

People v Ashton

2010 NY Slip Op 32907(U)

June 18, 2010

Sup Ct, Kings County

Docket Number: 7758/03

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 # 7758/03

-against-

RONALD ASHTON,

Defendant.

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

INTRODUCTION

Defendant pled guilty on July 6, 2004, to Criminal Sale of a Controlled Substance in the Third Degree (Penal Law § 220.39[1]) a Class B Drug Felony. On September 9, 2004, defendant was sentenced to an indeterminate term of imprisonment of five (5) to ten (10) years. Defendant began serving his sentence with the Department of Correctional Services on September 17, 2004. Defendant was released on parole in this matter on August 29, 2006. On February 8, 2008, defendant’s parole was revoked based on a federal conviction relating to a arrest for possessing a weapon on December 6, 2004. Defendant is still incarcerated as a result of his parole revocation.

By papers dated April 9, 2010, defendant moved this court, pursuant to CPL 440.46, for an order vacating his indeterminate sentence and for resentencing to a determinate term of imprisonment. The People filed opposition to defendant’s motion on May 24, 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

Defendant was arrested on May 14, 2003, following a large-scale investigation by the Kings County District Attorney's Office. During the course of that investigation, two undercover officers made at least seven recorded buys of cocaine from defendant between February 28, 2003, and April 9, 2003. As a result of this arrest defendant was charged, along with several co-defendants, with two counts of Conspiracy in the First Degree (Penal Law § 105.17); two counts of Conspiracy in the Second Degree (Penal Law § 105.15). Defendant was also individually charged with seven counts of Criminal Sale of a Controlled Substance in the Third Degree (Penal Law § 220.39[1]), and one count of Criminal Possession of a Controlled Substance in the Seventh Degree (Penal Law § 220.03).

On July 6, 2004, before the Honorable Cheryl Chambers, J.S.C., defendant withdrew his previously entered plea of not guilty and entered a plea of guilty to one count of Criminal Sale of a Controlled Substance in the Third Degree (Penal Law § 220.39[1]), in full satisfaction of the indictment. On September 9, 2004, defendant was sentenced to an indeterminate term of imprisonment of five (5) to ten (10) years imprisonment. Defendant entered the custody of the New York State Department of Correctional Services (hereinafter referred to as "DOCS"), on September 17, 2004.

Defendant was first released on parole in this matter on August 29, 2006. Defendant's parole was revoked on February 8, 2008, after he was convicted of a federal gun charge stemming from an arrest in Brooklyn. Defendant is still incarcerated on the instant matter, and it is expected to begin serving his federal prison sentence after he is released.

During his incarceration, defendant has been cited twice for Tier II disciplinary infractions.¹ On November 11, 2005 he was cited for a Tier II infraction for playing chess when he was not permitted to do so. Defendant's other Tier II citation occurred in February 2008 when he was

¹ DOCS has a tiered system of punishment for infractions. Tier I is the lightest form of disciplinary action, Tier II is the intermediate level, and Tier III is the highest level.

found in possession of ibuprofen pills that were not prescribed to him.

Defendant has also completed various programs while incarcerated. He successfully completed the DOCS Residential Substance Abuse Treatment program, and an anger management program called Aggression Replacement Training. Additionally, defendant has completed educational and vocational programs, including obtaining his GED, and completing two phases of the DOCS Transitional Services Center class. Defendant has also completed the Inmate Program Assistance Training which would enable him to assist teachers and instructors and tutor other inmates. Defendant has also availed himself of vocational training opportunities, participating in the General Business program, and earning himself four Department of Labor job titles.

Defendant had no convictions prior to the instant offense. After defendant was released on parole he was convicted of a federal gun charge. Defendant was arrested on December 6, 2006, in front of 619 East 29th Street after being frisked by a police officer who found a loaded revolver.² On December 3, 2007, defendant pled guilty to the federal gun charge and was sentenced to 46 months incarceration. As noted above, defendant is expected to begin serving his federal sentence after he is released from custody on the present matter.

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,

² Defendant was initially charged under Kings County Indictment Number 10689/06 with weapons possession charges. When defendant was indicted on the federal charges stemming from the same arrest, the Kings County District Attorney's Office dismissed Indictment Number 10689/06.

§ 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 (1st 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 (1st 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).

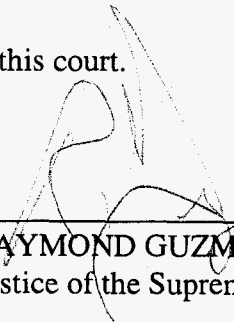
In the instant action, defendant was released to parole supervision on August 29, 2006. Defendant's parole was violated and he was returned to the custody of DOCS on February 8, 2008. Had defendant not been rearrested and had his parole revoked, he would still be out on parole. However, it was only due 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

