

**People v Johnson**

2008 NY Slip Op 31089(U)

March 14, 2008

Supreme Court, Kings County

Docket Number: 0004802/1997

Judge: L. Priscilla Hall

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CRIMINAL TERM PART 14

-----x  
THE PEOPLE OF THE STATE OF NEW YORK

By: Hon. L. Priscilla Hall

-against-

Date: March 14, 2008

JAMES JOHNSON

DECISION & ORDER

Indictment No. 4802/97

-----x  
Defendant moves, *pro se*, pursuant to CPL §440.20 for an order vacating his sentence on the grounds that the court lacked the jurisdiction to sentence him as a second violent felony offender. Defendant committed a deadly robbery on July 24, 1986 and was consequently convicted by a jury of manslaughter in the first degree (PL §125.20[1]) and robbery in the first degree (PL §160.15[3]). On March 2, 1998, defendant was sentenced as a second violent felony offender to two consecutive terms of imprisonment of twelve and one half to twenty-five years on each count. The conviction was affirmed on appeal (*People v Johnson*, 4 AD3d 483 [2d Dept. 2004], lv denied 2 NY3d 763 [2004]).

Defendant's adjudication as a second violent felony offender was based upon his prior convictions for murder in the second degree on June 19, 1967 and attempted robbery in the third degree on November 6, 1967. For those two crimes defendant was sentenced to concurrent terms of twenty years to life and five years. While serving his sentences on the predicate felonies, defendant received work release and furlough program status beginning on August 29, 1975 prior to his eventual release into parole October 19, 1976.

At the sentencing under the instant indictment, defendant stated that he had reviewed the predicate statement with his attorney and admitted that he had been convicted of the two 1967

felonies. He did not challenge the constitutionality of his prior convictions when given an opportunity to do so. Defendant now alleges that more than ten years passed between his prior sentence and the commission of the instant offense in violation of the time limit prescribed under PL §70.04(1)(b). He argues that the correct date of his release from incarceration should be August 29, 1975, the date he entered the temporary release programs, and not the parole date of October 19, 1976, which the court applied in adjudicating him a second violent felony offender. For the following reasons, the motion is denied.

Among the factors required to meet the criteria of a predicate felony conviction, a prior sentence must have been imposed not more than ten years before the commission of the present felony (PL §70.06[1][b][iv]). Excluded from the ten years are any periods during which the individual has been “incarcerated” (PL §70.06[1][b][v]). The Court of Appeals has interpreted the term “incarcerated” to include the entire time the defendant is within the custody of the Department of Correctional Services (“DOCS”) prior to being released on parole (*People v Cagle*, 7 NY3d 647, 651 [2006]). In *Cagle*, the defendant participated in a day-reporting program and argued that the time he spent in that program did not extend the ten-year statutory period because he was not incarcerated. The court rejected his argument, holding that he was nevertheless confined and in DOCS custody during his participation in the day-reporting program (*Id.* at 650).

Day-reporting programs fall into the general category of temporary release programs in which qualified inmates may participate (*see* 7 NYCRR §§1900, 1925.2). New York’s temporary release statute also includes programs for work release, furlough, community services, industrial training, educational leave and leaves of absence (Correction Law §851[9]; 7 NYCRR §1900.3). In a day-reporting program, for example, inmates are subject to reporting duties and

travel restrictions and must surrender their employment earnings to the day-reporting center (7 NYCRR §1902.1). In *Cagle*, the defendant was required to report to a residential treatment facility, undergo drug tests and participate in rehabilitative programs. Before entering the program he was required to sign a Memorandum of Agreement and a copy of the day-reporting rules (*Cagle* at 650). Based on these strict requirements and conditions, the court found that the defendant should be considered incarcerated for the duration of the temporary release program and until his release on parole (*Id.*).

Inmates participating in work release and furlough programs, like those granted temporary release for any of the reasons described in the statute, must abide by the same rules and regulations (7 NYCRR §1900.3). An inmate on work release or furlough remains under the control of DOCS while away from prison premises and is granted only “extended bounds of confinement” (Correction Law §855[5]). Just as the inmate was required to do in *Cagle*, as a condition of release, the defendant in the instant case signed a form agreeing to abide by the DOCS leave regulations. Defendant agreed that his participation in the program was a privilege, not a right, subject to revocation at any time (7 NYCRR §1926.2[c]; see Correction Law §§633[7], 855[9]).

Likewise, defendant also signed a Memorandum of Agreement (7 NYCRR §1902.1) in which he acknowledged that DOCS retained custody over him during his temporary release. Pursuant to this agreement defendant was required to report to a parole officer, follow a curfew and to submit to drug and alcohol testing, among other things. In these respects, the terms of defendant’s release are indistinguishable from those found relevant in *Cagle*. Inmates in day-reporting, work release and furlough programs “are merely granted the revocable privilege of

... serving their sentences of imprisonment under less strict conditions of supervision than other prisoners under lock and key” (*Cagle* at 651).

Policy considerations were also an important element of the Court’s decision in *Cagle*. Penal Law §70.06 is aimed at deterring “recidivism by enhancing the punishments of those who, having been convicted of felonies, violate the norms of civil society and commit felonies again” (*People v Walker*, 81 NY2d 661, 665 [1993]). Consequently, once an inmate is fully released from incarceration upon entering parole, he must prove that he can function in a law-abiding manner for at least ten years to avoid being sentenced as a recidivist (*see People v Orr*, 57 AD2d 578 [1977]).

In this instance the work release and furlough periods were properly excluded. Since defendant remained under DOCS supervision and received credit toward his sentence while away from the correctional facility, he must “be considered incarcerated until he completed his sentence of imprisonment for the prior crime and was released into parole” (*Cagle* at 651). Defendant remained at liberty for less than ten years before committing the instant offense. Thus, defendant’s prior conviction was properly determined to be a predicate felony and his adjudication as a second violent felony offender cannot be challenged.

Accordingly, defendant’s motion is denied. This decision shall constitute the order of the court.

ENTER:

*[Signature]*  
L. PRISCILLA HALL, J.S.C.

**ENTERED**  
MAR 18 2008  
NANCY T. SUNSHINE  
COUNTY CLERK