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Supreme Court, Queens County, New York.
The PEOPLE of the State of New York
v.
Wydell WATSON, Defendant.
No. QN10173/97.

March 15, 2010.

Lynn W.L. Fahey, Esq., Appellate Advocates, New York, Kathleen Whooley, Esq., Of Counsel, for Defendant.

Richard A. Brown, District Attorney, Queens County District Attorney's Office, Kew Gardens, Marilyn A. Filingeri, Esq., Of Counsel, for People.

ROBERT C. KOHM, J.

***1** By motion, dated November 2, 2009, the defendant has moved for an order resentencing him to a determinate sentence in accordance with *Penal Law* §§ 60.04 and 70.70, pursuant to the 2009 Drug Law Reform Legislation ("DLRA 3") as codified in *Criminal Procedure Law* § 440.46.

The People have submitted an affirmation in opposition, dated December 17, 2009, to which the defendant has submitted a reply affirmation, dated December 31, 2009 and a supplemental memorandum in support of resentencing, received by the Court on February 24, 2010.

Findings of Fact

The basic facts underlying this application are not in dispute and are as follows:

On January 15, 1997, the defendant was arrested and charged with the crime of Criminal Sale of a Controlled Substance in the Third Degree (*Penal Law* § 220.39(1)). The arrest was predicated upon the defendant having sold crack cocaine to an undercover police officer the prior day. On September 17, 1997, the defendant pled guilty before this Court to the sole count of the indictment, and in exchange was promised an indeterminate sentence of from five to ten years incarceration. On October 14, 1997, this Court sentenced the defendant as promised at the time of the plea.

Thereafter, the defendant was granted parole and was released from the Department of Correctional Services ("DOCS") on May 7, 2001. However, the defendant's parole was revoked on October 11, 2006, based upon an August 2, 2005 conviction for the crime of Criminal Possession of a Controlled Substance in the Seventh Degree (*Penal Law* § 220.03), as well as several technical violations including: failure to report to his parole officer, failure to enter and complete a required outpatient treatment program, and his absconding from parole for a period of approximately three months. As a consequence thereof, the defendant was returned to custody at the Ulster Correctional Facility.

On March 14, 2007, the defendant was released on parole for the second time. Just three months later, the defendant's parole was again revoked, this time on June 13, 2007 because of his conviction on May 22, 2007 for the crime of Criminal Possession of a Controlled Substance in the Seventh Degree, together with additional technical violations including: failure to report to his parole officer and testing positive for cocaine & heroin. The defendant was returned to custody, this time to the Downstate Correctional Facility.

The defendant was granted parole for the third time on January 17, 2008. However, due to another drug related conviction -Criminal Possession of a Controlled Substance in the Seventh Degree on August 6, 2008-in addition to a technical violation regarding his failure to abide by his curfew, the defendant's parole was revoked on August 19, 2008 and he was returned to custody at the Downstate Correctional Facility.

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On December 30, 2008, the defendant was paroled for the fourth time. In keeping with his demonstrated and repeated pattern of participation in offenses involving controlled substances upon release from custody, the defendant was arrested on February 27, 2009 for the crime of Criminal Possession of a Controlled Substance in the Third Degree, and pled guilty on May 15, 2009 to Criminal Possession of a Controlled Substance in the Seventh Degree. Based upon this most recent conviction and in conjunction with further technical violations including: failure to make scheduled office visits to his parole officer, failure to enter and complete a drug detoxification program, and his changing of his residence without permission, the defendant's parole was revoked for the fourth time on June 4, 2009, and he was returned to custody.

***2** While still in custody at the Bare Hill Correctional Facility based upon this fourth and most current parole violation, the defendant filed the instant motion, dated November 2, 2009, shortly after the effective date (October 7, 2009) of the newly enacted Section 440.46 of the *Criminal Procedure Law*. During a conference with the Court, on February 17, 2010, the Court was informed that the defendant was, in fact, released from custody on or about February 13, 2010.

Conclusions of Law

In pertinent part, the 2009 Drug Law Reform Act (see *Criminal Procedure Law* § 440.46(1)) provides that "(a)ny 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 13, 2005, who is serving an indeterminate sentence with a maximum term of more than three years, may, ... [FN1] 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 sentence."

FN1. The omitted portion of the statute refers to any person serving a sentence on a conviction for or who a predicate felony conviction for an "exclusion offense." The defendant does not fall within that category.

Upon a plain reading of subd. 1 of *Criminal Procedure Law* § 440.46 it would appear that the defendant is within the class of persons eligible to move for resentencing under "DLRA 3." At the time that he moved for resentencing he was back in the actual custody of "DOCS", based upon his latest parole violation; the crime for which he had originally been convicted (Criminal Sale of a Controlled Substance in the Third Degree--Penal Law § 220.39 (1)) is defined in Article 220 of the *Penal Law* and was committed prior to January 13, 2005; he had been sentenced to an indeterminate sentence (5-10 years)with a maximum term of more than three years; and, he was not disqualified by virtue of any "exclusion offense" (*Criminal Procedure Law* § 440.46(5)(a)(b)).

However, in the opinion of this Court the defendant, Wydell Watson, was not "in the custody" of "DOCS" within the meaning of "DLRA 3" when this motion was filed and was, therefore, ineligible to move for resentencing pursuant to *Criminal Procedure Law* § 440 .46(1). The Court's reasoning is based upon the fact that the defendant had already served his term of imprisonment, having been released to parole on May 7, 2001, and was only then incarcerated by virtue of a fourth parole violation. This very issue concerning the proper interpretation of the term "in custody" has been addressed by appellate courts, including the Court of Appeals, in cases emanating from the Drug Law Reform Act of 2004 (providing an opportunity for resentencing of defendants convicted of A-I drug felonies) and the Drug Law Reform Act of 2005 (providing an opportunity for resentencing of defendants convicted of A-II drug felonies).

In *People v. Mills* [FN2], 11 NY3d 527, the Court of Appeals held that Then "no longer qualified for 2005 DLRA relief" on a 1999 Class A-II drug felony conviction once he had "been released to parole supervision", despite the fact that he had been

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re-incarcerated due to a parole violation (*People v. Mills,* supra, at 537; citing *People v. Hardy,* 49 AD3d 779-780 [2d Dept.2008]; *People v. McCloud,* 38 AD3d 1056, 1057 (3d Dept.2007), lv dismissed 8 NY3d 947 [2007]; *People v. Hernandez,* 46 AD3d 1429, 1426 (4th Dept.2007), lv dismissed 9 Ny3d 1034 [2008]. In reaching its determination the Court of Appeals concluded: "Surely the Legislature did not intend fresh crimes to trigger resentencing opportunities."

> FN2. *Mills* was a consolidated appeal also involving a second defendant named Jose Then. The issue involving the interpretation of the term "in custody" was discussed in that portion of the decision dealing with Mr. Then. (11 NY3d 527, 537).

***3** A similar result was reached by the Appellate Division-First Department in ***People v. Rodriguez,* 68 AD3d 676 (Dec. 29, 2009**) wherein the court held that Rodriguez was not eligible to be resentenced under the 2004 Drug Law Reform Act. The Appellate Division found that the "**act was not intended to apply to those offenders who have served their term of imprisonment, have been released from prison to parole supervision, and whose parole is then violated, with a resulting period of incarceration" (*People v. Rodriguez,* supra**, quoting *People v. Bagby,* 11 Misc.3d 882, 887 (2006); see also *People v. Mills,* 11 NY3d 527, 537). Again, the court's reasoning was based upon the common sense view that the Legislature did not intend "fresh crimes" to trigger resentencing opportunities.

This Court is not aware--either by its own research or through the submissions by the parties--of any appellate authority on the resentencing/custody issue at bar with respect to "DLRA 3." There have been several trial level courts which have rendered decisions, both reported and unreported, analyzing the rights of incarcerated parole violators to apply for resentencing; including *People v. Matthews,* 26 Misc.3d 1217(A)and *People v. Romero,* 1010 N.Y. Slip Op 50170U (both holding against the right to be resentenced, in accord with the *Mills-Rodriguez* line of cases) and *People v. Figueroa,* 2010 WL454919 (holding that an offender who returns to "DOCS" custody following a parole violation is not, by virtue of that fact, statutorily barred from resentencing consideration under the 2009 DLRA). In *Figueroa,* the Court wrote that "... in the 2009 DLRA the Legislature created a long list of offenders who were statutorily ineligible for resentencing [FN3] because of their previous criminal histories." The Court further opined that "(t)his detailed listing creates a strong inference that the Legislature intended those offenders and not others to be barred from the statute."

> FN3. Referring to the class of persons designated under *Criminal Procedure Law* § 440.46(5)(a)(5)

This Court does not share a similar opinion regarding the Legislature's intentions. True, the Legislature specifically highlighted those class of persons who were barred or ineligible for applying for resentencing under "DLRA 3", including certain violent felony offenders, those offenders convicted of merit time ineligible offenses, and all second and persistent violent felony offenders; however, the hierarchal placement of the subject language, as contained in subd.5 of the statute, compels the conclusion that before any consideration to disqualification can be entertained by the Court, the potential applicant for resentencing has to first establish strict compliance with the four condition precedents set forth in subd. 1 of *Criminal Procedure Law* § 440.46, to wit: "custody", "conviction of an Art. 220 class "B" felony offense", "commission of the offense prior to January 13, 2005", and an "indeterminate sentence with a maximum term of more than three years."

***4** The first so-called condition precedent; namely custody by "DOCS" was present under both "DLRA 1" and "DLRA 2" and has been consistently held by the appellate courts not to be compatible with situations wherein the defendant's "subsequent" custody was the product of a parole viola-

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tion of the underlying conviction. Finding no legitimate factual distinction between the custody requirements under "DLRA 1" and "DLRA 2", and now set forth under the recently enacted "DLRA 3", and cognizant of the manner in which this particular requirement has been treated under the *Mills-Rodriguez* line of cases, this Court holds that the defendant is ineligible for resentencing under *Criminal Procedure Law* § 440.46(1).

Accordingly, the defendant's motion for resentencing is denied. [FN4]

> FN4. Having determined that the defendant was ineligible for resentencing, the Court has not addressed the issue of whether "substantial justice dictates" against resentencing in the case of Mr. Watson.

The foregoing constitutes the opinion and decision of the Court.

Order signed herewith.

The Clerk is directed to forward copies of this memorandum decision to the attorney for the defendant and to the District Attorney.

Slip Copy, 2010 WL 891882 (N.Y.Sup.), 2010 N.Y. Slip Op. 50402(U) Unreported Disposition

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