Spanakos

Order

SUPREME COURT - THE STATE OF NEW YORK
CRIMINAL TERM - PART K-7 - QUEENS COUNTY
125-01 QUEENS BOULEVARD
KEW GARDENS, NY 11415

P R E S E N T:

HON. ROBERT CHARLES KOHM
Justice

X

THE PEOPLE OF THE STATE OF NEW YORK — IND. NO.: N10539/96

- against - — MOTION: Resentence

JAMES WALLTOWER,

Defendant.

X

The following papers numbered
1 to 4 submitted in this motion.

The Legal Aid Society
BY: Laura Lieberman Cohen, Esq.

HON. RICHARD A. BROWN, D.A.
BY: Anastasia Spanakos, ADA
OPPOSED

	Papers Numbered
Notice of Motion/Affidavit/Exhibits	1
Affirmation in Opposition/Exhibits	2
Supplemental Affirmation in Opposition	3
Reply/Exhibits	4

Upon the foregoing papers, defendant's motion to be resentenced pursuant to the Drug Law Reform Act of 2009 is granted in accordance with the accompanying memorandum decision.

GLORIA D'AMICO
Clerk

Date: April 6,2010

HON. ROBERT CHARLES KOHM

ROBERT CHARLES KOHM, J.S.C.

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS : CRIMINAL TERM : PART K-7

THE PEOPLE OF THE STATE OF NEW YORK	BY: ROBERT CHARLES KOHM, J.
-against-	DATE: April 6, 2010
JAMES WALLTOWER,	INDICT. NO.: N10539/96
Defendant.	

On May 7, 1997, the defendant was convicted, upon a jury verdict, of criminal sale of a controlled substance in the third degree, a class B felony, and sentenced by this Court to an indeterminate prison term of from ten to twenty years, as a second felony offender. He now seeks to be resentenced to a determinate term pursuant to the Drug Law Reform Act of 2009 (L. 2009, Ch 56, §9 [the 2009 DLRA]).

CPL 440.46 was codified concomitant to the 2009 DLRA. It generally offers defendants who are in the custody of the Department of Correctional Services serving indeterminate sentences having maximum terms in excess of three years that were imposed for class B felony drug offenses committed prior to January 13, 2005 an opportunity to apply to be resentenced under the newly-revised Penal Law §§ 60.04 & 70.70.

Certain categories of defendants are, however, excluded from eligibility for resentencing. CPL 440.46(5) renders an otherwise eligible person "who is serving a sentence on a conviction for or has a predicate felony conviction for an exclusion offense" ineligible for resentencing. An exclusion offense is defined, in relevant part, 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 70.02 of the Penal Law ...." (CPL 440.46 [5][a]).

The People argue that the defendant is ineligible for resentencing both because he has a predicate felony conviction for an exclusion offense and because he is still serving his sentence on the offense.

On August 24, 1993, the defendant, under the name Davon Fouler, was convicted, upon his plea, of attempted robbery in the second degree, a class D violent felony (*see* Penal Law § 70.02 [1], [b],[c]), and sentenced to a term of from one to three years imprisonment. He was paroled on May 25, 1994, but re-incarcerated in June, 1994, after he absconded from his work release program. The defendant was then re-paroled on October 6, 1994. On

May 4, 1995, the defendant was convicted of criminal possession of a controlled substance in the seventh degree, upon his plea, and sentenced to one year imprisonment. As a result of the drug conviction, the defendant's parole from the 1993 attempted robbery conviction was violated and he was assessed eight months. The defendant's parole was again revoked upon his conviction in this case.

The People claim that the defendant is ineligible for resentencing because his 1993 conviction for attempted robbery occurred within ten years of his conviction in this case. They also contend that the defendant is, in fact, now serving time on both the robbery and instant drug convictions because he had one year, two months and twenty-six days remaining on his robbery sentence when his parole was revoked upon his conviction herein. They argue that such remaining time is both served consecutively to the term imposed herein pursuant to Penal Law § 70.25 (2-a) and, pursuant to Penal Law § 70.30(1)(b), added to the maximum portion of his current drug sentence, thereby creating one aggregate sentence for both convictions.

There is little legislative history concerning the 2009 DLRA. The People's arguments with respect to the ten-year "look back" period for an exclusion offense are persuasive, particularly as they are based upon an eminent authority's explanation, albeit brief, of CPL 440.46 (*see* Preiser, Practice Commentaries,

McKinney's Cons Laws of NY, Book 11A, CPL 440.46, 2010 Supp Pamph, at 25). Nevertheless, it is the opinion of this Court, like those of others that have recently considered the issue (*see e.g.* *People v Danton*, 2010 NY Slip Op 20035 [Sup Ct., New York Co., February 2, 2010 [Kahn, J.]; *People v Brown*, 2010 NY Slip Op 50000U [Sup Ct., New York Co., January 4, 2010 [Conviser, J.]; *People v Roman*, 889 NYS2d 922 [2009]), that in light of both the dearth of legislative guidance and the ameliorative purposes of the 2009 DLRA, the natural meaning of the term "within the preceding ten years" in CPL 440.46(5)(a)is the ten-year period immediately preceding the date of filing of the application for resentencing. Since the defendant filed this application on November 17, 2009, his 1993 robbery conviction is too distant to render him ineligible for resentencing. In addition, since the *sine qua non* of an exclusion offense resulting from a single violent felony is a conviction within ten years, the fact that the defendant is allegedly still serving time on the 1993 robbery is immaterial.

In this latter regard, the Court does not find the People's reliance on *People v Buss* (11 NY3d 553 [2008]) persuasive. *Buss* dealt with an entirely different statute, the Sex Offender Registration Act (SORA). The Court of Appeals, after noting that "the primary function" of Penal Law § 70.30 "is to allow for the ready calculation of parole eligibility ..." (at 557), determined that "[t]he primary goals of SORA ... are best served by

recognizing that a person who is returned to prison while on parole for a sex offense continues to be subject to his sex offense sentence", and so found it "reasonable to apply section 70.30." No similar justification exists with respect to the 2009 DLRA. The Act's resentencing exclusions are exceptions to its general ameliorative purpose and provisions (*see* Statutes § 213). "Exceptions [to a statute] must be strictly construed in order that the major policy underlying the legislation itself is not defeated. They extend only so far as their language fairly warrants, and all doubts should be resolved in favor of the general provision rather than the exception" (*id*). The primary goals of the 2009 DLRA are not served by using Penal Law 70.30 to expand the definition of an exclusion offense.

The People also argue that substantial justice requires that the defendant's application be denied. They contend that in the thirteen years the defendant has been incarcerated, he has proven to be unreceptive to drug treatment programs and demonstrated an inability to abide by the rules regulating his conduct. More specifically, the People point to the fact that during his incarceration the defendant has completed only one drug treatment program- almost eight years ago- and been found guilty of nine drug-related prison infractions since completing it. In addition to the drug infractions, the defendant has physically fought with other inmates, refused to abide by direct orders, and

possessed both a makeshift weapon and gang-related materials. As a result of his infractions, the defendant has served over 3,300 days of SHU or keeplock confinement and lost eligibility for merit time.

In support of his application, the defendant states that his adult criminal history, which includes one prior conviction for misdemeanor drug possession in addition to the convictions discussed above, stems from his addiction to drugs and that his addiction was, in turn, fostered by his troubled upbringing. The defendant was raised in a fatherless home by a mother who was an alcoholic. He has six siblings, each of whom have different fathers. As a teenager, the defendant and his family moved to Far Rockaway, where his addiction and problems with the juvenile justice and, later, criminal justice systems began.

While acknowledging a difficult adjustment to prison life when incarcerated at the age of 21, the defendant also states that he has made substantial efforts to address his addiction and prepare for his release. As noted by the People, the defendant completed a Residential Substance Abuse (RSAT) Program in 2002. In 2009, he completed Aggression Replacement Training (ART). He obtained what appears to be a second high school equivalency diploma in 2007, and has continued his studies through an in-cell study program. The defendant has also participated in vocational programs in electrical work and landscaping and worked in the

residential medical unit as an orderly. He states that he has made arrangements to live with his sister, secured a job in construction with his stepfather, and hopes to enroll in an out-patient drug treatment program should he be released.

By reference to a specific provision of the Drug Law Reform Act of 2004 (L 2004, ch 738, § 23), CPL 440.46(3) provides that an application for resentencing shall be granted unless "substantial justice" dictates otherwise. While courts have a measure of discretion with respect to resentencing applications (*see People v Rodriguez*, 54 AD3d 600 [2008]; *People v Curry*, 52 AD3d 732 [2008], *lv denied* 11 NY3d 735 [2008]; *People v Beasley*, 47 AD3d 639 [2008]), "case law indicates a presumption in favor of granting a motion for resentencing..." (*People v Beasley*, *supra*, at 641). The defendant's poor inmate disciplinary record, consisting of 32 infractions, 21 of which are of the more serious tier 3 level, militates against granting the defendant's motion, as does his violent felony conviction. However, more recently, the defendant has apparently made a concerted effort over a sustained period to obey prison rules, other than those relating to drug use: he has not committed a non-drug-related infraction since April, 2004 (*see* People's Exhibit 11). While that effort is admirable, the Court is wary of the defendant's failure to avail himself of a drug treatment program since 2002.

Upon considering the totality of circumstances, the Court

has determined that substantial justice does not dictate denial of the defendant's application. Accordingly, it is the judgment of this Court that a determinate term of 15 years imprisonment, followed by 3 years of post-release supervision, for the crime of criminal sale of a controlled substance in the third degree, upon resentence, *nunc pro tunc*, is appropriate.

Prior to the date set for resentencing, the defendant may withdraw his application or appeal this order. Otherwise, the parties are directed to appear at 10:00 A.M. on April 20, 2010 in Part K-7 of the Supreme Court, Queens County, at which time the defendant will be afforded the opportunity for a hearing as mandated by law in order to place any additional matter before the Court. In the event the defendant chooses to rely on his submissions herein, the Court shall vacate the defendant's previous sentence and resentence him in accordance with the foregoing.

The District Attorney is directed to prepare an order to produce the defendant on that date.

Order entered accordingly.

Dated: April 6, 2010

HON. ROBERT CHARLES KOHM

ROBERT CHARLES KOHM, J.S.C.