

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

D32867
O/kmb

_____AD3d_____

Submitted - October 17, 2011

PETER B. SKELOS, J.P.
L. PRISCILLA HALL
PLUMMER E. LOTT
SHERI S. ROMAN, JJ.

2010-07151

DECISION & ORDER

The People, etc., respondent,
v La-Teek Berry, appellant.

(Ind. No. 3637/02)

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

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Maria Park of counsel; Samuel K. Mersky on the brief), for respondent.

Appeal by the defendant from an order of the Supreme Court, Kings County (Del Guidice, J.), dated July 12, 2010, which denied his motion for resentencing pursuant to CPL 440.46 on his conviction of criminal sale of a controlled substance in the third degree, which sentence was originally imposed, upon his plea of guilty, on January 18, 2006.

ORDERED that the order is reversed, on the law and as a matter of discretion in the interest of justice, the motion is granted, and the matter is remitted to the Supreme Court, Kings County, for further proceedings in accordance with the resentencing procedure set forth in CPL 440.46.

The defendant, who was convicted of criminal sale of a controlled substance in the third degree, moved for resentencing pursuant to CPL 440.46. The Supreme Court determined that the defendant was ineligible for resentencing because, after having been paroled, he was reincarcerated for violating parole. Alternatively, the court concluded that, even if the defendant was eligible for resentencing, substantial justice dictated the denial of his motion.

“[P]risoners who have been paroled, and then reincarcerated for violating their parole, are not for that reason barred from seeking relief” under CPL 440.46 (*People v Paulin*, 17 NY3d 238, 242; *see People v Howard*, 85 AD3d 1202, 1203). Accordingly, as the People correctly

November 15, 2011

Page 1.

PEOPLE v BERRY, LA-TEEK

concede on appeal, the Supreme Court erred in concluding that the defendant was ineligible for resentencing under CPL 440.46 by virtue of his parole violation.

The Supreme Court further improvidently exercised its discretion in denying the defendant's resentencing motion. As described by the Legislature, the Drug Law Reform Act was initially enacted in 2004 because the drug laws then in place "provide[d] inordinately harsh punishment for low level non-violent drug offenders" and "waste[d] valuable state tax dollars which could be used more effectively to provide drug treatment to addicts and harsh punishment to violent criminals" (Mem in Support, NY St Assembly, 2004 McKinney's Session Laws of NY, at 2179; see *People v Paulin*, 17 NY3d at 244). The Legislature also concluded that it was appropriate to provide an opportunity for retroactive sentencing relief to individuals serving such "inordinately harsh punishment[s]" (*People v Paulin*, 17 NY3d at 244 [internal quotation marks omitted]), which relief was extended in 2009 to eligible defendants, like the defendant here, convicted of class B felonies (see CPL 440.46). Significantly, while the Legislature did not make resentencing mandatory, it included a statutory presumption in favor of resentencing (see L 2004, ch 738, § 23; CPL 440.46[3]; *People v Beasley*, 47 AD3d 639, 641; see also *People v Braithwaite*, 62 AD3d 1019, 1021).

Here, the Supreme Court's determination that substantial justice dictated denial of the defendant's resentencing motion was based upon the defendant's record of committing drug offenses and his commission of an offense while on parole. Under the circumstances of this case, these factors are insufficient to overcome the statutory presumption in favor of resentencing. The defendant's offense consisted of typical low-level drug selling activity, as did the other drug offenses he committed. Further, the defendant's recent convictions did not involve violence or weapons. While the Court of Appeals and this Court have indicated that a defendant's status as a parole violator may be relevant to a determination of whether substantial justice dictates denial of resentencing (see *People v Paulin*, 17 NY3d at 244; *People v Phillips*, 82 AD3d 1011, 1012), it is merely one factor to consider, and does not mandate denial of a resentencing motion (cf. *People v Beasley*, 47 AD3d at 640-641). Where, as here, "the facts underlying the defendant's conviction [and other criminal offenses] were not unusually serious, [and] his prison record included no serious infractions and many positive accomplishments," the presumption that the defendant is entitled to benefit from the reforms enacted by the Legislature based upon its judgment that the prior sentencing scheme for drug offenses like that committed by the defendant was excessively harsh, has not been rebutted (*id.* at 641; see *People v Nunziata*, 87 AD3d 555; *People v Concepcion*, 85 AD3d 811, 812; *People v Hallman*, 84 AD3d 1266, 1267; cf. *People v Stamps*, 50 AD3d 827). As substantial justice did not dictate denial of the defendant's motion, it should have been granted.

SKELOS, J.P., HALL, LOTT and ROMAN, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court