

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM : PART N-60

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THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER

-against-

SCI No. 10325/03

JOSE SURIEL,

Defendant.

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PAULINE A. MULLINGS, A.J.S.C.:

In a motion filed on October 7, 2009, the defendant moves to vacate his sentence of four to twelve years, imposed on October 17, 2007, and to re-sentence him to a determinate term of imprisonment, pursuant to Criminal Procedure Law § 440.46. The People have filed an Affirmation in Opposition to the defendant's motion dated October 23, 2009. The defendant has filed a reply affirmation dated November 4, 2009. For the reasons set forth below, defendant's motion for re-sentencing is dismissed.

FACTS

The defendant was arrested on November 7, 2002 and charged with Criminal Sale of a Controlled Substance in the Second Degree (*Penal Law § 220.41[1]*)(two counts) and Criminal Sale of a Controlled Substance in the Third Degree (*Penal Law § 220.39[1]*)(four counts) based upon three separate sales of cocaine to an undercover police officer. On April 9, 2003, the defendant waived prosecution by indictment and consented to be prosecuted by Superior Court Information (Court File). On the same day, defendant pled guilty to a single count of Criminal Sale of a Controlled Substance in the Third Degree (*Penal Law § 220.39*) in exchange for a an

indeterminate sentence of four-to-twelve years (*Id.*). On October 17, 2007, the defendant was sentenced in accordance with the Court's promise¹ (*Id.*).

The defendant makes the following averments in support of his motion for re-sentencing:

(1) that his case represents the defendant's first conviction; (2) that he has successfully completed the Department of Correctional Services ("DOCS") Residential Alcohol and Substance Abuse Treatment; (3) that aside from a single disciplinary infraction incurred the first week of his incarceration, the defendant has a clean prison disciplinary record; (4) that he has participated in vocational and educational programs; (5) that he has the support of a loving family; and (6) that social workers employed by, or working in conjunction with, The Legal Aid Society, who have been preparing to assist individuals who return to the community as a result of the Rockefeller Drug Reform Act, will be available to him upon his release should he require them (*10/8/09 Affirmation of Nancy E. Little*).

While not disputing the factual averments made by the defendant in support of his motion, the People aver that the defendant: (1) received a verbal reprimand for possession of three pink pills and a book of matches seized when his cell was searched on October 28, 2007; (2) that in addition to residential drug treatment, the defendant has completed a masonry program and is employed as a porter and student while incarcerated (*10/23/09 Affirmation of Howard McCallum*).

¹ The defendant was originally scheduled to be sentenced on June 11, 2003 but he did not return to Court for sentence on that date. A bench warrant was ordered and the defendant remained a fugitive until August 3, 2007 when he was involuntarily returned on the warrant (*Court File*).

The People do not oppose the re-sentencing of the defendant and argue that a determinate sentence of seven years followed by two years post-release supervision is appropriate.

The defendant argues in his reply papers that the sentence proposed by the People, should the Court grant his motion for re-sentencing, is actually more severe than the sentence he is currently serving (*11/4/09 Reply Affirmation of Nancy E. Little*). The defendant argues that the People's recommendation fails to fully take into account his rehabilitation while incarcerated. Finally, the defendant argues that a sentence of two years incarceration and one year post release supervision would be appropriate.

The Court notes that the defendant, in his reply papers, avers that he was released from the custody of the Department of Correctional Services on October 26, 2009 and transferred into the custody of United States Immigration and Customs Enforcement (*Id.*). The Court was further advised by counsel for the defendant that the defendant was deported from the United States on November 10, 2009.

DISCUSSION

Criminal Procedure Law Section 440.46 provides, in pertinent part:

1. 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.
2. As part of any such application, the defendant may also move to be resentenced to a determinate sentence in accordance with section 70.70 of the penal law for any one or more class C, D, or E felony offenses defined in article two hundred twenty or two hundred twenty-one of the penal law, the sentence or sentences for which were imposed by the sentencing court at the same time or were included in the same order of commitment as such class B felony.

3. 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; provided, however that the court's consideration of the institutional record of confinement of such person shall include but not be limited to such person's participation in or willingness to participate in treatment or other programming while incarcerated and such person's disciplinary history. The fact that a person may have been unable to participate in treatment or other programming while incarcerated despite such person's willingness to do so shall not be considered a negative factor in determining a motion pursuant to this section.

(Criminal Procedure Law § 440.46).


Based upon the defendant's averment that he was released from the custody of the Department of Correctional Services on October 26, 2009, he is no longer an eligible defendant under this statute. Furthermore, based upon the defendant's deportation from the United States, the Court has no jurisdiction under any statutory scheme to entertain a motion for post-conviction relief.

CONCLUSION

Based upon the foregoing, the defendant's motion is dismissed.

This constitutes the Decision and Order of this Court.

Dated: Kew Gardens, New York
November 13, 2009



Pauline A. Mullings,
Acting Justice of the Supreme Court

EXHIBIT D