

People v Miller

2010 NY Slip Op 32904(U)

June 10, 2010

Sup Ct, Kings County

Docket Number: 121/03

Judge: Abraham G. Gerges

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MEMORANDUM

SUPREME COURT

KINGS COUNTY

The People of the State of New York

BY ABRAHAM GERGES, J.

Date: June 10, 2010

v.

Jamar Miller,

Defendant.

Ind. # 121/03

Defendant moves for resentence under the Drug Law Reform Act of 2009 (hereinafter 2009 DLRA, and codified as CPL 440.46).

The court has considered defendant's motion papers, attachments and reply, the People's response and the court file in determining the instant motion.

Defendant contends he is eligible for resentence under the 2009 DLRA and the People oppose arguing that defendant's criminal history and institutional confinement infractions warrant denial.

Facts

Defendant, 27, along with twenty-six other individuals, was indicted for participating in organized drug sales in the Ocean Towers housing complex. During the time period specified in the indictment over seventy-five drug sales were made at the complex, which is within 1,000 feet of a school. Defendant was directly involved in eight separate drug and weapons sales to undercover police officers involving over one-half pound of cocaine.

Indictment #121/03 was filed charging defendant with Conspiracy in the First and Second Degree, two counts of Criminal Sale of a Controlled Substance in the First Degree, four counts of Criminal Sale of a Controlled Substance in the Second Degree,

two counts of Criminal Possession of a Controlled Substance in the Second Degree, four counts of Criminal Sale of a Controlled Substance in the Third Degree in or near School Grounds, one count of Criminal Possession of a Controlled Substance in the Third Degree, five counts of Criminal Sale of a Controlled Substance in the Third Degree, four counts of Criminal Sale of a Firearm in the Third Degree, and five counts of Criminal Possession of a Weapon in the Third Degree.

On March 2, 2005, defendant, represented by counsel, pleaded guilty to Criminal Sale of a Controlled Substance in the Third Degree and Conspiracy in the Second Degree.

On March 22, 2005 defendant was sentenced to concurrent terms of incarceration of a minimum of seven years to a maximum of twenty-one years for the drug sale count and a minimum of two years to a maximum of six years for Conspiracy in the Second Degree.

Defendant's Prior Convictions

Defendant's prior history includes a plea of guilty to Manslaughter in the Second Degree on September 12, 1997. Defendant, fourteen years old at the time, was adjudicated a juvenile offender and sentenced to an eighteen month term of incarceration.

Defendant was adjudicated a youthful offender on October 26, 2001 for Attempted Criminal Sale of a Controlled Substance in the Third Degree and was sentenced to a five year term of probation.

Defendant pleaded guilty on November 19, 2001 to Aggravated Unlicensed Operation of a Vehicle in the Third Degree, an unclassified misdemeanor, and was sentenced to a conditional discharge, an alcohol abuse program and a fine. On January 16, 2002, a warrant was issued and on February 13, 2002, defendant was returned to court on the warrant.

Defendant's History While Incarcerated

Defendant has been incarcerated in the New York State Department of Corrections system since April 26, 2005. During his period of incarceration, defendant has committed

six disciplinary violations. Four were Tier II violations and two were Tier III violations, the most serious level of violation.

The Tier II violations occurred during 2006. On April 22, 2006, defendant was cited for fighting, violent conduct and disobeying a direct order. Defendant was observed in an altercation with another inmate and ignored a direct order from a corrections officer to cease; he received 30 days keeplock, and lost privileges. On May 11, 2006, defendant was cited for destruction of state property and disobeying a direct order after he was observed “fishing” (distributing or receiving contraband by means of a long string made from a sheet); he received five days keeplock and loss of privileges. On August 8, 2006 defendant was observed wearing an unauthorized watch and he lost privileges, including recreation. On August 20, 2006 defendant was observed playing cards with another inmate while his recreation privileges were suspended; he received 15 days keeplock and loss of privileges.

The Tier III violations occurred in 2008. On July 30, 2008, defendant paid another inmate to set fire to another inmate’s “cube.” The fire destroyed the inmate’s personal and state property, and forced the closing of the entire dormitory. Defendant lost 12 months good time credit, received a 12 month 16 day stay in the Special Housing Unit, was fined \$190.00 and lost various privileges. On August 6, 2008, prison officials received information that defendant’s life was endangered because of his role in the arson and was placed in involuntary protective custody for 23 days; this is classified by Corrections as a Tier III infraction.

While incarcerated, defendant participated in a Drafting vocational program, completed the Alcohol and Substance Abuse Treatment (ASAT) program in May 2007 and also completed Aggression Replacement Training (ART) in 2009. He has also a work history as a program aide, porter and teacher’s aide; receiving positive evaluations from 2005 to present.

Law

CPL 440.65, in pertinent part, provides for resentencing for those convicted of crimes defined in article two hundred twenty of the penal law. Criminal Sale of a Controlled Substance in the Third Degree is a crime under article two hundred twenty of the penal law.¹ Defendant is therefore eligible for resentencing under the 2009 DLRA for this count. Courts have discretion with respect to resentencing applications, although the “law indicates a presumption in favor of granting a motion for resentencing...” (*People v. Beasley*, 47 AD3d 639, 641 [2008]) unless substantial justice dictates that the application should be denied (L.2004, chap. 738, §23) .

Defendant, 27 years old, has been involved in criminal activity for almost half of his life. His first contact with the criminal justice system occurred at age 14 with his participation in a homicide. Upon his release from incarceration, defendant’s involvement with drugs began, starting with low level drug offenses and culminating in the instant drug conspiracy case involving twenty-six individuals. This case involved the defendant’s personal involvement in the sale of over one-half pound of cocaine on eight separate occasions and also included the illegal sale of guns; defendant was a not a minor participant in these sales.

Although defendant has made some efforts at rehabilitation, he has continued to flout the law while incarcerated. His prison disciplinary record, and specifically the Tier III arson offense, is particularly troubling to this court. While the court is mindful of the sound basis for the repeal of harsh drug laws, based on the foregoing, substantial justice dictates that the application be denied.

The motion for resentencing is hereby denied.

¹ The count of Conspiracy in the Second Degree is not an eligible offense within the meaning of the DLRA, therefore the sentence imposed for this count pursuant to the plea agreement remains unchanged.

This constitutes the decision and order of the court.

Defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, NY 11201 for a certificate granting leave to appeal from this determination. This application must be made within 30 days of service of this decision. Upon proof of 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 certificate granting leave to appeal is granted (22 NYCRR 671.5).

E N T E R,

ALD. My

J. S. C.

HON. ABRAHAM G. GERGES
J.S.C.

ENTERED
JUN 11 2010
NANCY T. SUNSHINE
CLERK