People v Gonzalez
2006 NY Slip Op 30142(U)
February 24, 2006
County Court, Suffolk County
Docket Number: 0000447/1988
Judge: James F.X. Doyle
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COUNTY COURT, SUFFOLK COUNTY
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK, JAMES F.X. DOYLE, J.C.C.

v. Indictment No. 447-88

Dated: February 24, 2006

EDWIN GONZALEZ,

Defendant.

---x

HON. THOMAS J. SPOTA
District Attorney of Suffolk County
By: KARLA LATO, ESQ.
Criminal Courts Building
210 Center Drive
Riverhead, New York 11901

EDWIN GONZALEZ
Pro-Se Defendant
Franklin Correctional Facility
62 Bare Hill Road, P.O. Box 10
Malone, New York 12953
DIN: 05A1872

Upon the following papers numbered 1 to 2 read on this motion for an order to assign counsel and re-sentencing defendant; Notice of Motion and supporting papers 1 ; Affidavit in Opposition 2 .

Based upon the foregoing papers heretofore had herein, it is hereby

ORDERED that Defendant's motion is denied in its entirety.

The above named defendant has moved this court for an order, pursuant to CPL §440.20, setting aside his previously imposed sentence and, further, requests that he be re-sentenced in accordance with PL §70.71 and Chapter 643 of The Laws of 2005 (Drug Law Reform Act Part 2, hereinafter referred to as DLRA-2)[1]. The District Attorney has filed an Affidavit in Opposition with the court citing that the defendant herein does not meet the threshold criteria to be eligible for re-sentencing under the aforementioned recent drug reform legislation.

On May 3, 1988, a judgment of conviction was entered against the defendant on a plea of guilty to Criminal Sale of a Controlled Substance in the second degree [PL §220.18], a class "A-II" felony. He was sentenced to an indeterminate term of incarceration of five years to life. The defendant has completed his jail sentence for this offense.

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[1]Since the passage of the original DLRA (Chapter 738 of the Laws of 2004), which dealt primarily with class A-I, the Legislature has promulgated additional reformative drug offense legislation. Effective October 29, 2005, Chapter 643 of the Laws of 2005 provides for the re-sentencing (to a determinate sentence) of certain class A-II felony drug offenders currently serving indeterminate sentences.

[* 2]

At the onset, to be eligible for re-sentencing under this legislation a defendant must: (1) be in the custody of the Department of Corrections; (2) be convicted of a Class A-II drug felony committed prior to October 29, 2005; (3) have been re-sentenced thereon to an indeterminate term of imprisonment with a minimum of not less than three years and a maximum term of life; (4) be more than twelve months from being an "eligible inmate" for temporary release, as that term is defined in Correction Law §851(2) (an inmate becomes eligible to apply for temporary release within two years of parole eligibility, meaning the defendant must have more than three years remaining on the minimum term of his sentence to apply for re-sentencing); and (5) meet the eligibility requirement of Correction Law §803(1) (which requires a defendant be eligible to earn "merit time", which means the defendant cannot also be serving another sentence for which merit time is not available, such as certain sex offenses, all violent felony offense, any homicide, or if the defendant has a poor disciplinary record, or has been found to have filed a frivolous lawsuit).

Pursuant to Correction Law § 851 (2), "eligible inmate" is defined as "a person confined in an institution who is eligible for release on parole or who will become eligible for release on parole or conditional release within two years. Since a defendant must be more than twelve months from being an "eligible inmate" for temporary release (Corrections Law §851[2]), the A-II statute requires that an eligible inmate must be more than three years from being parole eligible. This provision suggests that the Legislature intended that relief is only to be available to those A-II inmates whose minimum terms are largely unexpired.

Here, the defendant is ineligible to be re-sentenced pursuant to the DLRA because he was released from prison to the New York State Department of Parole on August 12, 1997.[2] Based upon the foregoing, the defendant does not qualify as an eligible inmate, as that term is defined in Correction Law § 851 (2)(1).

In summary, the defendant is not eligible for re-sentencing under DLRA-2 and his motion for re-sentencing is therefore summarily denied.[3]

The foregoing constitutes the decision, opinion and order of the court

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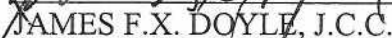

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[2] Information obtained from the New York State Department of Correctional Services Inmate Information data base.

[3] Although *People v. Figueroa,* (21 AD3d 337, 800 NYS2d 673 [1st Dept., Aug. 2005]) requires the court to conduct a hearing in the presence of the defendant, the requirement of a hearing is limited to individuals who are actually eligible for re-sentencing.

COUNTY COURT, SUFFOLK COUNTY
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

v.

EDWIN GONZALEZ,

Defendant.

JAMES F.X. DOYLE, J.C.C.

Indictment No. 103B-98

Dated: February 24, 2006

HON. THOMAS J. SPOTA
District Attorney of Suffolk County
By: KARLA LATO, ESQ.
Criminal Courts Building
210 Center Drive
Riverhead, New York 11901

EDWIN GONZALEZ
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Franklin Correctional Facility
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DIN: 05A1872

Upon the following papers numbered 1 to 2 read on this motion for an order to assign counsel and re-sentencing defendant; Notice of Motion and supporting papers 1 ; Affidavit in Opposition 2 .

Based upon the foregoing papers heretofore had herein, it is hereby

ORDERED that Defendant's motion is denied in its entirety.

The above named defendant has moved this court for an order, pursuant to CPL §440.20, setting aside his previously imposed sentence and, further, requests that he be re-sentenced in accordance with PL §70.71 and Chapter 643 of The Laws of 2005 (Drug Law Reform Act Part 2, hereinafter referred to as DLRA-2)[1]. The District Attorney has filed an Affidavit in Opposition with the court citing that the defendant herein does not meet the threshold criteria to be eligible for re-sentencing under the aforementioned recent drug reform legislation.

On May 13, 1998, a judgment of conviction was entered against the defendant on a plea of guilty to Attempted Criminal Sale of a Controlled Substance in the third degree [PL §220.39], a class "C" felony. He was sentenced to an indeterminate term of incarceration of 4 ½ to 9 years. The defendant has completed his jail sentence for this offense.

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[1]Since the passage of the original DLRA (Chapter 738 of the Laws of 2004), which dealt primarily with class A-I, the Legislature has promulgated additional reformative drug offense legislation. Effective October 29, 2005, Chapter 643 of the Laws of 2005 provides for the re-sentencing (to a determinate sentence) of certain class A-II felony drug offenders currently serving indeterminate sentences.

[* 4]

At the onset, to be eligible for re-sentencing under this legislation a defendant must: (1) be in the custody of the Department of Corrections; (2) be convicted of a Class A-II drug felony committed prior to October 29, 2005; (3) have been re-sentenced thereon to an indeterminate term of imprisonment with a minimum of not less than three years and a maximum term of life; (4) be more than twelve months from being an "eligible inmate" for temporary release, as that term is defined in Correction Law §851(2) (an inmate becomes eligible to apply for temporary release within two years of parole eligibility, meaning the defendant must have more than three years remaining on the minimum term of his sentence to apply for re-sentencing); and (5) meet the eligibility requirement of Correction Law §803(1) (which requires a defendant be eligible to earn "merit time", which means the defendant cannot also be serving another sentence for which merit time is not available, such as certain sex offenses, all violent felony offense, any homicide, or if the defendant has a poor disciplinary record, or has been found to have filed a frivolous lawsuit).

Pursuant to Correction Law § 851 (2), "eligible inmate" is defined as "a person confined in an institution who is eligible for release on parole or who will become eligible for release on parole or conditional release within two years. Since a defendant must be more than twelve months from being an "eligible inmate" for temporary release (Corrections Law §851[2]), the A-II statute requires that an eligible inmate must be more than three years from being parole eligible. This provision suggests that the Legislature intended that relief is only to be available to those A-II inmates whose minimum terms are largely unexpired.

Here, the applicant does not "stand convicted" of a class A-II felony drug offense having been sentenced as a class "C" felon. Accordingly, the provisions of DLRA-2 are not applicable. Arguendo, had the defendant been convicted of a class A-II felony drug offense, he still would not be eligible for re-sentencing pursuant to the DLRA-2 as he was released from prison and does not qualify as an eligible inmate, as that term is defined in Correction Law § 851 (2).

In summary, the defendant is not eligible for re-sentencing under DLRA-2 and his motion for re-sentencing is therefore summarily denied.[2]

The foregoing constitutes the decision, opinion and order of the court

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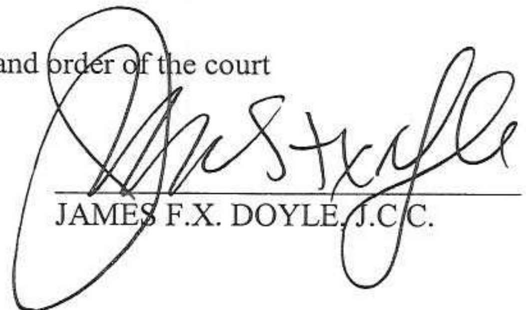

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[2]Although *People v. Figueroa,* (21 AD3d 337, 800 NYS2d 673 [1st Dept., Aug. 2005]) requires the court to conduct a hearing in the presence of the defendant, the requirement of a hearing is limited to individuals who are actually eligible for re-sentencing.