

SUPREME COURT : NEW YORK COUNTY  
TRIAL TERM : PART 66

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THE PEOPLE OF THE STATE OF NEW YORK :

- against - : Indictment No. 9280/99

JERRY WILLIAMS, :

Defendant. :

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RUTH PICKHOLZ, J.

The People have moved for renewal and reargument of a decision dated December 23, 2009. That decision held, inter alia, that petitioner was not ineligible for relief under the 2009 DLRA (DLRA 3) on indictment 9280/99 merely because he was incarcerated for violating the terms of his parole on that conviction. They note that one of the bases of my holding was my conclusion that the rule stated in People v. Then (decided with People v. Mills, 11 NY3d 527), that one who was in custody for violating parole was no longer eligible for resentencing, was limited to resentencing applications under the 2005 DLRA (DLRA 2). I cited People v. Gonzalez (29 AD3d 400) for the proposition that the rule had apparently not been extended to applications under the 2004 DLRA (DLRA 1). The People have brought to my attention that subsequent to my decision the Appellate Division First Department expressly held that one who had been reincarcerated for violating the terms of his parole was ineligible for relief under 2004 DLRA (*see* People v. Rodriguez, \_\_ AD3d \_\_ ; 2009 Slip Op 09717, 12/29/09). They argue that, as the language in DLRA 1 and DLRA 3 are similar, the same rule should apply to

petitioner. They also argue that it is sensible to extend this rule to those applying under the 2009 DLRA and that a contrary rule encourages parolees to violate the conditions of their release.

As salutary as such a rule may be, it is the function of Legislature to make it law. It is certainly not the function of a trial court. The determination of the Appellate Division, First Department that such a rule applies to defendants petitioning for resentencing under the 2004 DLRA does not, of course, bind me in deciding this application, which is brought pursuant to the 2009 DLRA. The question is whether the reasoning expressed in Rodriguez will be adopted by the Appellate Division for DLRA 3 cases. The People argue, in effect, that I should anticipate that the appellate court will adopt a similar rule for DLRA 3 petitions, either because of shared similarities in the language of the 2004 and 2009 acts, or for policy or other reasons. I have no reason or right to do so. In the absence of binding authority, I cannot rule based upon an anticipated outcome, but only upon what I reason is the proper interpretation of the statute. The fact remains that the plain wording of the statute does not permit me to create an automatic exclusion for a defendant who is in custody simply because he has been reincarcerated for violating his parole. The statute provides that

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 (CPL 440.46 [1]).

This is plain language, and by its terms defendant is eligible to apply for resentencing. The wording gives little leeway for contrary interpretation. I do not agree that a defendant who has committed a class B felony, been released and then reincarcerated because of a parole violation is not in custody on the original class B narcotics felony, but on the parole violation. The violation may have triggered the reincarceration, but the defendant is returned to prison to serve, if need be, “the maximum amount of *his sentence remaining*, dating from the time of his act of delinquency (People ex rel. Petite v. Follette, 24 N.Y.2d 60 at 62-63) (citations omitted; emphasis added). Therefore, when the parole board determined that petitioner had violated the terms of his parole, it brought him back to serve a portion of his original sentence.

When the Court of Appeals stated in People v. Then (11 NY3d 527) that a defendant who has been released to parole supervision for a class A-II felony drug conviction no longer qualifies for resentencing for that particular conviction, it did not create a rule out of thin air, on the basis that it is simply a good idea to have such a rule, but in the context of interpreting the language contained in Correction Law 851 (2) and the 2005 DLRA.<sup>1</sup> There is nothing in the Court’s decision that suggests that it would have

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<sup>1</sup>When read in conjunction those statutes precluded from resentencing those who are less than three years from parole .

created such a rule independently, outside of the context of the particular statutory text before it:

Then urges us to read the “eligible inmate” language literally . . . . This would create illogical, if not perverse, results. . . . *A valid and more sensible reading of the statutory text* is that in order to be eligible for resentencing, an inmate must be more than three years from parole eligibility for the same class A-II drug felony for which resentencing is sought. In Then's case, he became ineligible for parole on the 1999 conviction the minute he was, in fact, paroled. We therefore hold that once a defendant has been released to parole supervision for a class A-II drug felony conviction, he or she no longer qualifies for 2005 DLRA relief for that particular conviction (emphasis added) (11 NY3d 527 at 537).

The statutory text of the 2009 DLRA is not at all similar to that of the 2005 DLRA, and there is nothing remotely comparable for me to parse. If I were to incorporate the rule urged by the People into the 2009 DLRA I would therefore be fashioning it out of whole cloth. Furthermore, not only does the 2009 DLRA , unlike the 2005 DLRA, not contain any eligibility requirement that is tied to how far the inmate is from his or her parole date, but it contains eligibility criteria of its own. This fact compels the conclusion that the Legislature intended those criteria to be exclusive . For whatever reason, the Legislature abandoned the eligibility model it devised for the 2005 DLRA when it enacted the 2009 DLRA. I cannot incorporate aspects of that abandoned model into the 2009 Act when the Legislature did not.<sup>2</sup> I discount the argument that , as the 2009

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<sup>2</sup>I do not agree that if the holding in Then is not applied to the 2009 DLRA, parolees will be encouraged to violate the terms of their parole. Even if I did, however, I would not accept the People's invitation to apply the Then rule to the case before me. In affirming the denial of relief to one seeking resentencing under the 2005 DLRA, the

DLRA shares with the 2004 DLRA the requirement that the offender be “in the custody of the Department of Correctional Services,” it can be inferred that the Legislature intended to treat petitioners under each statute identically. Assuming for the sake of argument that it is possible to rest such an inference on so slender and generic a phrase, the argument does not militate in the People’s favor. When the 2009 DLRA was enacted, People v. Then was law; People v. Rodriguez was not. That the Legislature anticipated, or even considered, that the Courts would extend the Then rule to DLRA 1 cases is, at best, unclear. If the Legislature indeed intended to treat DLRA 3 and DLRA 1 offenders identically, it is at least as likely as not that it did so under the belief that by avoiding eligibility requirements similar to those set forth in the DLRA 2, and utilizing those found in DLRA 1, it was returning to a model that had no Then rule.

That is not to say that a court must ignore a parole violation to absurd result. On the contrary, a parole violation is a factor to be weighed in determining whether substantial justice requires that ameliorative relief should be denied. It may often be determinative in at that stage of the inquiry that the defendant has been returned to

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Appellate Division Second Department has recently stated that, “[w]hile the eligibility requirements of 2005 DLRA may produce anomalous results in certain cases, that is a matter for the Legislature to address” (People v. Delk, 59 AD3d 733). A trial court should exercise at least as much forbearance in making law as an intermediate appellate court.

prison because he has violated his parole. But as violations are of varying seriousness, commission of a violation should not automatically make one ineligible for relief. In fact, it is probably more sensible to weigh the seriousness of the violation at the “substantial justice” stage of the determination. In some cases the violation may be serious and require denial of the application. In other instances, where the violation is not predicated upon the commission of a new crime, but upon some lesser infraction, the court may find that it should not bar relief. For that same reason, permitting those who have been reincarcerated because of parole violations to apply for relief under the statute does not promote additional violations. If a parolee is aware that he is only eligible for relief if he is in custody, he is also doubtless aware that a further violation may tip the scale against him. He therefore has no incentive to violate his parole.

For all of the foregoing reasons, upon reargument and renewal I adhere to my decision.

A.J.S.C.

Dated: January 27, 2010