation, which represents the Defendant, also indicates that it will assist him through its re-entry program during his release.

CONCLUSIONS OF LAW

Initially, there is a dispute among the parties about which of the three concurrent 5 to 10 year indeterminate sentences being served by the Defendant are at issue here. Defendant's "Notice of Motion" concerned only Indictment #'s 8212-02 and 4317-03. The first of these indictments was prosecuted by the New York County District Attorney's office. That office has not responded to Defendant's motion. The second of these indictments was prosecuted by the Office of the Special Narcotics Prosecutor ("SNP"). The SNP has responded to Defendant's motion, but only with respect to his conviction under Indictment #

2100-03 which was *not* included in Defendant's Notice of Motion. The SNP did prosecute that action. The SNP asserts that it is not in a position to respond to the additional indictment it prosecuted, however, (# 4317-03 which *was* included in Defendant's Notice of Motion) because the sentence on that case was imposed concurrently with the sentence for the case prosecuted by the New York County District Attorney's office. In his final submission on this case, the Defendant, moreover, indicated that his initial failure to move with respect to all three indictments was an error. Defendant now indicates that he is seeking resentencing with respect to all three indictments.

The Defendant and the SNP (here representing the People) have fully briefed the relevant issues and the Court's determination in the instant decision is based solely on a threshold eligibility question on which there is no factual dispute and which is common to all three concurrent sentences. That issue is whether Defendant's release on parole should serve to bar him from resentencing eligibility. Given these facts, the Court has determined to rule on Defendant's motion with respect to all three indictments notwithstanding the irregularities in the submissions.

In reviewing a resentencing motion, the Court must first determine whether the Defendant is statutorily eligible for resentencing. The People argue that the Defendant is ineligible for [*3]resentencing for two related reasons. First they argue that he is ineligible for resentencing because he was previously released on parole and then reincarcerated for a parole violation. The Defendant argues that this previous parole violation and reincarceration does not bar Defendant from resentencing. This is an issue on which the trial courts have disagreed. This Court previously issued a detailed decision in which it held that "a defendant who is returned to prison after violating the provisions of his parole is not, by virtue of that fact, barred from resentencing

eligibility under the 2009 DLRA". *People v. Figueroa*, 894 NYS2d 724 (New York County Supreme Court, February 8, 2010). In accordance with that decision, the Court finds that the Defendant's previous parole violation does not render him ineligible for resentencing.

The People also argue that the Defendant is ineligible for resentencing for a related reason. Although the Defendant was in DOCS custody when he filed the instant motion, he is no longer in DOCS custody. The People argue that in order to be eligible for resentencing, a defendant must be in DOCS custody when a resentencing motion is determined. *See* People's Memorandum of Law in Support of People's Response to Defendant's Motion for DLRA Resentencing, April 27, 2010 at 3 ("Regardless of whether his [Defendant's] motion was timely filed while he remained in custody, Defendant is now clearly at liberty. On this basis alone, resentencing should be denied. *citing* *People v. Figueroa*, Unreported Decision, SCI No. 2606/03 (New York County Supreme Court, March 29, 2010, Ward, J.).

There are a number of arguments which could be advanced in opposition to the People's position on this issue. First, that position is contradicted by the language of the statute. Under the 2009 DLRA:

Any 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, except as provided in subdivision five of this section, 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. CPL 440.46 (1) (emphasis added).

The requirement that an offender must be in DOCS custody under the statute refers to the date a motion for resentencing is made. There is no requirement that an offender must be in DOCS custody when a motion for resentencing is determined. Nor is the Court aware of any legislative history which indicates that the statute should not be read as it was written.

The 2009 DLRA provides that the substantive standards for determining resentencing motions are governed by the provisions of previously enacted legislation which authorized the resentencing of offenders convicted of Class A-1 drug felonies. CPL 440.46 (3), referencing §23 of Chapter 738 of the Laws of 2004, the "2004 DLRA". Like the 2009 DLRA, the 2004 DLRA provides that an offender in DOCS custody may apply to be resentenced and contains no indication that the Legislature intended to exclude eligible offenders who were in custody when they applied for resentencing and were subsequently released from custody. It is axiomatic, of course, that in construing a statute courts should strive to give effect to the intent of the legislature. *Carney v. Philippone*, 1 NY3d 333 (2004), *rearg. denied*, 2 NY3d 794. In [*4]undertaking that analysis, "[w]here the language of a statute is clear and unambiguous, courts must give effect to its plain meaning". *People v. Kisina*, 14 NY3d 153 (2010), *quoting Matter of Tall Trees Constr. Corp. v. Zoning Bd. of Appeals of Town of Huntington*, 97 NY2d 86 (2001). There is no ambiguity in the language of the statute on this point. The statute makes the Defendant eligible for resentencing.

Making resentencing eligibility depend on the date of a court's decision on a motion rather than the date a motion was made would also mean that an offender's eligibility for resentencing might depend on how many days the prosecution took to respond to a motion or how many days a court took to reach a decision. A defendant filing a timely motion could have his motion denied because of delays which might be occasioned by any number of factors or simply because a court did not have time to rule on a motion before an offender's release from prison. This is not a theoretical possibility. Based on motions this Court has already considered for resentencing under the DLRA, including the instant matter, it is apparent that many offenders applying for resentencing under the statute are at or near the dates when they may be released on parole. This is a consequence of the fact that the 2009 DLRA only applies to offenders who committed crimes prior to January 13, 2005, that the Act became effective on October 7, 2009 and that many offenders are serving sentences with minimum periods of imprisonment of less than five years.

These consequences would not impact the initial incarceratory portions of sentences. They would affect the supervisory terms of those sentences. An incarcerated defendant applying for resentencing and serving a 4 ½ to 9 year indeterminate sentence, for example, might, on the day a motion was scheduled for a decision, be eligible to have the 4 ½ years of their supervisory term eliminated or reduced. If that defendant faced the unfortunate happenstance of having the date of a decision on their motion delayed, however, and during that delay was released from prison, their ability to seek a modification of any portion of that 4 ½ year supervisory term would be eliminated.

The 2009 DLRA is obviously a "remedial statute" which was created to remedy perceived injustices which were inherent in the sentencing system previously applied to low-level drug offenders. "Generally speaking, remedial statutes . . . are liberally construed, to spread their beneficial result as widely as possible". McKinney's Statutes § 321. Eligibility bars to ameliorative statutes are not generally contingent on the date a court makes a decision. Such a date is both unknowable at the time a motion is made and can inevitably subject a movant to arbitrary consequences having no relationship to the merits of a claim or an offender's diligence in prosecuting it. The rule urged by the People might also result in a range of disruptive consequences for the courts and the correctional system.^[FN1] Such a rule would make perfect sense, [*5] in the Court's view, if the only relief an offender was entitled to request on a resentencing motion was a modification of the incarceratory portion of a sentence. But DLRA resentencings encompass both the incarceratory and supervisory terms of previously imposed indeterminate sentences.^[FN2] Nor is there any doubt that an offender's parole or post-release supervision term is an integral part of his sentence. *See People v. Catu*, 4 NY3d 242 (2005).

Finally, an offender's release from prison does not in any respect render a motion to reform the supervisory portion of a sentence moot. The doctrine of mootness prohibits a court (with certain exceptions) from rendering decisions on cases which do not present live controversies and prohibits advisory opinions ruling on "academic, hypothetical, moot, or otherwise abstract questions". *Saratoga County Chamber of Commerce v. Pataki*, 100 NY2d 801, 810-811 (2003) (quotations and citations omitted). In this case, even though Defendant has been released on parole, he has more than 3 years remaining until the maximum expiration date of his sentences. Were this Court to grant Defendant's motion, it would be empowered to reduce or eliminate that supervisory term. While on parole or post-release supervision, an offender is required to comply

with various conditions set by the Division of Parole and may be incarcerated for up to the balance of the supervisory term in the event of a violation. The imposition of post-release supervision has a "definite, immediate and largely automatic effect on defendant's punishment". *Catu, supra*, 4 NY3d at 244, (quotation omitted). Defendant's motion does not present an abstract or academic question. It presents an application whose determination would have a fundamental impact on his liberty.

This Court, obviously, has concerns about a rule which would have a defendant's DLRA resentencing eligibility hinge on the date a decision on a motion was made rather than the date a motion was filed. On May 6, 2010, however, after the submissions of the parties in this case, the First Department appeared to definitively resolve the issue in this Department in *Orta*. In that case, the trial court had held that the Defendant was not eligible for resentencing under the 2009 DLRA because he had previously been released on parole and then reincarcerated for a parole violation. The First Department noted that if it were to accept that argument, it would be required to remit the case to the trial court for a discretionary determination with respect to the motion. The Court then went on to hold that it was not required to reach that issue because subsequent to making his motion, the Defendant had been released on parole:

. . . [D]uring the pendency of this appeal, defendant has again been released on parole. *Since he is not in custody, he is not presently eligible for resentencing.* [*6](CPL 440.46(1). Therefore, this appeal is moot, and we do not find applicable the exception to the mootness doctrine set forth in *Matter of Hearst Corp. v. Clyne* (50 NY2d 707, 714-715 (1980))(emphasis added).^{1FN31}

As the People argued in a supplementary submission in this case, the holding in *Orta* is directly applicable to the facts here. Here, the Defendant filed a timely motion under the 2009 DLRA. But he was subsequently released on parole. Therefore, "since he is not in custody, he is not presently eligible for resentencing." *Id.*

In a submission subsequent to the *Orta* decision, Defendant argued that the decision is not applicable to this case. Defendant argues that the *Orta* Court held only that the *Orta* Defendant's *appeal* was moot, not that his initial resentencing motion was moot. The Court does not agree with this argument. First, although the *Orta* holding is very brief, it in no way contains the limitation Defendant ascribes to it. The holding simply asserts that ("[s]ince he [the Defendant] is not in custody, he is not presently eligible for resentencing"). The holding is not limited to a defendant's appellate remedies. It states a general rule applicable to 2009 DLRA resentencing motions. Indeed, the *Orta* Court made it a point to assert that its holding did not address whether Defendant's claims on appeal were valid but was directed solely to the remedy the Defendant might be entitled to receive if his appeal was successful. *Orta* provides that when a defendant is released from confinement, any claim he may have had for relief under the 2009 DLRA becomes moot.

Defendant's reading of *Orta*, in the Court's view, is also not a reasonable one. It is obvious that a claim which presents a live controversy at trial may, due to the passage of time, become moot by the time an appeal is considered. But Defendant appears to assert that a 2009 DLRA resentencing

application can at the same moment both present a real controversy with respect to a trial court's consideration and be moot with respect to an appellate court's decision. Regardless of whether such a circumstance might exist in other contexts, the Court does not believe such a rule could properly be applied here. Where both a trial and appellate court are applying the identical statute, for a movant seeking the identical relief, at the identical moment in time, considering the identical facts and applying the identical legal standard, in the Court's view, the doctrine of mootness should not ordinarily lead to two completely variant conclusions which are based solely on which level of court is assessing the issue. At this moment, Defendant's claim is either moot or it is not. The First Department has apparently held that a claim like that made by the Defendant here is moot. This Court may not agree with that decision. But it is obviously bound to follow it. By virtue of the holding in *Orta*, therefore, Defendant's motion is denied.

May 17, 2010 [*7]

Daniel Conviser

A.J.S.C.

Footnotes

Footnote 1: Once might imagine, for example, requests by defendants that they remain in prison longer even though granted parole so that their motions for the reduction of supervisory terms could be considered, emergency applications to judges to place consideration of DLRA resentencing motions ahead of other matters on a court's docket so that a client's claims would not face mandatory dismissal or arguments that the People not be given the time they had requested to respond to a motion and obtain discovery (of a defendant's prison records, for example) because granting that time would result in the denial of a defendant's claim.

Footnote 2: The 2009 DLRA authorizes resentencing for offenders serving certain "indeterminate sentences". CPL 440.46 (1). A person serving an indeterminate sentence continues to serve that sentence while under parole and that parole term is a part of that indeterminate sentence. Penal Law §70.40 (1). Upon resentencing, an offender must be sentenced in accordance with Penal Law §70.70. CPL 440.46 (1). That Penal Law statute requires that drug law determinate sentences include a period of post-release supervision. Penal Law §70.70 (3) (b). In short, the modification of an offender's parole term and the imposition of a period of post-release supervision are mandatory when a court grants a 2009 DLRA resentencing motion. In the Court's experience, this is not a matter of controversy or dispute - it is uniformly understood by parties and courts adjudicating these motions.

Footnote 3: Under this rule, it would appear that any appeal by a defendant of the denial of a resentencing motion for any reason might become moot at the moment a defendant was released from custody. The consequence of being released from prison subsequent to a trial court decision, however, is not at issue here. In the instant case, the Defendant was released from custody prior to this Court's determination of Defendant's motion.

