

SUPREME COURT COUNTY OF ONONDAGA
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff,

v.

Indictment#03-73
Index#03-290

WILLIAM REED

Defendant.

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff,

v.

Indictment#99-57
Index#98-3959

WILLIE HILL, JR.

Defendant.

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff,

v.

Indictment#95-858
Index#95-2537

ROY WATSON

Defendant.

DECISION

Each of the above named defendants moves for resentencing on their Class B felony drug convictions pursuant to CPL 40.46. Defendants Watson and Hill made a previous motion which was denied with leave to renew. Defendant Reed's motion has yet to be ruled upon.

The issue presented by each motion concerns whether a conviction for a violent felony offense in each defendant's background renders him ineligible for resentence.

People v. William Reed

The People contend that defendant is ineligible due to a conviction for a violent felony offense of Criminal Possession of a Weapon in the Third Degree committed on April 12, 1993, upon which sentence was imposed on September 20, 1993. Defendant was thereafter sentenced on the class “B” felony at issue, on April 21, 2003, after having been convicted on March 27, 2003, for an offense that was committed on July 26, 2002.

People v. Roy Watson

The People contend that defendant is ineligible due to a conviction for a violent felony offense of Assault in the Second Degree committed on January 21, 1993 for which defendant was convicted on May 10, 1993 and sentenced on August 25, 1993. Defendant was thereafter sentenced on the class “B” felony at issue, on June 5, 1996, after having been convicted on April 1, 1996, for two different offense dates of August 2, 1995 and September 14, 1995.

People v. Willie Hill

The People contend that defendant is ineligible due to a conviction for a violent felony offense of Assault in the First Degree committed on March 13, 1994 upon which a conviction was entered on July 19, 1994 and sentence on September 7, 1994. Defendant was thereafter sentenced on the class “B” felony at issue, on July 2, 1999, after having been convicted on June 3, 1999, for an offense that was committed on December 9, 1998.

DISCUSSION

CPL §440.46(1) provides as follows: “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(5) provides that a defendant who has a “predicate felony conviction¹ for an exclusion offense” is ineligible for resentencing. An “exclusion offense” is defined as “(a) a crime for which the person was previously convicted within the preceding ten years, excluding any time during which the offender was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony, which was: (I) a violent felony offense as defined in section 70.02 of the penal law; or (ii) any other offense for which a merit time allowance is not available pursuant to subparagraph (ii) of paragraph (d) of subdivision one of section eight hundred three of the correction law; or (b) a second violent felony offense pursuant to section 70.04 of the penal law or a persistent violent felony offense pursuant to section 70.08 of the penal law for which the person has previously been adjudicated.”²

¹There is no universal statutory definition of “predicate felony”. It is used in some statutes such as CPL 220.10[c] [“whereit appears that the defendant has previously been subjected to a predicate felony conviction as defined in penal law section 70.06”] Penal Law 70.06, entitled “Definition of second felony offender”, by implication defines “predicate felony” by defining a second felony offender as “a person, other than a second violent felony offender as defined in section 70.04, who stands convicted of a felony defined in this chapter, other than a class A-I felony, after having previously been subjected to one or more *predicate felony convictions* as defined in paragraph (b) of this subdivision,” and then goes on to set forth how a court is to determine “whether a prior conviction is a predicate felony conviction.”

²CPL § 440.46(5).

There are at least four possible ways to interpret the look-back language:

1. Measure the time between the **commission of the previous felony and the time of commission of the present [Class B drug] felony**. Add any days that defendant was incarcerated for any reason after the commission of the previous felony before commission of the Class B drug felony on which resentence is sought. If it equals 10 years and 1 day or more, defendant is eligible. If it equals 10 years or less, defendant is ineligible.

2. Use the definition of “predicate felony conviction as defined in penal law section 70.06”,³ by measuring the time from the **date of sentence on the previous felony to the date of commission of the Class B drug felony** on which resentence is sought.⁴

3. Measure the time between **the date the application is filed and the date of guilty plea to the previous felony** which is the date of “conviction” under CPL 1.20(13).⁵ Add any days that defendant was incarcerated for any reason after the commission of the previous felony before commission of the Class B drug felony on which resentence is sought. If it equals 10 years and 1 day or more, defendant is eligible. If it equals 10 years or less, defendant is ineligible.

4. Measure the time between the **date the application is filed and the date of sentence on the previous felony**, which is the date of the “judgment” under CPL 1.20(15). Add any days that defendant was incarcerated for any reason after the commission of the previous felony before commission of the Class B drug felony on which resentence is sought. If it equals 10 years and 1 day or more, defendant is eligible. If it equals 10 years or less, defendant is ineligible.

³CPL 220.10[c] [“whereit appears that the defendant has previously been subjected to a predicate felony conviction as defined in penal law section 70.06”]. Penal Law 70.06, entitled “Definition of second felony offender”, by implication defines “predicate felony” by defining a second felony offender as “a person, other than a second violent felony offender as defined in section 70.04, who stands convicted of a felony defined in this chapter, other than a class A-I felony, after having previously been subjected to one or more *predicate felony convictions* as defined in paragraph (b) of this subdivision,” and then goes on to set forth how a court si to determine “whether a prior conviction is a predicate felony conviction.”

⁴Penal Law 70.06, entitled “Definition of second felony offender”, by implication defines “predicate felony” by defining a second felony offender as “a person, other than a second violent felony offender as defined in section 70.04, who stands convicted of a felony defined in this chapter, other than a class A-I felony, after having previously been subjected to one or more *predicate felony convictions* as defined in paragraph (b) of this subdivision,” and then goes on to set forth how a court si to determine “whether a prior conviction is a predicate felony conviction.” Penal Law 70.06(1)(b)(v): “In calculating the ten year period under subparagraph (iv), any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration.”

⁵*Matter of Merrill*, 214 A.D.2d 244 (1st Dep’t 1995)(“a jury verdict, or plea, of guilty constitutes the conviction [CPL 1.20(13)].”

The court initially read the look-back language the same way as Professor Preiser did as expressed in his Practice Commentary to CPL 440.46.⁶ However, such good company in the face of the exhaustive opinions of four judges for whom the court has great respect (copies attached to this decision)⁷ is not enough to persuade the court that the look-back is to be measured from the date of the Class B drug conviction. The court plans to follow the lead of respected colleagues and reach the same result, but not necessarily for all reasons relied upon by them, and not without explaining the ambiguities that have caused the court to be grappling with this issue for so long.

When the unnecessary verbiage is stripped from the language at issue, it reads:

“The provisions of this section shall not apply to any person who ...has a **predicate felony** conviction for... a crime for which the person **was previously convicted within the preceding ten years**, excluding any time during which the offender was incarcerated for any reason between the time of commission of the **previous** felony and the time of commission of the present felony, which was....a violent felony offense as defined in section 70.02 of the penal law....”

The court will set forth below the pertinent text and comment(s) about it:

“Certain categories of inmates are excluded pursuant to subdivision five. Paragraph (a) excludes inmates presently serving a sentence for or who were convicted in the preceding ten years of a violent felony offense or of a crime not eligible for allowance of “merit time” pursuant to Correction Law § 803 [1(d)(ii)], measuring the ten year period by the interval between commission of the former and present crimes excluding time spent under incarceration.”

⁷See the attached opinions in *People v. Sosa, Banton and Brock*, decided by Honorable Marcy Kahn.(Supreme Court, New York County); *People v. Williams*, decided by Honorable Ruth Pickholz. (Supreme Court, New York County); *People v. Roman*, decided by Honorable William Mogulescu. (Supreme Court, Bronx County); *People v. Brown*, decided by Honorable Daniel Conviser (Supreme Court, New York County).

Text:

“The provisions of this section shall not apply to any person who ...has a *predicate felony* conviction for an exclusion offense.”

Comment:

Had the Legislature intended that the look-back be calculated from the date of application, it would not have used the adjective “predicate” unless it intended to distinguish a “felony conviction” or a “prior felony conviction” from a “predicate felony conviction”.⁸ It would have used “prior” or “previous” or no adjective at all.

Text:

“[A]n ‘exclusion offense’ is a crime for which the person *was previously convicted within the preceding ten years,*”

Comments::

Had the Legislature meant the look-back to be calculated from the application date, it would have omitted the adverb “*previously*” so that the provision simply read “a crime for which the person was convicted within the preceding ten years”. The word “previously” creates an ambiguity.

While grammar is not controlling,⁹ application of grammatical rules exposes the ambiguity in the statute. By using the past tense [“was previously convicted within the preceding ten years”], the Legislature “express[ed] the idea that an action started and finished at a specific time in the past.”¹⁰ Had the present perfect tense been used [“has been previously convicted within the preceding ten years”], the Legislature would have expressed “a connection with the **present** or now,”¹¹ *i.e.*, the application date.

Had the Legislature used “has been previously convicted”, it would have removed the question that is begged by the existing language: was convicted *previously* to what?

⁸CPL 220.10[c] employs the phrase “predicate felony conviction as defined in penal law section 70.06”. Penal Law 70.06 employs the phrase “after having *previously* been subjected to one or more *predicate felony convictions*”.

⁹See McKinney's Cons. Laws of N.Y., Book 1, Statutes § 251).

¹⁰www.EnglsihClub.com

¹¹www.EnglsihClub.com

Legislative Intent

Comment:

The Legislature may have intended¹² the exclusion of persons convicted of a Violent Felony Offense before commission of their drug crimes as a public protection measure. By excluding any incarceration time from the ten year calculation, the Legislature may have intended to recognize that living crime-free at liberty without committing a violent crime demonstrates a reduced risk of re-offense, while living crime-free in jail does not. It also would be inconsistent for the Legislature to allow a defendant whose violent felony conviction's age is measured from the date of application to be eligible for resentencing, only to have that same violent felony conviction's age (this time to be measured from the date of the drug crime's commission) to make the defendant's mandatory minimum sentence six years determinate and maximum sentence fifteen years determinate. _____

CONCLUSION

The court agrees with Judge Pickholz' observation that "it is far from impossible to read the statute"¹³ as suggested by the People. In fact, the court did so initially. Upon reflection however, court finds that there are ambiguities in the statute---that both the construction offered by the People and the construction offered by the defendant are plausible. However, the court does not view CLP 440.46 as a criminal statute, and thus concludes that the "rule of lenity" [where "two constructions of a criminal statute are plausible, the one more favorable to the defendant should be adopted"]¹⁴ is not applicable here. What is applicable is the well settled principle that "[w]here the language of a statute is susceptible of two constructions, the courts will adopt that which avoids injustice, hardship, constitutional doubts or other objectionable results."¹⁵

¹²As Judge Conviser pointed out, there is scant legislative history other than a transcript of floor comments. *People v. Brown* at page 6.

¹³*People v. Williams* at page 11.

¹⁴*People v. Jackson*, 106 A.D.2d 93 (2d Dep't 1984).

¹⁵ *Matter of Jacob*, 86 N.Y.2d 651, 667, quoting *H. Kauffman & Sons Saddlery Co. v. Miller*, 298 N.Y. 38, 44.

When the Appellate Division was confronted with resolving a claimed ambiguity in an eligibility section the 2005 Drug Law Reform Act, it made no mention of the “rule of lenity”, but rather found that, because the language was plain and unambiguous, it had “no occasion to apply the principle that ‘[w]here the language of a statute is susceptible of two constructions, the courts will adopt that which avoids injustice, hardship, constitutional doubts or other objectionable results’”.¹⁶ Having identified the proper principle that controls resolution of an ambiguity in a statute such as CPL 440.46 and confirmed the accuracy of that identification with Appellate Division case law, the court must apply that principle.

The court hereby finds that CPL 440.46(5) is “susceptible of two constructions”, and, as a consequence, the court is required to chose the construction which avoids injustice or hardship, *i.e.*, measure the look-back from the application date so as not to delay a defendant’s possible release from prison that may result from consideration of a resentencing motion. That is the action the law dictates pending resolution of the ambiguity by the Appellate Division.

John Brunetti
Acting Justice of the Supreme Court

Dated: February ___, 2010

¹⁶*People v. Delk*, 59 A.D.3d 733, 734-735 (2d Dep’t 2009).