

**People v Simon**

2010 NY Slip Op 32906(U)

June 21, 2010

Sup Ct, Kings County

Docket Number: 7333/99

Judge: Raymond Guzman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS – PART 9

----- X  
THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER  
Indictment # 7333/99

-against-

KEVIN SIMON,  
Defendant.

----- X  
RAYMOND GUZMAN, J.S.C.

**INTRODUCTION**

Defendant pled guilty on April 12, 2000, to Criminal Sale of a Controlled Substance in the Third Degree (Penal Law § 220.39[1]) a Class B Drug Felony, and Criminal Possession of a Controlled Substance in the Seventh Degree, a Class A Misdemeanor. On January 30, 2004, defendant was sentenced on the Class B felony to an indeterminate term of imprisonment of four and one-half (4 ½) to nine (9) years, the minimum sentence for a Second Felony Offender, and one year definite on the misdemeanor. Defendant began serving his sentence with the Department of Correctional Services on February 10, 2004. Defendant was released on parole in this matter on June 1, 2005. On January 7, 2010, defendant’s parole was revoked. Defendant was again released to parole supervision on March 30, 2010.

By papers dated March 24, 2010, defendant moved this court, pursuant to CPL 440.46, for an order vacating his indeterminate sentence on the felony conviction and for resentencing on the felony conviction to a determinate term of imprisonment. The People filed opposition to defendant’s motion on May 28, 2010, arguing that defendant was not eligible for resentencing due to his parole violation, and that the motion was moot because defendant is no longer incarcerated.

After a thorough review of the case file, the submissions of the parties and the relevant precedent, the Court finds defendant is ineligible for resentencing.

## FINDING OF FACTS

On September 8, 1999, defendant, acting in concert with another, sold ten dollars worth of crack cocaine to an undercover police officer in his home. Following the transaction, when the police placed defendant under arrest, they recovered additional narcotics and a gun from his apartment.

For these crimes, defendant was charged by Kings County Indictment Number 7333/99, with one count of Criminal Sale of a Controlled Substance in the Third Degree (Penal Law § 220.39[1]), one count of Criminal Sale of a Controlled Substance in the Fifth Degree (Penal Law § 220.31), two counts of Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 220.16[1]), two counts of Criminal Possession of a Controlled Substance in the Seventh Degree (Penal Law § 220.03), one count of Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03[2]), and one count of Criminal Possession of a Weapon in the Fourth Degree (Penal Law § 265.01[1]).

Defendant pled guilty on April 12, 2000, to one count of Criminal Sale of a Controlled Substance in the Third Degree, a Class B felony, and one count of Criminal Possession of a Controlled Substance in the Seventh Degree, a Class A misdemeanor, in full satisfaction of the indictment. Defendant was initially placed in a residential drug treatment program following his plea with the understanding that if he successfully complete the program his felony would be dismissed and he would have only a misdemeanor conviction on his record.

Despite initial success and being given three opportunities in three different programs, defendant failed to successfully complete any of those programs. As a result of his inability to stay in treatment defendant was sentenced on January 30, 2004, to the minimum sentence for a second felony offender convicted of a Class B felony, an indeterminate term of imprisonment of four and one-half (4 ½) to nine (9) years. Defendant was also sentenced to one year determinate on the misdemeanor charge to run concurrently. Defendant was transferred to the custody of the New York

State Department of Correctional Services (hereinafter referred to as "DOCS"), on February 10, 2004.

Defendant was first released on parole in this matter on June 1, 2005. Defendant's parole was revoked on January 7, 2010, for his failure to report a change of address and for not keeping his appointments with his parole officer. Defendant was again released on parole on March 30, 2010, and is presently not in the custody of DOCS.<sup>1</sup>

During his incarceration, defendant was not cited for any disciplinary infractions. Despite his failure to complete drug treatment before he was incarcerated, defendant was able to complete the DOCS Alcohol and Substance Abuse Treatment Program while incarcerated.

Defendant's first conviction occurred on December 16, 1992, when he pled guilty to Attempted Criminal Sale of a Controlled Substance in the Third Degree, (Penal Law § 110/220.39[1]), and was sentenced to five years probation. While still on probation, defendant pled guilty to Criminal Possession of a Controlled Substance in the Seventh Degree (Penal Law § 220.03) and was sentenced to time served. Defendant pled guilty in the instant matter on April 12, 2000. After absconding from his court mandated treatment program, defendant pled guilty to Criminal Possession of a Controlled Substance in the Seventh Degree (Penal Law § 220.03), and was sentenced to ten days incarceration.

After defendant was released on parole he was convicted of two minor charges in Jersey City, New Jersey. On April 3, 2007, he was found guilty of failure to give a controlled substance to the police. Subsequent to that conviction, Defendant was found guilty of shoplifting on December 14, 2007. Defendant has no other convictions since his release on parole.

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<sup>1</sup> Defendant filed the instant motion on March 24, 2010, some six days before he was released from DOCS custody, a release which would have made him statutorily ineligible to bring a motion pursuant to CPL 440.46.

## LEGAL ANALYSIS

Criminal Procedure Law § 440.46 is the codification of the third law aimed at reforming the drug sentencing laws in New York State, more commonly referred to as the Rockefeller Drug Laws. Like its predecessors the Drug Law Reform Act of 2004, (L 2004, ch 738, §23), dealing with Class A-I Felony drug offenders, and the Drug Law Reform Act of 2005, (L 2005, ch 643, §1), dealing with Class A-II Felony drug offenders, the Drug Law Reform Act of 2009, (L 2009, ch 56, pt AAA, § 9), allows certain eligible individuals who are serving indeterminate prison terms to petition to be resentenced to a determinate term of imprisonment. The Drug Law Reform Act of 2009, is the extension of that relief to individuals convicted on Class B Felony drug offenses.

In any motion brought pursuant to CPL § 440.46, there is an initial threshold question which must be addressed prior to a determination of the motion on the merits. At issue in the present motion is whether the defendant meets those eligibility requirements. Specifically, the question before this court is whether a defendant in the custody of DOCS only because of a violation of parole is eligible for CPL § 440.46 resentencing.

On June 10, 2010, the First Department squarely addressed the question of whether parole violators are eligible for resentencing. Specifically, the First Department held, “We conclude that the 2009 DLRA, like it’s predecessors, ‘was not intended to apply to those offenders who have served their term of imprisonment, have been released from prison to parole supervision, and whose parole is then violated, with a resulting period of incarceration.’” People v Pratts, 2010 NY Slip Op 04928 (1<sup>st</sup> Dept 2010) (*quoting* People v Bagby, 11 Misc3d 882, 887 [2006]). The First Department continued, “There is no reason to believe that the Legislature intended parole violations to trigger resentencing opportunities.” *Id.* (*citing* People v Mills, 11 NY3d 527, 537 [2008]; Bagby, 11 Misc 3d at 887).

The Second Department has not yet ruled on this issue, and therefore the doctrine of *stare decisis* requires that this Court follow the precedent of the First Department in People v Pratts, 2010 NY Slip Op 04928 (1<sup>st</sup> Dept 2010) until the Second Department or the Court of Appeals announces a contrary rule. *See, Mountain View Coach Lines, Inc v Storms*, 102 AD2d 663 (2d Dept 1984); *see also People v Turner*, 5 NY3d 476, 482 (2005).

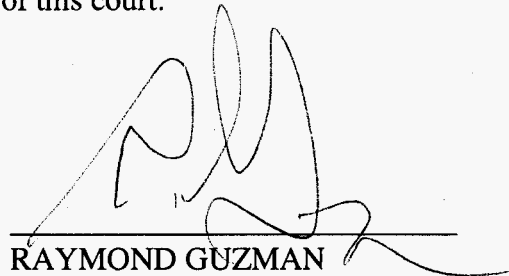
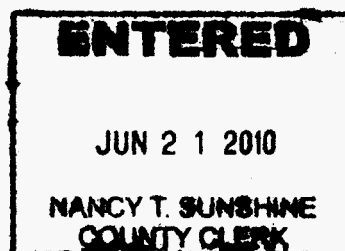
In the instant action, defendant was released to parole supervision on June 1, 2005. Defendant's parole was violated and he was returned to the custody of DOCS from January 7, 2010, until he was released again on March 30, 2010. Defendant was on parole for five years, and only returned to the custody of DOCS because of his parole violation for a brief period of three months. On the eve of his release from DOCS custody, defendant filed the instant motion. It was only due to the parole violation that defendant's opportunity to file for resentencing was triggered. Accordingly, in light of the controlling legal authority, defendant is ineligible to be resentenced pursuant to CPL § 440.46, and his motion is denied.

### CONCLUSION

For the foregoing reasons, defendant's motion for resentencing pursuant to CPL § 440.46 is denied.

This opinion shall constitute the decision and order of this court.

Dated: June 18, 2010  
Brooklyn, New York



RAYMOND GUZMAN  
Justice of the Supreme Court