

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 5

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THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER

SCI# 11310-98

-against-

GREGORY PARADISE,

Defendant,

----- X
SHERYL L. PARKER, J.S.C.

By papers dated October 30, 2009, defendant moves this court for an Order vacating his sentence imposed on August 8, 2002, and for a re-sentencing of defendant in accordance with the 2009 Drug Law Reform Act (“DRLA”) Penal Law §70.70 and Criminal Procedure Law § 440.46. The People have taken the position that the defendant is not eligible for resentencing. The following is the court’s decision.

FINDING OF FACTS

Defendant was arrested on November 6, 1998 pursuant to a narcotics sale to a New York City Police Department undercover officer at the intersection of Milford Street and Glenmore Avenue in Kings County. He was charged with two counts each of criminal sale of a controlled substance in the third degree (P.L. §220.39[1]), criminal possession of a controlled substance in the third degree (P.L. §220.16[1]) and criminal possession of a controlled substance in the

seventh degree (P.L. §220.03).

On December 2, 1998 defendant plead guilty to P.L. §220.39 and §220.03 on the instant Superior Court Information. The defendant was to participate in the Kings County TASC drug treatment program. Were the defendant to complete the program successfully his plea to the felony would be dismissed and he would be sentenced on the misdemeanor to a conditional discharge. Alternatively, were the defendant to fail the defendant would receive a period of incarceration of 4 and ½ to 9 years on the felony conviction and one year on the misdemeanor.

On February 3, 1999 the defendant was released to an inpatient drug treatment program. On March 4, 1999 a bench warrant was issued for the defendant. The defendant had absconded from the program. On May 29, 1999 the warrant was vacated and the defendant was remanded. On June 21, 1999 the defendant was sentenced to 4 ½ to 9 years on the felony to run concurrently with a sentence of one year on the misdemeanor.

The New York State Department of Corrections (DOCS) has a tiered system of punishment for infractions. Tier I is the lightest form of discipline. Tier II infractions are punished by up to 30 days of keeplock, which means an inmate is confined to their cell for up to 23 hours a day and loses many privileges. Tier III is the highest level of discipline, for which keeplock can exceed 30 days and an inmate can be placed in isolation in the Special Housing Unit (SHU), in addition to the loss of other privileges.

It is agreed among the parties, that while in prison defendant received one Tier II infraction. Defendant held a number of vocational positions while incarcerated.

After his release on parole, defendant was convicted on three misdemeanors. During his period of incarceration defendant filed the instant motion.

The defendant is now at liberty.

CONCLUSIONS OF LAW

In 2004 and 2005 the legislature enacted the DLRA I and II under the Laws of 2004 and 2005 Chapters 738 and 643 permitting defendants incarcerated on a class A-I or A-II drug felony offense to apply to the sentencing court to be resentenced pursuant to P.L. §70.71. This reform was intended to give inmates serving excessive prison sentences an opportunity to apply to the court for resentence under the new guidelines, and to take into consideration during sentencing the aim of the legislature to promote rehabilitation before incarceration on many types of drug offenses. It is evident from the legislative history of these two statutes that their primary goal was to ameliorate the unreasonable sentences imposed under the previous law.

In April of 2009 C.P.L. §440.46 and P.L. §70.70 became effective, allowing defendants who are incarcerated on a class B, C, D and E felony drug conviction to apply to the court for resentence pursuant to P.L. §60.04 and §70.70. The statute is similar in nature to the 2004 and 2005 Drug Law Reform Act. In fact, section three of §440.46 states that the “provisions of section twenty-three of chapter seven hundred thirty-eight of the laws of two thousand four shall govern the proceedings on and determination of a motion brought pursuant to this section.” The courts were given the discretion to divert class B,C,D and E felony drug offenders to drug treatment programs as an alternative to state prison. (Press Release, Assembly Speaker Sheldon Silver, March 27, 2009).

Eligibility

The DRLA I and II have been interpreted by the courts as not intended to apply to

offenders who have been re-incarcerated on a new offense after parole on the original underlying felony. (*People v. Mills/Then*, 11 NY3d 527 [2008]; *People v. Rodriguez*, 2009 Slip Op 09717; *People v. McCloud*, 38 AD3d 1056 [2007], *appeal dismissed*, 8 NY3d 947; *People v. Cavallaro*, 46 AD3d 1024 [2007], *appeal dismissed*, 10 NY3d 762).

Defendant attempts to distinguish the instant matter from sentences on class A-I and A-II felonies, in that the DRLA of 2004 and the DRLA of 2005 statutorily required a defendant to be more than three years away from release on his or her sentence to be eligible for resentencing under the new guidelines. The 2009 DRLA does not have that requirement, probably because the sentencing guidelines for class B felonies were much less severe than those of the class A felonies, and the minimum sentences were generally more modest. Also, as the Court in *Mills/Then* pointed out, the Executive Director of the New York State Defenders Association stated in a letter to the Governor regarding the 2005 reform,

[t]he bill is narrowly tailored to offer the possibility of relief to inmates who are most desperately in need of sentence review: those non-violent drug offenders who are serving sentences for Class A-II drug offenses with *relatively long minimum terms* who were overlooked in the 2004 Drug Law Reform Act. (Emphasis in original).

In *People v. Bagby*, 11 Misc3d 882 (2006), the Westchester Supreme Court took steps to lay out the legislative intention of the Drug Law Reform Act in its decision denying resentencing to a defendant who had been re-incarcerated on a violation of parole and was applying for resentencing under the DLRA. It is evident from the statutes of 2004, 2005 and 2009 that a defendant must be incarcerated to apply for relief. The courts in *Mills/Then* and *Bagby* pointed out that a defendant who is at liberty on parole, may be incited to commit an infraction to violate parole for the sole purpose of applying for resentencing. "Surely the legislature did not intend

fresh crimes to trigger resentencing opportunities.” (*Mills/Then, Supra*).

Although the 2005 DRLA specifically mentions the remaining period of time a defendant must be serving in order to be eligible for relief and the 2009 statute remains silent, the reasoning behind the courts’ denial to parole violators who are re-incarcerated does not turn on the language of the statute. It turns on the purpose. As the Appellate Division, First Department clearly stated in *People v. Rodriguez*, 2009 Slip Op 09717, citing *People v. Bagby*, 11 Misc3d 882 (2006), the act “was not intended to apply to those offenders who have served their term of imprisonment, have been released from prison to parole supervision, and whose parole is then violated”.

The 2009 law was intended to alleviate the mandatory sentences that judges were faced with when presiding over defendants charged with felony drug offenses. Additionally, drug treatment became a priority for those in need and the treatment options were expanded and funded by the state budget. Further relief is provided to some offenders who remain incarcerated under the old sentencing guidelines. (Executive release from the Governor, April 24, 2009. Emphasis added.). The law was not intended to apply to those who reoffended and were returned to incarceration. Accordingly, Court finds that the defendant is not eligible for resentence under the 2009 DRLA.

Substantial Justice

Even were the Court to find the defendant eligible under the 2009 statute, substantial justice dictates that the defendant not be resentenced. (C.P.L. §440.46(3); 2004 C. 738 §23). The defendant was convicted in the instant matter upon a plea of guilty on December 2, 1998.

On February 3, 1999 he was released to an inpatient drug treatment program. On March 3, 1999 the defendant absconded from the treatment program. On March 4, 1999 a bench warrant was issued for the defendant. On May 29, 1999 the defendant was returned on the warrant and remanded. On June 21, 1999 the defendant was sentenced to state prison. Additionally, the People have provided the Court with the defendant's NYSID sheet as of January 12, 2010.. Following his release from prison on the instant matter, and while on parole, the defendant sustained what appear to be three misdemeanor arrests and convictions:

<u>Arrest Date</u>	<u>Conviction Date</u>	<u>Crime of Conviction</u>
January 12, 2008	February 19, 2008	P.L. §220.03
July 18, 2006	August 9, 2006	P.L. §220.03
December 8, 2004	January 31, 2005	P.L. §220.03

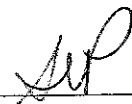
From the outset the defendant was given the opportunity that the 2009 DRLA specifically aims to provide: drug treatment. He failed to take advantage of that chance. Upon his release he sustained three new convictions. Based on the aforementioned, the Court finds that substantial justice dictates that the defendant not be granted resentencing under the new sentencing guidelines.

The defendant is hereby advised pursuant to 22 NYCRR § 671.5 of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York 11201 for a certificate granting leave to appeal from this determination. This application must be made within 30 days of service of this decision. Upon proof of his financial inability to retain counsel and to pay the costs and expenses of the appeal, the defendant may apply to the Appellate

Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Application for poor person relief will be entertained only if and when permission to appeal or a certification granting leave to appeal is granted.

The foregoing opinion shall constitute the Decision and Order of this Court.

Dated: January 14, 2010
Brooklyn, New York



SHERYL L. PARKER
Justice of the Supreme Court