

STATE OF NEW YORK
SUPREME COURT

COUNTY OF MONROE

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

-vs-

RAFAEL WALLACE,

Defendant.

Decision & Order
No. 0763/92

MONROE COUNTY CLERK
MAY 20 AM 9:21

FILED

APPEARANCES: MICHAEL C. GREEN,
DISTRICT ATTORNEY
Holly Moynihan, Esq.
Attorney for People

TIMOTHY P. DONAHER,
PUBLIC DEFENDER
Wedade W. Abdallah, Esq.
Attorney for Defendant

EGAN, J. This is a motion by Defendant pursuant to Criminal Procedure Law ("CPL") § 440.46 for re-sentencing under the popularly known "Drug Law Reform Act of 2009 (hereinafter, "DLRA 3) and in accordance with Penal Law (hereinafter, "PL") §§60.04 and 70.70.

BACKGROUND

Defendant was convicted after trial of Criminal Sale of a Controlled Substance in the Third Degree (a class B non-violent felony) in violation of PL § 220.16-1 and Criminal Possession of a Controlled Substance in the Third Degree (a class B non-violent felony) in violation of PL §220.39-1. Both crimes occurred on May 27, 1992. On February 26, 1993, he was sentenced to an indeterminate term of incarceration of 10-20 years with the Department of Corrections (hereinafter, "DOCS").

Claiming that he is eligible for re-sentencing under DLRA 3, the Defendant seeks to vacate his prior sentence and to have a new sentence imposed of between 6 and 15 years determinate with a period of post-release supervision of between 1 ½ to 3 years.

In considering and deciding this motion, the Court has reviewed the motion, the People's

opposing affirmation with exhibits and the Court's own file.

DISCUSSION

Defendant's motion is without merit. As the People correctly state, although Defendant is conditionally eligible as a class B non-violent drug felon, he is not entitled to re-sentencing because he has a previous violent felony conviction which was committed within ten years prior to the date of the original sentencing date, with appropriate tolling. A simple review of the Defendant's criminal history reveals a conviction for Burglary, 2nd Degree, a Class C violent felony in 1984. Pursuant to that conviction, the Defendant was sentenced to incarceration for a period of four years. With statutory tolling applied, the Defendant committed, and was sentenced for, the instant drug felonies within ten years of the commission of the violent felony. Therefore, the Defendant is ineligible for re-sentencing under DLRA 3 because he committed an "exclusion offense". See CPL §440.46 (5)(a).

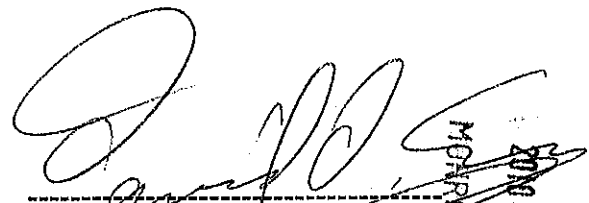
Moreover, because the Defendant is a parole violator and was returned to custody after a parole violation, he is not eligible for re-sentencing under DLRA 3. *People v. Colon*, __ Misc3d __, (Supreme Court, NY County, March 23, 2010, White, JSC); *People v. Romero*, 26 Misc3d 1218(A), 2010 WL 391281 (Supreme Court, Bronx County, February 4, 2010). In short, and as a matter of law, the Defendant was not "in the custody of DOCS" within the meaning of DLRA 3 because the cause of his incarceration at the time he applied for re-sentencing was the revocation of parole. *People v. Romero, supra*. To the extent that contrary authority exists on the latter point in other courts of coordinate jurisdiction throughout the state, this Court declines to follow their reasoning. The Defendant's remaining contentions are without merit.

It is accordingly,

ORDERED that Defendant's motion for re-sentencing is denied in all respects.

This Decision shall constitute the Order of the Court.

**DATED: Rochester, New York
May 17, 2010**


HON. DAVID D. EGAN
SUPREME COURT JUSTICE
MORRIS COUNTY CLERK
MAY 20 AM 9:21

FILED