

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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Submitted - May 11, 2011

PETER B. SKELOS, J.P.
THOMAS A. DICKERSON
L. PRISCILLA HALL
LEONARD B. AUSTIN
ROBERT J. MILLER, JJ.

2006-06200

DECISION & ORDER

The People, etc., respondent,
v Jemel Anderson, appellant.

(Ind. No. 04-00328)

Gary E. Eisenberg, New City, N.Y., for appellant.

Thomas P. Zugibe, District Attorney, New City, N.Y. (Itamar J. Yeger of counsel),
for respondent.

Appeal by the defendant from a resentence of the County Court, Rockland County (Bartlett, J.), imposed May 18, 2006, pursuant to the Drug Law Reform Act of 2005 (L 2005, ch 643), upon his conviction of criminal possession of a controlled substance in the second degree, upon his plea of guilty, which sentence was originally imposed on November 4, 2004.

ORDERED that the resentence is reversed, on the law, on the facts, and as a matter of discretion in the interest of justice, and the matter is remitted to the County Court, Rockland County, for further proceedings in accordance herewith.

In September 2004, the defendant pleaded guilty to criminal possession of a controlled substance in the second degree, a Class A-II felony. In November 2004, the defendant was sentenced, as a second felony drug offender, to an indeterminate term of imprisonment of six years to life. The defendant subsequently moved to be resentenced pursuant to the Drug Law Reform Act of 2005 (L 2005, ch 643) (hereinafter the 2005 DLRA). In response, the People, inter alia, recommended that the defendant be resentenced to a determinate term of imprisonment of eight years with five years of postrelease supervision. On May 18, 2006, the County Court conducted a hearing and declared its intention to resentence the defendant to a determinate term of imprisonment of 10

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years with five years of postrelease supervision. The County Court advised the defendant that he had the right to withdraw his application for resentencing before the proposed sentence was imposed. After consulting with his attorney, the defendant accepted the proposed sentence. The County Court then imposed the sentence.

“Upon determining that the defendant is eligible for resentencing under the 2005 DLRA, the court, unless it finds that ‘substantial justice dictates that the application should be denied’ (L 2005, ch 643, § 1), must ‘specify and inform’ the defendant of the sentence it proposes to impose under the new sentencing structure, and must ‘enter an order to that effect’ (*id.*). This initial DLRA order is appealable as of right, in accordance with the applicable provisions of the criminal procedure law (*id.*). The statute provides that ‘[t]he court shall notify [the defendant] that, unless he or she withdraws the application or appeals from [the initial DLRA] order, the court will enter an order vacating the sentence originally imposed’ and imposing the proposed sentence (*id.*). If the defendant appeals from the initial DLRA order and it is affirmed, the matter is to be remitted to the sentencing court following the appeal, in order to afford the defendant another opportunity to withdraw the resentencing application ‘before any sentence is imposed’ (*id.*). If the defendant does not withdraw the application or appeal from the initial DLRA order, the court issues a final DLRA order imposing the sentence, which is also appealable as of right (*id.*)” (*People v Love*, 46 AD3d 919, 920-921; *see People v Struss*, 79 AD3d 773, 775).

In this case, the County Court should have entered the initial DLRA order specifying the determinate sentence it would impose prior to imposing the sentence, and should have advised the defendant of his right to appeal from the initial DLRA order in accordance with the procedure set forth in the 2005 DLRA. Instead, after the defendant declined to withdraw his application, the County Court erred when it immediately proceeded to sentence the defendant.

We further find that the County Court’s proposed sentence was excessive (*see generally People v Liddell*, 189 AD2d 896). Under the circumstances of this case, we find that the People’s recommended sentence, namely, a determinate term of imprisonment of eight years with five years of post release supervision, is appropriate.

In light of this determination, we remit the matter to the County Court, Rockland County, to enter the initial DLRA order specifying a proposed sentence, consisting of a determinate term of imprisonment of eight years with five years of postrelease supervision, and informing the defendant that, unless he withdraws his motion or appeals from the initial DLRA order, the County Court will enter an order vacating the sentence originally imposed and imposing the proposed sentence (*see People v Struss*, 79 AD3d at 775-776).

SKELOS, J.P., DICKERSON, HALL, AUSTIN and MILLER, JJ., concur.

ENTER: 
Matthew G. Kiernan
Clerk of the Court