

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

D32579  
H/kmb

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - September 23, 2011

MARK C. DILLON, J.P.  
ARIEL E. BELEN  
SHERI S. ROMAN  
ROBERT J. MILLER, JJ.

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2010-00537

DECISION & ORDER

The People, etc., respondent,  
v Marcelino Perez, appellant.

(Ind. No. 10542/04)

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Lynn W. L. Fahey, New York, N.Y. (Kathleen Whooley of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano, Johnnette Traill, and Danielle Hartman of counsel), for respondent.

Appeal by the defendant from an order of the Supreme Court, Queens County (Mullings, J.), dated December 10, 2009, which specified and informed him that the court would impose a determinate term of imprisonment of seven years, to be followed by a two-year period of postrelease supervision in the event of a resentencing pursuant to CPL 440.46.

ORDERED that the order is affirmed, and the matter is remitted to the Supreme Court, Queens County, for further proceedings in accordance herewith.

Despite the defendant's nearly spotless disciplinary record while incarcerated, and his commendable academic achievements, a more lenient resentencing than the one proposed by the Supreme Court is not warranted under the circumstances of this case. The Drug Law Reform Act of 2004 (*see* L 2004, ch 738), which, inter alia, replaced the indeterminate sentencing system of the Rockefeller Drug Laws with a determinate system, and the subsequent Drug Law Reform Acts of 2005 and 2009 (*see* L 2005, ch 643; L 2009, ch 56, respectively), which, among other things, expanded opportunities for persons convicted of drug-related felonies prior to 2004 to apply for resentencing, were enacted with the goal of ameliorating harsh sentences for "low level" drug offenders (*see People v Williams*, 84 AD3d 1279, 1280, *lv denied* 17 NY3d 823, quoting Assembly

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Mem in Support, 2004 McKinney's Session Laws of NY, at 2179). Here, at the time of his arrest, the defendant was traveling with two other persons in a vehicle which contained over 368 pounds of cocaine. Accordingly, we find that the proposed resentence of a determinate term of imprisonment of seven years, to be followed by a two-year period of postrelease supervision for his conviction of criminal possession of a controlled substance in the third degree, was not excessive (*see People v Herrera*, 54 AD3d 873; *People v Curry*, 52 AD3d 732; *People v Stamps*, 50 AD3d 827).

The defendant's release to parole during the pendency of this appeal does not render the appeal academic (*see People v Williams*, 84 AD3d at 1280; *see also People v Overton*, 86 AD3d 4, 16, *lv denied* 17 NY3d 820).

Pursuant to the Drug Law Reform Act of 2009 (*see* CPL 440.46), we remit this matter to the Supreme Court, Queens County, to afford the defendant an opportunity to withdraw his application for resentencing before any resentence is imposed (*see* CPL 440.46[3]; L 2004, ch 738, § 23).

DILLON, J.P., BELEN, ROMAN and MILLER, JJ., concur.

ENTER:

  
Matthew G. Kiernan  
Clerk of the Court