

**People v Middleton**

2010 NY Slip Op 32703(U)

September 28, 2010

Supreme Court, Kings County

Docket Number: 8000/00

Judge: Deborah A. Dowling

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**MEMORANDUM**

**SUPREME COURT : KINGS COUNTY**

**(Criminal Term, Part 1)**

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**PEOPLE OF THE STATE OF NEW YORK,**

**By: DOWLING, J.**

**- against -**

**Dated: September 28, 2010**

**Indictment No. 8000/00**

**ROBERT MIDDLETON,**

**Defendant.**

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The defendant submitted the instant motion seeking an order for re-sentencing pursuant to Penal Law (PL) §70.70 and newly enacted Criminal Procedure Law (CPL) §440.46. The defendant contends that under this newly enacted statute, he is eligible for re-sentencing. The People submitted opposition to the defendant's motion. For the reasons stated herein the defendant's motion is denied in its entirety.

***Background***

The defendant was convicted of a class B felony drug conviction on September 20, 2000. The defendant and co-defendant Raul Salaman sold an envelope of cocaine to an undercover police officer in exchange for twenty dollars (\$20) pre-recorded buy money (PRBM) at the corner of Stone and Sutter Avenue in Kings County. Upon confirmation of

the sale, a police back up team arrested the defendant. He was searched and found in possession of twelve (12) additional envelopes of cocaine, nine hundred and thirty dollars (\$930), and drug paraphernalia including an ink pad, a strainer, and empty bags that could be used to package additional quantities of cocaine. The co-defendant was also in possession of twelve dollars (\$12) pre-recorded buy money exchanged during the buy and bust operation when arrested.

The defendant was charged, under Kings County Indictment Number 8100/00, with Criminal Sale of a Controlled Substance in the Third Degree (P.L. §220.39[1]), Criminal Sale of a Controlled Substance in the Fifth Degree (P.L. §220.31), two counts of Criminal Possession of a Controlled Substance in the Third Degree (P.L. §220.16[1]), and two counts of Criminal Possession of a Controlled Substance in the Seventh Degree (P.L. §220.03).

On April 4, 2001, the defendant plead guilty to one count of Criminal Sale of a Controlled Substance in the Third Degree in satisfaction of the counts charged in the indictment and was promised a sentence of four and one half to nine (4½ to 9) years incarceration. The case was adjourned to June 4, 2001 for sentencing and in the interim the defendant was released on bail pending sentencing. However, the defendant did not return to court for sentencing on that date. On February 21, 2006, after having absconded for approximately five years, the defendant was returned to court on the bench warrant. On March 20, 2006, defendant was sentenced to four and one half to nine (4 ½ to 9) years imprisonment. The defendant entered state prison on March 28, 2006. Defendant is currently

incarcerated at Wallkill Correctional Facility.

### *Conclusion of Law*

As stated above, the defendant submitted the instant motion seeking resentencing.

The defendant relies upon the newly enacted provisions of the Drug Law Reform Act (DLRA

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3) and P.L. §§ 60.04, 70.70 and C.P.L. §440.46 in support of his motion for resentencing.

The defendant contends that he is eligible for re-sentencing because he is (1) in the custody of the Department of Correctional Services, and (2) serving an indeterminate prison term with a maximum term exceeding three years. The defendant also noted that under C.P.L. §440.46 “an eligible defendant’s motion for resentencing must be granted unless substantial justice dictates otherwise.” The defendant believes there is nothing in his record which bars his application for re-sentencing. In his motion papers, the defendant highlights that the court “may consider any facts or circumstances relevant to the imposition of a new sentence,” including the “institutional record of confinement”. The defendant further notes that C.P.L. §440.46 explicitly provides that:

The court’s consideration of the institutional record of confinement...shall include but not be limited to such person’s participation in or willingness to participate in treatment or other programming while incarcerated and such person’s disciplinary history.

The defendant contends that he has vigorously participated in treatment as evidenced by the evaluations and reviews from the treatment programs he participated in while

incarcerated. The defendant argues that he has made every effort to better himself as a member of society by participating in treatment. The defendant argues that based upon his efforts at treatment and conduct in prison this court should re-sentence him.

The people oppose the defendant's application for re-sentencing pursuant to C.P.L. §440.46 (1), which the People argue prohibits re-sentencing of any individual previously adjudicated a second violent offender. The People submitted the defendant's criminal rap sheet and the sentencing minutes as evidence of the defendant's second felony offender status.

The defendant's motion for re-sentencing relies upon C.P.L. §440.46 (1) which provides that:

Any person in the custody of the department of correctional services convicted of a class B felony offense defined in article two hundred twenty of the penal law which was committed prior to January thirteenth, two thousand five, who is serving an indeterminate sentence with a maximum term of more than three years, may, except as provided in subdivision five of this section, upon notice to the appropriate district attorney, apply to be re-sentenced to a determinate sentence in accordance with sections 60.04 and 70.70 of the penal law in the court which imposed the sentence.

However, subdivision five provides that:

The provisions of this section shall not apply to any person who is serving a sentence on a conviction for or has a predicate felony conviction for an exclusion offense.

An exclusion offense in this case is defined as:

A second violent felony offense pursuant to section 70.04 of the penal law or a persistent violent offense pursuant to section 70.08 of the penal for which the person has previously been adjudicated.

A review of the defendant's criminal history reveals that he was adjudicated a second violent felony offender. The defendant's rap sheet reveal that on, June 25, 1993, the ~~defendant was convicted for criminal possession of a weapon, which is a violent felony.~~

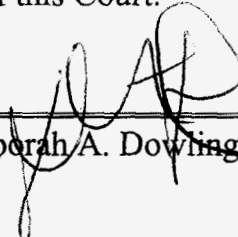
When the defendant was sentenced in the instant offense on September 20, 2000, the sentencing minutes reflect that the defendant was adjudicated a second felony offender based on his previous conviction in 1993. The defendant is therefore ineligible under C.P.L. §440.46, to apply for re-sentencing on his class B drug felony conviction.

While the defendant argues that he has made progress while incarcerated in DOCS that should warrant re-sentencing, the record does not support that assertion. The People submitted evidence that the defendant committed a Tier III disciplinary violation, which is the most serious level of disciplinary violation in DOCS. The violation resulted in the defendant receiving 30 days in the special housing Unit. Although, the defendant might be working hard while incarcerated, and that is a commendable goal, he has not shown sufficient evidence to support his contention.

Moreover, the Court cannot overlook the fact that the defendant absconded from the law prior to being sentenced in an effort to avoid punishment. After due consideration of the papers submitted herein the defendant's instant motion seeking re-sentencing is denied. In reviewing the defendant's criminal history, it is clear that he is not eligible for re-sentencing.

Further, the defendant failed to set forth any viable arguments to establish otherwise. Accordingly, the defendants motion is hereby denied in its entirety.

This shall constitute the decision and order of this Court.

  
Deborah A. Dowling, JSC

**ENTERED**  
SEP 27 2010  
NANCY T. SUNSHINE  
COUNTY CLERK