

People v Johnson

2007 NY Slip Op 32690(U)

August 16, 2007

Supreme Court, New York County

Docket Number: 0006583/2000

Judge: Marcy L. Kahn

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : CRIMINAL TERM : PART 44

-----X
THE PEOPLE OF THE STATE OF NEW YORK, : Ind. No 06583-2000
: :
: :
: :
-against- : DECISION AND ORDER
: ON DEFENDANT'S
: MOTION PURSUANT TO
: PL §70.71
: :
DAVID JOHNSON, : :
: :
Defendant. : :
: :
-----X

MARCY L. KAHN, J.:

By notice of application dated July 3, 2007, defendant moves for re-sentencing pursuant to PL §70.71 and the Drug Law Reform Act of 2005¹ ("DLRA-2"). For the reasons stated in this opinion, defendant's motion is denied.

On February 15, 2002, pursuant to a plea bargain, defendant pleaded guilty before another justice of this court to the class A-II felony offense of criminal possession of a controlled substance in the second degree. (PL §220.18[1]). Defendant was sentenced as a second felony offender to an indeterminate prison term of six years-to-life. Upon defendant's direct appeal from the judgment, the Appellate Division, First Department vacated the second felony offender adjudication and reduced defendant's sentence to five years-to-life. (People v. Johnson, 308 AD2d

¹ L. 2005, Ch.643, §1.

384 [1st Dept. 2003])). Thereafter, defendant moved this court for re-sentencing under §23 of the 2004 Drug Law Reform Act ("DLRA"),² seeking a determinate sentence including a term of post-release supervision pursuant to PL §70.71. On April 29, 2005, this court denied that application in a written decision and order.

Defendant was released to parole in this case on or about September 26, 2005. On July 6, 2007, defendant was re-incarcerated due to a parole violation. He is currently in the custody of the Department of Correctional Services on that violation. He now moves for re-sentencing pursuant to PL §70.71 and the DLRA-2.

Defendant alleges that he is eligible for re-sentencing under DLRA-2 because he is a first-time felony offender in New York, and while incarcerated has maintained a good prison record, has attained his graduate equivalency diploma and has earned a vocational trade certificate. Defendant, who apparently believes, incorrectly, that he was convicted of a class A-I felony, now seeks re-sentencing as an A-II felon to a determinate term of incarceration. He appears to contend that because he was convicted of possessing six and five-eighths ounces of cocaine, a crime which was, under prior law, an A-I felony, but under the sentencing provisions of the DLRA is now

²L. 2004, Ch. 738 §§1-41.

an A-II felony offense, he should now be re-sentenced to an A-II felony determinate sentence. Defendant's motion is without merit.

At the outset, defendant was in fact convicted, as stated, of a class A-II felony as a result of his plea bargain, and received a sentence then available for an A-II felony offense. Furthermore, although the DLRA eliminated life sentences for class A-I and A-II drug felons, the statute's ameliorative determinate sentencing provisions (PL §70.71) apply only prospectively, to crimes committed after its effective date of January 13, 2005, rather than retroactively. (People v. Utsey, 7 NY3d 398 [2006]). The changes in the sentencing laws occasioned by the DLRA thus do not apply to defendant, whose crime was committed in 2000, prior to the effective date of the statutory changes to the sentencing structure.

Additionally, it is by now well-settled that "[a]n ameliorative amendment generally 'cannot be applied in favor of an offender tried and sentenced to imprisonment before its enactment. . . . [O]nce final judgment has been pronounced, a change in the law does not arrest or interfere with execution of the sentence" (People v. Utsey, supra, 7 NY3d at 404, quoting People v. Oliver, 1 NY2d 152, 163 [1956] [emphasis added], and citing People v. Walker, 81 NY2d 661, 667 [1993]; accord, People v. Rodriguez, 41 AD3d 334 [1st Dept. 2007];

People v. Quinones, 22 AD3d 218 [1st Dept. 2005], lv. den., 6 NY3d 817 [2006]). As defendant Johnson was convicted and sentenced on February 15, 2002, prior to the enactment of PL §70.71 as part of the DLRA in 2004, this principle also bars him from obtaining any sentencing relief from its provisions.

Defendant's remaining argument fares no better, as defendant is not, in any case, eligible for drug law re-sentencing. The DLRA-2 permits a person who was convicted of an A-II drug felony and was sentenced prior to the enactment of PL §70.71 to an indeterminate life-term prison sentence having a minimum term of three years or more to apply to be re-sentenced to a determinate term in accordance with PL §70.71. It provides:

Notwithstanding any contrary provision of law, any person in the custody of the department of correctional services convicted of a class A-II felony offense defined in article 220 of the penal law which was committed prior to the effective date of this section, and who was sentenced thereon to an indeterminate term of imprisonment with a minimum period not less than three years pursuant to provisions of the law in effect prior to the effective date of this section, and who is more than twelve months from being an eligible inmate as that term is defined in subdivision 2 of section 851 of the correction law, and who meets the eligibility requirements of paragraph (d) of subdivision (1) of section 803 of the correction law may, upon notice to the appropriate district attorney, apply to be re-sentenced in accordance with section 70.71 of the penal law in the court which imposed the original sentence.

(DLRA-2).

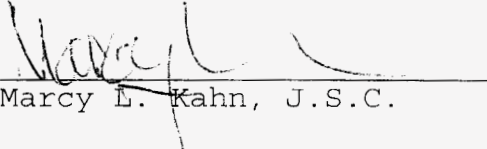
Defendant, having been released to parole on the instant case, is presently incarcerated for having violated his lifetime

parole. He now seeks to eliminate the maximum life-term portion of his sentence through re-sentencing under the DLRA-2. As the statute makes clear, however, to be eligible for re-sentencing, an A-II offender must be "more than twelve months from being an eligible inmate," meaning that the individual cannot be any closer than three years away from parole eligibility. (DLRA-2; People v. Bautista, 26 AD3d 230 [1st Dept.], app. dismiss. 7 NY3d 838 [2006]). At the time he filed this motion, defendant Johnson was less than three years from parole eligibility, as he had already been released to parole. This fact renders him ineligible for re-sentencing under the DLRA-2. (Id.; see People v. Thomas, 38 AD3d 319, 320 [1st Dept. 2007]). Accordingly, his motion on this ground must be denied as well.

For all the foregoing reasons, defendant's motion pursuant to CPL §70.71 for re-sentencing is denied in its entirety.

This opinion constitutes the decision and order of the court.

E N T E R:



Marcy E. Kahn, J.S.C.

Dated: New York, New York
August 16, 2007

FILED **AUG 16 07**