SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

THE PEOPLE OF THE STATE OF NEW YORK :

:Index Number 5267-03

-against-

:

TYRONE DAVIS, Decision, Order & Judgment

:

Defendant.

ZWEIBEL, J.:

Defendant Tyrone Davis moves to be re-sentenced, pursuant to CPL 440.20(1) and the newly enacted Drug Law Reform Act of 2005 (ch. 643, § 1, as amended) ("DLRA-2").[1] The People oppose the application, contending that defendant is ineligible for re-sentencing because he is not within the limited class of defendants entitled to apply for re-sentencing under the new drug sentencing provisions and "substantial justice dictates that the application should be denied" (see DLRA-2 § 23).

On September 7, 2003, 33rd Precinct Police Officer Victor Disla received a radio run for a robbery. He responded to the scene and saw defendant carrying a white bag and running while being chased by a large crowd. Officer Disla gave chase and another officer, Police Officer Rosen, cut defendant off. At this point, defendant threw the bag he was carrying to the ground. Officer Rosen apprehended defendant while Officer Disla recovered the bag. The bag contained nearly two pounds of

[1]The Legal Aid Society filed the instant motion seeking re-sentencing, dated August 15, 2006, on defendant's behalf on October 19, 2006.

cocaine and approximately $3,700 in cash, which is still A-I felony weight even under the new drug reform laws.

On October 10, 2003, defendant was arraigned on New York County Indictment Number 5267-03, which charged him with one count of Criminal Possession of a Controlled Substance in the First Degree (Penal Law § 220.21[1]). Before motions, defendant was offered a plea to Criminal Possession of a Controlled Substance in the Second Degree (Penal Law § 220.18) with a sentence of five years to life imprisonment. Defendant rejected the offer.

On April 8, 2004, the People answered ready for hearings and trial. After the defense attorney indicated that he could not start a trial because he had another trial starting the following week, the case was sent into Part 31 for hearings only. At that point, defendant was offered a plea to Criminal Possession of a Controlled Substance in the Second Degree (Penal Law § 220.18) with a sentence of six years to life imprisonment with a forfeiture stipulation and a waiver of his right to appeal. Defendant accepted the offer and entered a guilty plea to Criminal Possession of a Controlled Substance in the Second Degree (Penal Law § 220.18) and was promised a sentence of six years to life imprisonment with a forfeiture stipulation and a waiver of his right to appeal.

On May 21, 2004, the promised sentence was imposed. At

sentencing, defendant denied his guilt and demanded a trial. This Court rejected the defendant's application to withdraw his plea, finding that his plea allocution had been sufficient and his plea voluntary and knowing.[2]

Defendant is currently incarcerated at the Oneida Correctional Facility pursuant to this Court's sentence. While incarcerated, defendant has been found guilty of six Tier 2 violations and he received a total of 93 days of keep lock.[3]

On August 28, 2006, defendant filed a Petition for Re-Sentencing pursuant to the DLRA-2. On November 30, 2006, defendant filed a "Supplemental Affirmation in Support of Application for Re-Sentencing." On January 5, 2007, the People filed a response.

On January 25, 2007, oral argument was held on the motion.

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[2]Defendant's criminal record consists of six misdemeanor convictions as well as the felony conviction associated with the instant matter. His record dates back to April 22, 1997, when he was convicted of Possession of Burglar's Tools and sentenced to 20 days

[3]The New York State Corrections System has three levels. Tier 1 is the lightest form of discipline and stays on an inmates record for two weeks before it is expunged. Tier 2 is punishable by a maximum of 30 days of keep lock, which means that the inmate is confined to his cell for up to 23 hours and loses many of the privileges afforded inmates, such as visiting and recreation. It must be issued by a lieutenant. The highest offense is a Tier 3 offense, for which keep lock can extend over 30 days, good time credit can be reduced and an inmate can receive time in the Special Housing Unit (SHU), which is a form of isolation. These offenses are issued by a Captain or another type of high-ranking boss.

The People, the defendant and his attorney were present. The parties all agree that this argument was equivalent to the "hearing" that defendant was supposed to have.

The statutory changes effected by DLRA-2 were specifically designed to ameliorate the harsh sentences previously mandated for non-violent drug offenders convicted of Class A-II drug felonies. In order to be eligible under the DLRA-2, the statute has six requirements: (1) that the defendant be in custody of the New York State Department of correctional Services ("DOCS"); (2) that he stand convicted of an A-II felony offense; (3) that the A-II felony offense have been committed before October 29, 2005; (4) that he received a sentence of at least three years under Article 220 of the Penal Law as it existed prior to October 29, 2005; (5) that he is more than 12 months from becoming an "eligible inmate" as defined in the specified section of the Corrections Law; and (6) the offender must meet the eligibility conditions for merit time under Correction Law § 803(1)(d).

The People concede that the defendant meets the first four eligibility criteria for re-sentencing. He is in the custody of the DOCS for the commission of an A-II felony conviction, specifically, Criminal Possession of a Controlled Substance in the Second Degree (P.L. § 220.18[1]). The underlying offense was committed on September 7, 2003, which was prior to the enactment of the DLRA-2. After his conviction. defendant was sentenced to

an indeterminate term of from six years to life imprisonment.

The People argue that defendant fails to meet either the fifth or sixth prerequisite for re-sentencing. According to the People, defendant fails to meet the sixth condition, arguing that he is not eligible to receive merit time as described by paragraph (d) of subdivision 1 of section 803 of the Corrections Law.

Correction Law § 803(1)(d) provides, in relevant part, that:

> (i) Except as provided in subparagraph (ii) of this paragraph, every person under the custody of the department ... serving an indeterminate sentence of imprisonment with a minimum period of one year or more ... imposed pursuant to section 70.70 or 70.71 of the penal law, may earn a merit time allowance.
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> (ii) Such merit time allowance shall not be available to any person serving an indeterminate sentence authorized for an A-I felony offense ... or any sentence imposed for a violent felony offense as defined in section 70.02 of the penal law, manslaughter in the second degree, vehicular manslaughter in the second degree, vehicular manslaughter in the first degree, criminally negligent homicide, an offense defined in article one hundred thirty of the penal law, incest, or an offense defined in article two hundred sixty-three of the penal law, or aggravated harassment of an employee by an inmate.

Contrary to the People's contention, the reference in the 2005 DLRA to the "eligibility requirements" of Correction Law § 803(1)(d), does not preclude a defendant from whom a merit time allowance has been withheld pursuant to Correction Law § 803(1)(d)(iv), from seeking re-sentencing under the 2005 DLRA

(see People v. Sanders, _ A.D.3d_, 2007 WL 259269 [2nd Dept. January 30, 2007]; People v. Quinones, 11 Misc.3d 582, 595-596 [Sup. Ct. N.Y.Co. 2005]). The proscription under Correction Law § 803(1)(d)(iv) which provides that such allowance "shall be withheld for any serious disciplinary infraction" applies only to inmates who were eligible to earn an allowance, in the first instance, pursuant to Correction Law § 803(1)(d)(i) and (ii) and who may have been granted such allowance in the discretion of the Department of Correctional Services (hereinafter the DOCS), if that eligible inmate, inter alia, successfully participated in the work and treatment program assigned pursuant to Correction Law § 805. As the Appellate Division, Second Department recently held in People v. Sanders, supra, 2007 WL 259269, "[t]o adopt the People's interpretation of that provision of the 2005 DLRA which refers to Correction Law § 803(1)(d) would vest the authority for re-sentencing in the DOCS rather than in the sentencing court, a result the Legislature clearly could not have intended."

Here, the defendant, as conceded by the People, is statutorily eligible to earn a merit time allowance under Correction Law § 803(1)(d)(i) and (ii). Further, it is undisputed that the defendant also met the other requirements set forth in section 1 of the 2005 DLRA defining those inmates who are entitled to apply for re-sentencing. Thus, it appears that the People's argument against ineligibility on this ground must

fail.

The People also argue that defendant fails to meet the fifth condition of the DLRA-2, which requires a defendant to be more than 12 months from becoming an "eligible inmate" pursuant to Corrections Law § 851(2).

Under the DLRA-2, a defendant is eligible for re-sentencing if he is "more than twelve months away from being an eligible inmate as that term is defined in subdivision 2 of section 851 of the Correction Law." The term "eligible inmate" is defined in Subdivision (2) for purposes of determining an inmate's eligibility to participate in a temporary release program. In essence, then, DLRA-2 denies re-sentencing to inmates who are within one year of eligibility for temporary release. An inmate is eligible for temporary release when he "will become eligible for release on parole or conditional release within two years." Taken together, this means that a defendant is not qualified to apply for re-sentencing if he is eligible for parole within three years (see People v. Bautista, 26 A.D.3d 230 [1st Dept.], lv. granted 6 N.Y.3d 831 [2006]).

Rather than restricting themselves to the clear language of the DLRA-2 and its directive to Corrections Law § 851(2), the People read into it the additional requirements of subsection 2-b of Corrections Law § 851. That subsection, by its express terms, is applicable when determining eligibility for temporary release

or placement in a CASAT program. For those purposes, Corrections Law § 851(2-b) requires that the parole eligibility date be reduced by any possible merit time or good time credits. The People argue that this section renders defendant ineligible for re-sentencing.

As defendant notes, DLRA-2 cites only to subsection (2) and does not invoke subsection (2-b). The Court agrees with defendant that if the Legislature intended subsection 2-b to apply, it would simply have simply referred to eligible inmates as defined in 2 and 2-b of section 851.

Moreover, subsection 2 does not incorporate subsection 2-b by reference. Also, while subsection 2-b does not preclude the inclusion of good time and merit time for other eligibility calculations, it does not mandate it. Thus, there is no basis for reading subsection 2-b into subsection 2.

Furthermore, as the People acknowledge, the New York State Department of Correctional Services also interprets DLRA-2 to incorporate only the requirements of subsection 2 (see Memorandum of Deputy Commissioner and Counsel Anthony J. Annucci, annexed as Exhibit C to defendant's Reply Affirmation in Support of Re-Sentencing, dated June 6, 2006). Indeed, defendant was listed by DOCS as one of the inmates eligible for re-sentencing.

Here, defendant's earliest parole release date is September 3, 2009 although he has a Supplemental Merit Release Appearance

scheduled for July of 2007. Defendant filed the instant motion for re-sentencing on August 28, 2006. Thus, it appears that defendant is within the three year period for re-sentencing eligibility.

Accordingly, this Court finds that defendant is eligible for re-sentencing.

The People contend that substantial justice requires defendant not be re-sentenced, arguing that defendant has already received a substantial benefit from his plea agreement, has a substantial criminal record, a disciplinary history and is still eligible to terminate his life sentence. The Court agrees.

In support of their contention, the People basically point to defendant's criminal record and the facts of the instant case. The Court is aware that defendant possessed nearly two pounds of cocaine and approximately $3,700 in cash, which is still A-I felony weight even under the new drug reform laws. Although indicted for an A-II offense, the defendant received ample leniency when he was permitted to plead guilty to the Class A-II felony with a promise of six years to life imprisonment as the sentence. Indeed, had the defendant been convicted of the A-I felony charged in the indictment, he would have faced at the time a maximum term of incarceration of 25 years to life. That the defendant was a full participant in the crime charged is a matter that was resolved during the plea allocution when he knowingly,

intelligently and voluntarily admitted his guilt.

Additionally, defendant has at least six misdemeanor conviction dating back to 1997, at least one of which involved drugs. As to defendant's institutional record, he has received at least six Tier II infractions and received over 90 days of keep lock time while serving the instant sentence.

Defendant claims that he is the type of prisoner that the DLRA-2 was intended to help. He argues that his institutional record is minor and does not constitute a substantial reason to deny re-sentencing. He points to the fact that he has completed numerous educational and counseling programs. Defendant also claims that he is close to his family and that they are supportive of him.

Defendant states that he is an addict, not a career criminal. He served in the military and worked as a hospital dispatch operator in Yonkers, New York prior to being arrested for the underlying offense.

Defendant asks that the Court re-sentence him to the statutory minimum of three years with five years of mandatory post-release supervision.

After considering all relevant facts and circumstances, the submissions and oral arguments of the parties as well as defendant's institutional record of confinement, this Court finds that re-sentencing the defendant is not appropriate. He is not

the type of defendant that the DLRA-2 contemplated when considering "minor players" in a drug transaction. Furthermore, in the years he has been incarcerated, defendant has committed at least six Tier II infractions.

Moreover, the Court notes that the focus of the legislation was to benefit low-level, nonviolent and addicted offenders. Clearly, given the amount of money and cocaine recovered from defendant, defendant does not fall into this category as his involvement in the drug trade does not appear to be low-level to this Court. This was not even defendant's first drug conviction.

Finally, as the People point out, Section 37 of the Drug Law Reform Act ("DRLA") provides that the Division of Parole "must grant termination of sentence after three years of unrevoked parole to a person serving an indeterminate sentence for a Class A felony offense defined in article two hundred and twenty of the penal law." Therefore, even though the Court finds defendant to be ineligible for re-sentencing, as a defendant convicted of a Class A non-violent felony, he may apply to have the life portion of his sentence terminated after completing three years on parole (see Section 37 of the DRLA, amending Section 259J of the Executive Law adding subdivision 3-a).

This Court also notes that to the extent that defendant moves to set aside his sentence pursuant to CPL 440.20, subdivision one provides that such relief may be granted only

"upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law." Defendant fails to allege any of these specified grounds in his papers but rather relies solely on the amendment to the 2005 Drug Reform Law. Since substantial justice militates against re-sentencing defendant under the DLRA-2, and his sentence is not unauthorized, illegally imposed or otherwise invalid as a matter of law, defendant's motion for re-sentencing pursuant to CPL 440.20 is denied in its entirety.

The Court declines to re-sentence defendant and orders that his sentence remain at six years to life imprisonment.

This constitutes the decision and order of this Court.

ENTER:

Ronald A. Zweibel, J.S.C.

Dated: March 19, 2007