

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 72

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

ROGER SHERWOOD,

Defendant.

Indictment Nos.
6512/2000 and 678/2001

DECISION & ORDER

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R. UVILLER, J.:

The defendant moves pursuant to CPL §440.46 and the 2009 Drug Law Reform Act (L. 2009, Chapter 56, Section 9) ("DLRA3"), to be re-sentenced to a determinate sentence.

On February 14, 2002, the defendant pled guilty to Possession of a Controlled Substance in the Third Degree, a Class B felony, and Possession of a Controlled Substance in the Fourth Degree, under two separate indictments. He was sentenced as a predicate felon to the minimum indeterminate term of 6 to 12 years.¹ His predicate adjudication was based upon his 1989 Connecticut conviction for First Degree Aggravated Sexual Assault, a violent felony under New York Law. No challenge to his violent predicate status was raised at his plea or sentence.

After serving approximately 7½ years of his sentence on the instant indictments defendant, on October 6, 2009, filed the instant motion for re-sentence. Three days later, on October 9, 2009, defendant was released to parole.

Eligibility for Re-Sentencing

The Legislature's intent in enacting DLRA3 was to provide ameliorative relief from continued incarceration to certain inmates convicted of Class B drug felonies under the harsh

¹Under DLRA3, as a violent predicate felony offender, the sentencing range would be a minimum determinate term of six years and a maximum term of twelve years, plus post-release supervision.

penalties of the so-called Rockefeller drug laws. *See, People v. Bagby*, 11 Misc.3d 882; *People v. Weaver*, 7 Misc.3d 922; *People v. Stephen*, 7 Misc.3d 525, 526. Inmates eligible for re-sentencing are those who, among other criteria, “are *in the custody* of the department of correctional services *servin*g an indeterminate sentence (emphasis added).” CPL §440.46(1).

The question here is whether defendant, whose petition was filed while he was in custody, but who was released three days later and is no longer incarcerated, should be deemed to be “in the custody of the department of correctional services” for purposes of re-sentencing under DLRA3. No definition or explanation of the term “in the custody of the department of correctional services,” is contained in DLRA3 or any of the prior drug reform acts. *See, People v. Romero*, 2010 N.Y. Misc. Lexis 197. ²

Under the prior Drug Law Reform Acts of 2004 (L. 2004, Chapter 738, Sections 1-41) and 2005 (L. 2005, Chapter 643), however, inmates who had been released to parole and were re-incarcerated as parole violators were *not* deemed to be “in custody” and hence were ineligible for re-sentencing pursuant to those statutes. *See, People v. Mills*, 11 NY3d 527, 536-537. *See also, People v. Rodriguez*, 68 AD3d 676 (1st Dept. 2009) (“The [reform] act was not intended to apply to those offenders *who have served their terms of imprisonment, have been released from prison to parole supervision, and whose parole is then violated . . .* (emphasis added).” *Id.*, quoting *People v. Bagby*, 11 Misc. 3d 882, 887); *People v. (Elvis) Rodriguez*, 61 AD3d 1004, *lv denied* 12 NY3d 920.

²A parolee is deemed to be in custody for certain purposes. *See, Samson v. California*, 547 U.S. 845 (parolees have diminished rights under the Fourth Amendment); CPL §410.50(3)(probation officer may search the person or premises of a probationer without a warrant for evidence of a probation violation).

Although no appellate court has yet applied the logic of *Mills* to DLRA3, lower courts have done so. See, *People v. Watson*, 2010 N.Y. Misc. Lexis 488 (Sup. Ct. Queens County, March 15, 2010, Kohm, J.); *People v. Matthews*, 26 Misc.3d 1218A; *People v. Nieves*, 26 Misc.3d 1210A; *People v. Banks*, Unreported Decision, Sup. Ct. NY County, January 26, 2010, McLaughlin, J.); *People v. Baity*, Unreported Decision, Sup. Ct. NY County, February 3, 2010, Obus, J.).

Since a *re-incarcerated* parole violator is not considered to be “in custody” for re-sentencing purposes, then *a fortiori*, a parolee who is at liberty is not “in custody” for such purpose. Indeed, since he is at liberty there is no harsh sentence to ameliorate. Moreover, since defendant has completed the custodial portion of his sentence, his present application is most likely moot, See, *People v. Anderson*, 66 AD3d 1431, *lv denied* __NY3d__, 2009 N.Y. Lexis 4890 (defendant’s contention on appeal that his sentence was unduly harsh was rendered moot because he had completed serving his sentence); *People v. Bald*, 34 AD3d 1362.

Substantial Justice

Assuming *arguendo* that defendant’s present status and/or his status at the time he filed his petition does not render him ineligible for re-sentencing, his motion may be denied if “substantial justice dictates otherwise.” *CPL §440.46(3)*, referencing §23 of Chapter 738 of the *Laws of 2004 (2004 DLRA)*. *People v. Jones*, 25 Misc.3d 1238A; *People v. Lopez*, 10 Misc.3d 1056A. Re-sentencing, however, is not automatic. See, *People v. Salcedo*, 40 AD3d 356, *lv denied*, 9 NY3d 850; *People v. Wilson*, 46 AD3d 338.

The term “substantial justice” is not defined in DLRA3 or in either of the previous Drug Law Reform Acts. Rather, the statute allows the Court to consider any facts or circumstances relevant to the imposition of a new sentence which are submitted by such person . . . and may . . .

consider the institutional record of confinement of such person.” 2004 DLRA at §23. The totality of circumstances are to be taken into account balancing, in the exercise of the Court’s sound discretion, factors both favorable to the defendant as well as those that are unfavorable. See, *People v. (Randy) Rodriguez*, 54 AD3d 600; *People v. Jones*, 50 AD3d 282; *People v. Batista*, 45 AD3d 396; *People v. Gonzalez*, 29 AD3d 400, *lv denied* 7 NY3d 867.

The two indictments on which defendant seeks re-sentencing are not simple drug possession cases. They arise out of separate events during each of which defendant created a grave danger to the public. Regarding the first event, on September 12, 2000, officers observed defendant driving his auto erratically, running two red lights. When they approached his vehicle, he accelerated and a high speed chase ensued, terminating when defendant’s vehicle flipped over. Defendant then fled on foot and when the officers caught up to him a struggle ensued, causing injury to one of the officers. The defendant was arrested in possession of twenty-one bags of cocaine with an aggregate weight of more than three-quarters of an ounce. Defendant acknowledged driving his car after having used crack.

Defendant posted bail on that matter, but four months later, on January 4, 2001, he was again involved in a dangerous car chase with the police after they attempted to stop him for a traffic infraction. Officers chased him for approximately two miles, during which defendant ran a red light, a stop sign and crashed his car into another police car that had attempted to pull in front of him. Defendant then drove his car onto the sidewalk and again fled on foot. In a search incident to the arrest, he was in possession of three-eighths of an ounce of cocaine.

Defendant’s prior criminal history includes the following: In July, 1986, at 3:00 a.m., defendant, armed with a pellet gun and knife and wearing a mask, encountered a couple on the street who were strangers to him. The defendant forced the woman to perform oral sex on him.

He was charged under Connecticut law with First Degree Sexual Assault with a Deadly Weapon, Unlawful Restraint in the First Degree and related crimes. He was convicted after trial and sentenced to fifteen years, serving approximately 5½ years of the sentence. *Defendant's Reply Affirmation at ¶4.*

Prior to the 1989 Connecticut conviction, defendant had been convicted of operating a motor vehicle while impaired by alcohol and had also been arrested for exposing himself to a stranger.

During the pendency of the instant indictments defendant failed to appear in Court on August 12, 2001 and a bench warrant was issued. Approximately two months later he was extradited back to New York to face these charges. While these indictment were pending, he was twice arrested in Connecticut on domestic violence charges.

Although defendant's disciplinary record while incarcerated on these indictments is relatively good (see, *Exhibit G appended to Defendant's Motion*), it is not unblemished. He was found to have committed four Tier 2 infractions. Although defendant asserts that his struggle with alcohol and drug abuse throughout his adult life is the cause of his criminal activity, he provides no documentation of successful completion of any substance abuse programs while incarcerated.

Having balanced defendant's relatively favorable record of incarceration against his prior criminal history, including the commission of a violent sexual felony;³ the circumstances surrounding the instant crimes, including the grave public safety risk posed by his conduct, and taking into account that defendant received a highly advantageous plea under these two

³See plea and sentencing minutes at page 14.

indictments,⁴ substantial justice dictates that his motion for re-sentencing be denied. *See, People v. Morales*, 58 AD3d 550, *lv denied* 12 NY3d 819 (affirming denial on substantial justice grounds in view of seriousness of underlying drug crime and aggravating factors, as well as defendant's criminal history).

Accordingly, the defendant's motion for re-sentencing is **denied**.

This constitutes the Decision and Order of this Court.

DATED: April 7, 2010


RENA K. UVILLER, J.S.C.

PEOPLE: ADA Jeanine Launay

DEFENSE: Natalie Rea, Esq.

⁴The maximum term was twelve and one-half to twenty-five years on the third degree possession count and could have received consecutive time on the two indictments. In addition, defendant could have received consecutive time for the assault on the police officer.