

People v Ortiz
2006 NY Slip Op 30693(U)
September 7, 2006
Sup Ct, Kings County
Docket Number: 2788/04
Judge: Joel M. Goldberg
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART 22**

THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER

- vs. -

**HON. JOEL M. GOLDBERG
IND. NO. 2788/04
AUGUST 30, 2006**

TRACY ORTIZ,

DEFENDANT.

By a motion dated June 28, 2006, the defendant moves *pro-se*, for re-sentencing pursuant to the Drug Law Reform Act of 2005 (hereinafter DLRA-2). The People opposed in a letter dated July 14, 2006. The defendant replied in a motion dated July 19, 2006 and the People have replied in a letter dated August 8, 2006. For the reasons set forth below, the defendant's motion is denied.

BACKGROUND

Defendant was convicted after trial, on November 29, 2005, of Criminal Possession of a Controlled Substance in the Second Degree, a Class A-II felony offense, Conspiracy in the Second Degree and multiple additional counts consisting of Class B and C felony drug offenses for Criminal Sale and Criminal Possession of Controlled Substances as well as three counts of Criminal Possession of a Weapon in the Third Degree, specifically PL 265.02 (4), a Class D violent felony offense. *See* CPL 70.02 (1) (c).

Defendant was sentenced on January 3, 2006 to multiple indeterminate and determinate sentences including a sentence of eight and one-third to life on the Class A-II felony drug offense concurrent with eleven and one-half to twenty-three years on defendant's multiple Class B felony offenses concurrent to seven and one-half to fifteen years on multiple

Class C felony offenses in addition to concurrent determinate sentences of seven years and five years post-release supervision on each of the three counts of Criminal Possession of a Weapon in the Third Degree.

THE LAW

The DLRA originated as Chapter 738 of the Laws of 2004, but its re-sentencing provisions only applied to Class A-I felony drug offenses. Subsequently, the Legislature passed Chapter 643 of the Laws of 2005, commonly referred to as DLRA-2, which took effect on October 29, 2005 and supplemented the DLRA by providing for the re-sentencing of certain Class A-II felony drug offenders.

As stated in *People v. Hill*, 11 Misc. 3d 1053 (A), 2006 WL 373 161 (Sup. Ct, Kings County, Feb. 9, 2006):

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 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 offenses, any homicide, - - -).**

DISCUSSION

Because the defendant, in addition to the sentence on the Class A-II drug felony, is also now serving another sentence for which “merit time” is not available, to wit: his sentences for the three convictions of Criminal Possession of a Weapon in the Third Degree, which is a violent felony offense, the defendant, pursuant to Correction Law 803(1)(d)(i) and (ii), is not eligible to earn “merit time” on the Class A-II drug felony. Accordingly, the defendant is not eligible to be re-sentenced.

This is the position taken by the People in their July 14, 2006 answer to the defendant’s motion. The defendant’s reply seeks to avoid this Section 803(1) disqualification by claiming that he qualifies for “merit time” according to the language of 803(1)(d)(i). It is true that this section states that “every person under the custody of the Department [of Corrections] serving an indeterminate sentence of imprisonment of one year or more [which is the defendant’s Class A-II drug felony sentence] may earn a merit time allowance.” However 803(1)(d)(i) also states at the very beginning of that subparagraph that this provision applies “Except as provided in subparagraph (ii) of this paragraph.”

Subparagraph 803(1)(d)(ii) states that “such merit time allowance shall not be available to any person serving [certain specified sentences, including] ... any sentence imposed for a violent felony offense as defined in section 70.02 of the Penal Law” Because the defendant is serving three sentences for a violent felony offense specified in section 70.02 of the Penal Law, the defendant is not eligible to earn merit time on the Class A-II drug felony sentence and is, according to the criteria established by DLRA-2, not eligible to be re-sentenced. *See also People v. Quinones*, 11 Misc 3d 582, 592-594 (Sup Ct, NY County, 2005) which discussed a defendant who was eligible for a Class A-II re-sentence *because he was not also convicted of a violent felony offense*.

Because the defendant is not eligible to be re-sentenced, his production in court for a hearing on the motion is not required. *People v. Figueroa*, 21 AD 3d 337 (1st Dept 2005).

CONCLUSION

Accordingly, the defendant is not eligible for re-sentencing as a matter of law, and therefore the defendant's application is denied without a hearing.

SO ORDERED


JOEL M. GOLDBERG
JUDGE

The defendant is hereby advised pursuant to 22 NYCRR § 671.5 of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York 11201 for a certificate granting leave to appeal from this determination. This application must be made within 30 days of service of this decision. Upon proof of financial inability to retain counsel and to pay the costs and expenses of the appeal, the defendant may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Application for poor person relief will be entertained only if and when permission to appeal or a certificate granting leave to appeal is granted.

