

Short Form Order

SUPREME COURT - STATE OF NEW YORK
CRIMINAL TERM PART K-22 QUEENS COUNTY
125-01 Queens Boulevard Kew Gardens New York

P R E S E N T :

HON. ROBERT C. McGANN,
Justice Supreme Court

_____	:	Ind. No. 3242-04
THE PEOPLE OF THE STATE OF NEW YORK	:	
	:	Motion: Resentence
-against-	:	
	:	Submitted: January 14, 2010
DONALD STANLEY.	:	Argued
Defendant.	:	Hearing
_____	:	

The following papers numbered
1 to 4 submitted in this motion

David P. Greenberg, Esq.
For the motion

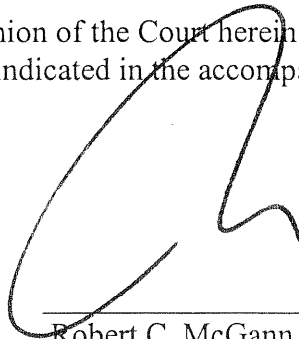
A.D.A. Sharon Brodt
Opposed

	Papers Numbered
Notice of Motion and Affidavits Annexed	1-2
Answering and Reply Affidavits	4
Exhibits	
Grand Jury Minutes	
Affirmation in Opposition	3

Upon the foregoing papers and in the opinion of the Court herein, the defendant, Donald Stanley's motion to be resentenced is granted as indicated in the accompanying memorandum of this date.

GRANTED:

Date: March 1, 2010



Robert C. McGann, J.S.C.

MEMORANDUM

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART K-22

THE PEOPLE OF THE STATE OF NEW YORK	: By: Robert C. McGann, J.S.C.
-against-	:
DONALD STANLEY,	: Dated: March 10, 2010
Defendant.	:
	: Ind. No. 3242-04
	:
	:
	:

The defendant, Donald Stanley, moves before this Court for an order to be resentenced pursuant to the Drug Law Reform Act of 2009, codified in C.P.L. 440.46.

The defendant was convicted after a jury trial in 2006. The defendant had been charged with Murder in the Second Degree, as well as Criminal Possession of a Controlled Substance in the Third Degree, and other charges. The evidence at the trial showed that the defendant had “pushed out” the tenants of a second floor apartment located at 23-64 37th Street, and had begun selling cocaine from the apartment. Early in the day of October 31, 2004, the defendant told a woman who worked for him that he was going to be robbed and that he needed a gun. Later that day, a witness, who was following Guy Butera up the stairs to the apartment, saw a black hand reach around a doorway and fire a gun in the direction of Butera. Butera was shot and subsequently died.

Police responded to the scene and searched the second floor apartment and recovered cocaine, crack cocaine, marijuana, pipes, razor blades, scrapers, numerous empty glassine envelopes, and an electronic scale, and \$1299 in cash.

Following the trial, the defendant was found not guilty of Murder in the Second Degree, and the lesser included offense of Manslaughter in the First Degree, and all of the weapon charges. He was found guilty of Criminal Possession of a Controlled Substance in the Third Degree, Criminal Possession of a Controlled Substance in the Fifth Degree, and two counts of Criminally using Drug Paraphrenalia, i.e., the glassine envelopes and the electronic scale.

At his sentence, after being arraigned as a second felony offender, for the conviction of Robbery in the Second Degree in Florida and Felony possession of cocaine, the defendant admitted the prior felonies and did not challenge the constitutionality of his convictions.

The defendant was found to be a second felony offender and sentenced to 12 ½ - 25 years.

The defendant appealed his conviction, and the conviction was affirmed by the Appellate Division in 2008. The Court stated “The hearing court correctly concluded that the defendant failed to demonstrate that he had a legitimate expectation of privacy in the apartment the police searched, from which they seized a little over two grams of cocaine and various drug paraphernalia. According to the testimony adduced at the suppression hearing, the defendant and another person had “pushed out” the prior tenant. They did not have a lease with the landlord and had not been paying rent. . . .” *People v. Stanley*, 50 A.D. 3d 1066.

The Appellate Division went on to state, “The defendant’s contention that the sentencing court improperly considered charges of which he was acquitted as a basis for imposing sentence. . . is without merit. . . . The sentence imposed was not excessive.” *Id.*

Leave to appeal to the Court of Appeals was denied *People v. Stanley*, 10 N.Y. 3d 964.

DEFENDANT'S ELIGIBILITY FOR RESENTENCING

Where a defendant has moved to be resentenced pursuant to the Drug Law Reform Act, the Court must first determine whether the defendant is eligible for resentencing. It is the position of the People that the defendant's conviction in Florida for Robbery, in 1994, makes him ineligible for resentencing. The defendant argues that this conviction does not bar resentencing.

C.P.L. 440.46, which embodies a portion of the Drug Law Reform Act, states that a defendant is not eligible for resentencing if he has a "predicate felony conviction for an exclusion offense." An exclusion offense is defined as "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 10.02 of the penal law. . . ." C.P.L. 440.46 (5)(a).

It is this ten year look back provision that is crux of this case. The People argue that the ten year look back provision begins at the date of the commission of the defendant's current drug conviction. In other words, because the defendant was convicted of a violent felony within ten years of his commission of this offense on October 31, 2004, the defendant is not eligible for resentencing.

The defendant argues that the ten year look back provision begins at the date of the motion for resentence. In other words, the defendant's conviction for the violent felony offense was more than ten years before the date of this motion, October 26, 2009.

In view of the effective date of this portion of the drug law reform, October 7, 2009, there

exists little case law to guide the Court in the determination of this question.

In the commentaries to this section, Peter Preiser clearly states a position which supports the People: “Certain categories of inmates are not included. [The law] excludes inmates presently serving a sentence for or who were convicted in the preceding ten years of a violent felony offense. . . . **measuring the ten year period by the interval between commission of the former and present crimes. . . .**” C.P.L. 440.46, Practice Commentaries, 2009. (Emphasis supplied by court.)

On the other hand, the State Department of Correctional Services has notified inmates by letter that the interpretation of the statute by the Department of Correctional Services is that the ten year look back provision begins on the date of the motion.

There are only a few reported cases which have examined this question. *People v. Roman*, 2009 NY Slip Op 29493 (December 4, 2009); *People v. Jones*, 2009 N.Y. Slip Op 52483U (December 10, 2009); *People v. Brown*, 2010 NY Slip Op 50000U (January 4, 2010); *People v. Danton*, 2010 N.Y. Slip Op. 20035 (February 2, 2010). In each of these cases, the court adopted the view advanced by the defendant in this case, i.e., that the ten year look back provision begins at the time that the motion is made.

The Court is especially persuaded by the opinion in *People v. Brown, supra*. After an extensive analysis of the legislative history and a close reading of the statute, the court observed “In short, there are significant arguments that the language of the statute along with its context within the 2009 DLRA, as a part of the legislature’s drug law reform efforts over the past five years and as part of the Penal Law, indicate that the reading of the 10 years look back provision urged by the People is the most reasonable one.” *Id.*

However, after considering the application in view of the ameliorative aims of all of the drug reform legislation, the court stated “But no amount of verbal parsing can overcome the plain fact that the most natural construction of the law is to read its reference point as the date of a resentencing application.” *Id.*

Therefore, for the purposes of this application, the court will deem that the defendant is eligible for resentencing under C.P.L. 440.46.

On April 19, 2006, the defendant was arraigned as a second felony offender, pursuant to his conviction for robbery in the second degree, and his conviction for Attempted Criminal Sale of a controlled substance in the third degree. The admission is binding on the defendant. *People v. Davis*, 135 A.D.2d 1088.

As a result, the Court intends to resentence the defendant as a second felony offender with a prior felony conviction for a violent felony.

The defendant, Donald Stanley, has an unbroken criminal record dating to 1980.

1980: Youthful offender adjudication for jostling.

1980: Youthful offender adjudication for Criminal Possession of a Weapon in the Fourth Degree.

1982: Youthful Offender adjudication for Robbery in the Second Degree.

1984: Conviction for Attempted Criminal Sale of a Controlled Substance, sentenced to 1 ½ - 4 ½ years. Parole revoked April, 1988.

1987: Arrested for Criminal Possession of a Controlled Substance, pled guilty to Disorderly Conduct.

1987: Pled guilty to Attempted Criminal Possession of Stolen Property; 90 days.

1988: Pled guilty to Criminal Possession of a Controlled Substance seventh degree; 1 year.

1990: Pled guilty to Criminal Possession of a Controlled Substance seventh degree; 90 days.

1991: Convicted of Possession of Drug Paraphernalia in North Carolina: 7 years.

1994: Convicted of Robbery and Possession of Cocaine in Florida; 366 days.

1997: Convicted Assault in the Third Degree; 30 days and probation; subsequent violation of probation and resentenced to 6 months.

1997: Pled guilty Criminal Possession of Controlled Substance seventh degree; Conditional Discharge.

1997: Pled guilty Criminal Possession of Controlled Substance seventh degree; Time served.

2000: Pled guilty Criminal Possession of Controlled Substance seventh Degree; 1 year.

2003: Pled guilty Criminal Possession of Controlled Substance seventh degree; 9 months.

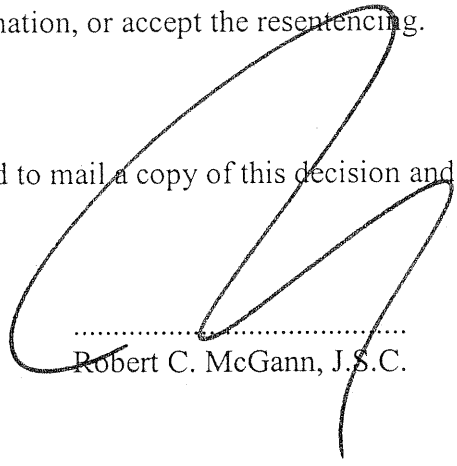
While the defendant was incarcerated under the current case, he committed two tier-two infractions.

Therefor, the Court intends to resentence the defendant to a determinate sentence of 10 years, with 3 years of post release supervision as to the count of Criminal Possession of a Controlled Substance in the Third Degree, and for his conviction of Criminal Possession of a Controlled Substance in the Fifth Degree, the Court intends to sentence the defendant to a determinate sentence of 4 ½ years with a period of post release supervision of 2 years. These sentences are to run concurrently.

The defendant may reject the Court's proposed resentencing, may choose to appeal the Court's proposed resentencing determination, or accept the resentencing.

Order entered accordingly.

The clerk of the court is directed to mail a copy of this decision and order to the attorney for the defendant.

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long vertical stroke extending downwards.

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Robert C. McGann, J.S.C.