SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 17

The People of the State of New York	By: Hon. Abraham G. Gerges
-against-	Date: September 14, 2010
	DECISION & ORDER
MARTIN COHEN	Indictment No. 10883/94

Defendant moves for an order vacating his sentence pursuant to CPL § 440.20 on the grounds that his sentence for a B felony drug conviction was cruel and unusual when compared to the modified sentence for his A-I felony drug conviction; that convicting him of two charges involving the same narcotics was illegal; and that he should be given one sentence to encompass the convictions for all of the firearms recovered from his possession. For the following reasons, the motion is denied.

On August 24, 1994, at approximately 9:15 A.M., at 305 95th Street, Kings County, New York, Noreen Maloney telephoned the police to inform them that her upstairs neighbor had attempted to enter her apartment from the fire escape. Ms. Maloney also provided the police with a physical description of the individual and informed them that the man lived directly above her in Apartment 308. The officers went to Apartment 308, knocked twice, and heard a man's voice ask who was there. After the officers identified themselves, the same voice asked if "this [was] about the girl downstairs" and told the officers to hold on.

As they waited, the officers heard a great deal of activity inside the apartment consisting of doors opening and closing, footsteps running, drawers closing violently. When the defendant

opened the apartment door, the officers invited him to step into the hallway. Defendant ignored this invitation. After the officers repeated themselves, defendant swung his arms, asked the officers what this was all about, and then stepped back into his apartment. The officers followed defendant inside and grabbed his arm, and in the course of doing so, observed the butt of a gun protruding from an open drawer in the bureau standing immediately to defendant's left. The officers handcuffed defendant and recovered a .22 caliber handgun from the drawer. Shortly thereafter, Ms. Maloney positively identified defendant as the man who had attempted earlier to enter her apartment.

Defendant was agitated and belligerent during transport, and after his request to have his handcuffs loosened was denied, looked at the officer and informed him that defendant has a great many more guns in his apartment, and "the next time any of you cops come to my door, I will shoot and kill all of yous (sic)."

Shortly thereafter, the police obtained and executed a search warrant for defendant's apartment. They recovered five operable firearms, numerous rounds of ammunition, two scales, a quantity of marihuana, over five ounces of cocaine, empty glassine envelopes, four beepers, sixteen different license plates and over $10,000 in cash.

Defendant was charged with criminal possession of a controlled substance in the first degree (Penal Law § 220.21[1]), criminal possession of a controlled substance in the third degree (PL § 220.16[1]), four counts of criminal possession of a weapon in the second degree (PL § 265.03), six counts of criminal possession of a weapon in the third degree (PL § 265.02[1])[1], six counts of criminal sale of a firearm in the third degree (PL § 265.11[2]), two counts of criminally

[1] Defendant had been convicted of unauthorized use of a vehicle in 1978.

using drug paraphernalia in the second degree (PL § 220.50[3]) and unlawful possession of marihuana (PL § 221.05).

After a jury trial, defendant was found guilty of criminal possession of a controlled substance in the first and third degrees, four counts of second-degree weapons possession, two counts of third-degree weapons possession, and unlawful possession of marihuana. On March 21, 1995, defendant was sentenced to concurrent prison terms of 15 years to life for first-degree drug possession, 8 1/3 to 25 years for third-degree drug possession, 5 to 15 years for three counts of second-degree weapons possession, 2 1/3 to 7 years on each of the third-degree weapons possessions, and 15 days for unlawful marihuana possession, to run consecutively with 2 1/2 to 7 1/2 years on the remaining count of second-degree weapons possession (Gerges, J., at trial and sentence).

Defendant's conviction was affirmed by the Appellate Division (*People v Conforti a/k/a Martin Cohen*, 263 AD2d 513 (2d Dept 1999), and leave to appeal to the Court of Appeals was denied (94 NY2d 878 [2000]). Defendant moved *pro se* on both December 19, 2004 and February 20, 2005 and again via defense counsel on February 25, 2005 for resentencing on his class A-I felony drug conviction pursuant to the Drug Law Reform Act ("DLRA") of 2004. On April 17, 2005, this Court granted defendant's motion for resentencing and by order dated May 23, 2007, vacated defendant's indeterminate sentence of 15 years to life and resentenced defendant to 10 years' incarceration with five years post-release supervision, to run consecutively with defendant's 2 1/2 to 7 1/2 year sentence for second-degree weapons possession and concurrently with all other terms of incarceration. On August 20, 2009,

defendant was released from the custody of the Department of Correctional Services ("DCAS") on parole.

In the instant motion, defendant moves pursuant to CPL § 440.20 to set aside his sentence on the ground that his sentence of 8 1/3 to 25 years for third-degree drug possession is cruel and unusual when compared with his modified determinate sentence for first-degree drug possession of ten years. Defendant further claims that he should not have been convicted of both criminal possession of a controlled substance with intent to sell and criminal possession of a controlled substance in the first degree for the same narcotics, because such convictions exposed him to double jeopardy. Finally, defendant claims that his consecutive sentence of 2 1/2 to 7 1/2 years for second-degree weapons possession was invalid as a matter of law.

Conclusions of Law.

CPL § 430.10 provides that except when specifically authorized by law, a legal sentence may not be changed once the sentence has commenced (*People v Richardson*, 100 NY2d 847, 850 [2003]). While the sentencing court retains the inherent power to correct an error in the sentence (*Id.*), that is not the case here. Defendant's sentence was within statutory guidelines and continues while he is on parole until the sentence is complete (PL § 70.40[a]).

The modification of defendant's sentence for his class A-I felony drug conviction was specifically authorized by the DLRA of 2004. No such statutory provision provides for the modification of defendant's sentence for his class B felony drug conviction. While the 2009 DLRA, as codified in CPL § 440.46, does allow resentencing for certain class B drug felony convictions, one of the conditions for resentencing requires defendant to be in DCAS custody. Because defendant was paroled on August 20, 2009, he does not qualify for resentencing.

Furthermore, defendant does not qualify for resentencing under the 2009 DLRA because his conviction for second-degree weapons possession is a violent felony offense and therefore constitutes an "exclusion offense" under the law (*see* CPL § 440.46[5][a], PL § 70.02[1][b], PL § 265.03).

The claim that defendant's sentence for criminal possession of a controlled substance in the third degree is "grossly disproportionate" to the modified sentence for criminal possession of a controlled substance in the first degree is rejected. The modification of defendant's sentence was limited to the A-I felony under a very specific statutory provision instituted in 2004 that did not apply at the time to B drug felony conviction and does not apply now. Moreover, as noted above, defendant is not eligible for the current provisions which provide for the modification of a B felony sentence under certain conditions.

The constitutional proscription against excessive or cruel and unusual punishment flows from the basic principle that the punishment for a crime should be proportional to the offense as applied to the offender under the norms that prevailed at the time of sentence (*see Kennedy v Louisiana,* 554 US 407 [2008]; *People v Broadie*, 37 NY2d 100 [1975]). Thus, a sentence that is within the limits of a valid statute generally does not constitute cruel and unusual punishment in a constitutional sense (*People v Jones*, 39 NY2d 694 [1976]). Here, defendant's sentence was valid when imposed and no legal reasons have arisen since that time to warrant a variation of that sentence. Accordingly, the modification of defendant's class A-I felony sentence is unrelated to the imposition of his class B felony sentence.

Defendant's second claim that his convictions for drug possession violated the double jeopardy clause is misplaced. Under CPL § 440.20, a defendant can only challenge his sentence

upon the grounds that it "was unauthorized, illegally imposed or otherwise invalid as a matter of law." Here, defendant is attacking the lawfulness of his conviction, which he may only pursue under CPL § 440.10. As such, defendant's motion as regards his conviction is denied.

Defendant's final argument that his possession of six different firearms constituted one act for which one sentence should have been imposed is incorrect. "Since defendant possessed several weapons, it was not illegal to impose '... sentences arising out of possession of each weapon" (*People v Negron*, 184 AD2d 532, 533 [2d Dept 1992] *quoting People v Iguarta,* 171 AD2d 547, 549 [1st Dept 1991]; *see People v Horn*, 196 AD2d 886, 887 [2d Dept 1993]).

Accordingly, defendant's claim is denied in its entirety.

This decision shall constitute the order of the court.

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 from this determination. This application must be made within 30 days of service of this decision. Upon proof of his 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 certification granting leave to appeal is granted.

ENTER

ABRAHAM G. GERGES, J.S.C.

ENTERED

SEP 16 2010

NANCY T. SUNSHINE
COUNTY CLERK

HON ABRAHAM G. GERGES
J.S.C.