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publication in the New York Reports.

No. 139
The People &c.,
Respondent,
v.
Nydia Santiago,
Appellant.

Barbara Zolot, for appellant.
Marc A. Sherman, for respondent.

SMITH, J.:

At least until a recent amendment, the 2009 Drug Law Reform Act (DLRA) allowed only incarcerated offenders, not offenders free on parole, to apply for resentencing (see People v Paulin, ___ NY3d ___ [2011] [decided today]). We hold in this case that a prisoner who applied before being paroled is not

barred from obtaining resentencing after her release.

Defendant was sentenced to four and a half to nine years in prison for a 2003 drug transaction. On November 25, 2009, she filed an application for resentencing under the 2009 DLRA. On December 3, 2009, before the application had been ruled on, she was released on parole. Supreme Court later denied her application, and the Appellate Division affirmed, saying that because defendant "is not in custody, she is not presently eligible for resentencing" (People v Santiago, 77 AD3d 407 [1st Dept 2010]). A Judge of this Court granted leave to appeal, and we now reverse.

This case, like Paulin, is controlled by CPL 440.46 (1) (codifying, in part, the 2009 DLRA), which as originally enacted said, in relevant part:

> "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 . . . apply to be resentenced . . . ."[1]

(CPL 440.46 [1]).

It is undisputed that defendant was entitled to "apply" for resentencing when she filed her application, because at that

[1]Here, as in Paulin, we need not decide whether a 2011 amendment changing "department of correctional services" to "department of corrections and community supervision" altered the scope of the 2009 DLRA (see L 2011, ch 62).

time she was still in custody. The People argue, however, that the statute was not intended to benefit those who have already been released when their applications are decided. The argument is not an unreasonable one. As we point out in Paulin, the apparent reason why the Legislature limited the statute's benefit to incarcerated offenders is that they suffer the greatest hardship from severe sentences (see ___ NY3d at ___). It is also true, as the People point out, that another avenue of relief is open to parolees. Executive Law § 259-j authorizes the Division of Parole to grant termination of sentence under certain circumstances; subdivisions 3 and 3-a of that section specifically permit, and in some cases require, the termination of sentences of paroled felony drug offenders.

On the other hand, the 2009 DLRA says only that an offender must be in custody when he or she applies for resentencing; it does not require that custody continue until the application is decided. And to read that requirement into the statute would have significant disadvantages: it could produce gamesmanship, and unnecessarily arbitrary results, by leading the parties, and perhaps some judges, to try to accelerate or slow progress toward a decision in the expectation that parole release will cause the application to fail. We conclude that it is best to read the statute as it is written. We hold that it applies to an offender who was in prison at the time she made her application, even though she was paroled before the application

was decided.

Accordingly, the order of the Appellate Division should be reversed and the case remitted to Supreme Court for further proceedings consistent with this opinion.

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Order reversed and case remitted to Supreme Court, Bronx County, for further proceedings in accordance with the opinion herein. Opinion by Judge Smith. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Pigott and Jones concur.

Decided June 28, 2011