

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART T-15

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

Case # 1043-2002

**Re-Sentencing
Order**

TERRANCE SCARBOROUGH,

Defendant.

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HONORABLE JOHN S. MOORE:

The defendant, Terrance Scarborough pled guilty to one count of Criminal Sale of a Controlled Substance in the Third Degree (Penal Law 220.39, in full satisfaction of Indictment # 1043-2002 before the Honorable Efrain Alvarado on July 3, 2002 . As part of the negotiated plea, defendant was placed under the supervision of the Treatment Accountability for Safer Communities (T.A.S.C.) program, and was ordered to enter and complete a twelve to eighteen month residential drug treatment program. Upon successful completion of the drug program defendant would be permitted to withdraw his plea and would be permitted to plead to a Class C felony offense and would be sentenced to five years probation. Defendant however absconded from the drug program and the Court issued a warrant for his arrest on January 6, 2004. Defendant was involuntarily returned on the warrant on January 27, 2005. On November 18, 2005, defendant was sentenced by the Honorable Robert Sackett, to the jail alternative of two to six years

incarceration.¹ On July 5, 2006, defendant was released to parole supervision. Thereafter, on April 23, 2007, defendant was arrested in New York County and charged with Robbery in the Third Degree. On May 28, 2007, defendant pled guilty to the charge of Robbery in the Third Degree. On June 1, 2007, defendant was sentenced to a term of incarceration of two to four years. Defendant is currently incarcerated at the Butler Correctional Facility.

Defendant, moves pursuant to CPL 440.46 (Drug Law Reform Act, L.2009, Ch. 56, sect. 9 (eff. Oct.7, 2009), to be re-sentenced to the minimum determinate sentence permitted under the drug reform legislation. The People oppose the instant application and urge that since “defendant has finished his original term of incarceration under ind #1043-02, any issues regarding present and future supervision and/or incarceration must be addressed to the Division of Parole pursuant to Executive Law 295-j. (See, People’s response at pg. 2). Additionally, the People urge that “substantial justice dictates that petitioner’s motion be denied.” (See, People’s supplemental response at pg 7).

CPL 440.46 provides in pertinent part that:

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

¹At the time of his sentence, defendant had 11 misdemeanor convictions and also had several out of state convictions from North Carolina.

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 re-sentenced to a determinate sentence in accordance with section 60.04 and 70.70 of the penal law in the court which imposed the sentence.

Preliminarily, the Court notes that it rejects and finds unpersuasive, the People's argument that defendant's remedy is to seek a merit termination of his sentence pursuant to Executive Law 259-j. The Court finds that defendant's application is properly brought pursuant to CPL 440.46 and the District Attorney is indeed the correct party to this action.

The question for this court is whether a defendant who has been released from prison, then violated the terms and conditions of his parole by committing a new crime and consequently is sentenced on the new matter and is re-incarcerated, is eligible for re-sentencing consideration pursuant to CPL 440.46[Drug Law Reform Act of 2009] ?

The eligibility language of the Drug Law Reform Act of 2004 and the Drug Law Reform Act of 2005 have been addressed by appellate courts, however, the eligibility language of the Drug Law Reform Act of 2009 has only been addressed by lower courts. Additionally, the lower courts are not in agreement as to whether inmates returned to custody on parole violations are eligible for re-sentencing under

the Drug Law Reform Act of 2009. While some lower court have held that the plain language of the 2009 Drug Law Reform Act dictates that parole violators are eligible for re sentencing, other lower courts have held that the Legislature could not have intended parole violators to benefit from their wrongdoing, or that parole violators are not “in custody” within the meaning of the legislation and thus, they are not eligible for re-sentencing.

The Court finds that while defendant is technically in the physical custody of the Department of Corrections, because he is in custody by virtue of having committed a new crime which resulted in his parole being revoked, defendant is not an eligible offender for re-sentencing. (See, *People v. Romero*, 26 Misc3d 1218(A),(Sup. Ct. Bx. Co., J. Newman , 2010).

In *People v Then* , 11 NY3d 527 (2008), decided with *People v Mills*, 11 NY3d 527 (2008) the Court held that a paroled defendant(defendant Then) who was returned to custody on a parole violation and on a new indeterminate sentence was not eligible for re-sentencing under Drug law Reform Act of 2005 (DLRA2). The *Then* Court reasoned that “defendant Then had broken the law while on parole, was a repeat offender and surely, the legislature did not intend fresh crimes to trigger re-sentencing opportunities .” (*People v. Then* , supra at 537). The Court is cognizant that *Then* referred to the Drug Law Reform Act of 2005 which contains different eligibility language than the current legislation. Nonetheless, this court

finds as in *Then* that the defendant who is re-incarcerated due to a new offense and a violation of parole which is based upon the new offense, is ineligible for re-sentencing under the Drug Law Reform Act of 2009. As noted in *Then*, “permitting a defendant to receive more lenient sentence after he has violated the conditions of his parole would create illogical, if not perverse results. .” (*People v Romero*, supra citing *People v. Then*, at 537). Clearly if the defendant had not broken the law while on parole he would be ineligible for re-sentencing pursuant to the Drug Law Reform Act of 2009 because he too would not be in custody.

In *People v. Rodriguez*, 68 AD3d 676 (1st Dept. 2009), the Appellate Division First Department held that “defendant was not eligible to be re sentenced under the Drug Law Reform Act of 2004 where he served his term of imprisonment, was then released to parole supervision, violated the terms of his parole supervision and was then re-incarcerated.” (*People v Rodriguez*, supra). In so ruling the Appellate Division, citing *People v Mills*, supra, pronounced its belief that “surely the Legislature did not intend fresh crimes to trigger re sentencing opportunities.” While the Court is aware that *Rodriguez* is not on point as it pertains to the 2004 legislation, I too concur that defendant’s commission of a new crime namely, a Robbery, should not bestow upon him a benefit that he otherwise would not have had, had he remained at liberty.

Assuming arguendo, that notwithstanding the foregoing, this court were to

find that the defendant was indeed eligible for re-sentencing, the Court would nonetheless be constrained to find that substantial justice warrants denial of his re-sentencing application. The Court has reviewed the defendant's extensive criminal history which dates back to 1978. In 1978, defendant was adjudicated a Youthful Offender for the crime of Robbery in the Third Degree and was sentenced to 60 days in jail and 58 months probation. In 1983, he was convicted of Attempted Criminal Possession of a Controlled Substance in the Seventh Degree, a B misdemeanor. In 1985, he was convicted of his first felony, Attempted Burglary in the Second Degree, a D felony and was sentenced to one year in jail. In 1997, he was convicted of Petit Larceny, an A misdemeanor. Again in 1997, he was convicted of Trespass, a violation. In 1999, he was convicted of Criminal Contempt, an A misdemeanor. In 2000, he was convicted of Assault in the Third Degree, and Intent to Fraudulently Obtain Transportation without Pay, both A misdemeanors. In 2001, he was convicted of: Criminal Possession of a Controlled Substance in the Seventh Degree; Assault in the Third Degree; Criminal Contempt in the Second Degree; Endangering the Welfare of A Child; and Criminal Mischief, all misdemeanors. In 2002, defendant pled guilty to the crime of Criminal Possession of a Controlled Substance in the Third Degree in full satisfaction of the instant indictment. This was defendant's second felony conviction. As noted above, he was released to parole supervision on July 5, 2006. While on parole supervision, defendant was arrested

and charged with the crime of Robbery in the Third Degree. On May 28, 2007, defendant pled guilty to the crime of Robbery in the Third Degree. This was defendant's third felony conviction.

In addition to defendant's three felony convictions, he has a multitude of misdemeanor convictions in New York. Defendant also has several out of state convictions. The Court has reviewed portions of the defendant's institutional record which have been provided by the defense. While the defendant has successfully completed several programs, he also has had some disciplinary infractions.

Defendant's application for re-sentencing pursuant to CPL 440.46 is denied. In so ruling, the Court reiterates that the defendant's conflicts with the law date back to 1978, span 3 decades and are not isolated to drug offenses, but rather run the full gamut of the penal law. The Court notes that the defendant's extensive criminal record, his conduct after his release to parole, which includes his subsequent felony conviction for a Robbery and his disciplinary record do not weigh in favor of re-sentencing. The fact that defendant participated in various programs and in fact successfully completed said program while incarcerated is commendable, but does not override or persuade this Court that he is a suitable candidate for re-sentencing. (See, *People v. Jesus Vega*, (Sup. Ct. Bx. Co., J. Oliver, 2009))

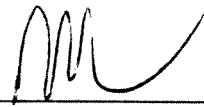
In sum the Court finds that substantial justice does not mandate re-sentencing

in this case.

Accordingly, defendant's motion for re-sentencing pursuant to CPL 440.46 is denied in all respects.

This constitutes the decision and order of the Court.

Dated: Bronx, New York
March 12, 2010



J.S.C.

HON. JOHN J. MOONEY