

**COUNTY COURT**

COUNTY OF ONCNDAGA

STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,  
Plaintiff,

-vs-

Indictment #2004-1159-1  
& 2004-1084-1  
Index # 03-1113

DELMETRI TURNER,

Defendant.

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HON. WILLIAM D. WALSH

**DECISION/ORDER**

The defendant has moved pursuant to *Section 440.46 of the Criminal Procedure Law (the Rockefeller Drug Law Reform Act)* for an order vacating the concurrent indeterminate sentences of six to twelve years imposed upon the judgments of conviction entered against him upon his pleas of guilty to one count of *Criminal Sale of a Controlled Substance in the Third Degree* under each of the above-referenced indictments, and seeks to be resentenced in accordance with the provisions of *Penal Law §§ 60.04 and 70.70*.

The People have opposed the motion on the grounds that the defendant is not an eligible inmate who qualifies for the relief sought because he has previously been convicted of an "exclusion offense," i.e., *Burglary in the Second Degree*.

*Criminal Procedure Law § 440.46 (1)*, which became effective on October 7, 2009, sets forth the eligibility requirements for "B" drug felons who may apply to be resentenced, 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.

*Criminal Procedure Law* § 440.46 (5) states, in relevant part:

The provisions of this section shall not apply to any person who is serving a sentence on a conviction for or has a predicate felony conviction for an exclusion offense. For purposes of this subdivision, an "exclusion offense" is:

(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 the commission of the previous felony and the time of the 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; ...

The court finds that the defendant is not an eligible inmate because his prior conviction for the crime of *Burglary in the Second Degree*, a violent felony, meets the criteria for an "exclusion offense" set forth in *Criminal Procedure Law* § 440.46 (5)(a)(i). The defendant entered a plea of guilty in Onondaga

County Court to one count of *Burglary in the Second Degree* which was alleged to have occurred on November 22, 1997, and was sentenced to an indeterminate term of two and one-quarter to four and one-half years on February 24, 1998.

The defendant was initially released to parole supervision on May 22, 2001. On May 17, 2002, parole was revoked and he was returned to state prison as a parole violator. He was eventually released from state prison upon the maximum expiration of his term of imprisonment on February 5, 2003.

The time period between the commission of the first of the present drug offenses, June 2, 2004, and the date of the commission of the offense of *Burglary in the Second Degree, November 22, 1997*, is six years, 5 months and 11 days. The time period between the commission of the second of the present drug offenses, August 4, 2004, and the date of the commission of the offense of *Burglary in the Second Degree, November 22, 1997*, is six years, 8 months and 13 days. Thus, with respect to both drug offenses, the defendant is well within the ten year time frame for the purposes of determining whether he was previously convicted of an "exclusion offense."

Furthermore, although not relevant to the issue of the defendant's eligibility, it is worth noting that he is a career criminal whose adult criminal history dates from April of 1995, when he was sixteen years old, to the present. As such, he does not in any event appear to the court to be the type of low level, non-

violent drug offender intended by the Legislature to benefit from the *Rockefeller Drug Reform Acts*.

Accordingly, inasmuch as the defendant is not an eligible inmate within the meaning of *Criminal Procedure Law* § 440.46, his motion is in all respects denied.

This shall constitute the Decision and Order of the Court.

Dated: December 9, 2009

  
HON. WILLIAM D. WALSH

ENTER

To: Delmetri Turner  
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