

People v Velez

2011 NY Slip Op 30881(U)

February 9, 2011

Supreme Court, Kings County

Docket Number: 8669/02

Judge: James P. Sullivan

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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: PART 3

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THE PEOPLE OF THE STATE OF NEW YORK	: DECISION AND ORDER
	:
-against-	:
	:
IRVING VELEZ,	:
	:
Defendant.	: Indictment No. 8669/02
-----X	

JAMES P. SULLIVAN, J.

By papers motion dated October 5, 2010, defendant has petitioned this court pursuant to the Drug Law Reform Act of 2009 for an order in accordance with CPL §440.46, vacating defendant’s indeterminate sentence of three to nine years’ imprisonment on his February 20, 2003 conviction for criminal possession of a controlled substance in the third degree, a class B drug felony, and resentencing him to a determinate sentence in accordance with C.P.L. § 70.70. The People have filed an answer in opposition and the defendant filed a reply memorandum. The court heard oral arguments on February 1, 2011. The parties have attached records, documents, and reports regarding the matter to be decided by the court. For the reasons stated below, the motion is denied.

Procedural History

On October 10, 2002, on four separate occasions from 10:05 to 11:10 a.m., New York City Police Officer Luis Read observed a buyer hand money to co-defendant, Fernando Delasantos in front of either 277 and 279 Menahan Avenue in Kings County, New York. After each transaction, Mr. Delasantos went to a trash can, removed an object, and handed this object to the buyer , who then left the location. After the fourth transaction, the officer observed the co-defendant, Mr. Delasantos hand money to the defendant, Irving Velez. At 11:20 a.m., Officer Read saw a fifth transaction with an apprehended buyer after which Mr. Delasantos again handed money to the defendant. At 11:30 a.m., Officer Read observed Mr. Velez cross the street and place a Newport cigarette box in the track of a fence. At 11:45 a.m., Officer Read arrested the defendant and his co-defendant, Mr. Delasantos. At the time of the arrest, defendant possessed \$18 in US. Currency and the co-defendant was in possession of \$20. The Newport box was seized and found to contain seven glassines of heroin.

With respect to these transactions, defendant and the co-defendant, Mr. Delasantos were charged under indictment No. 7054/02 with two counts of criminal sale of a controlled substance in or near school ground (P.L. § 220.44[1]); two counts of criminal sale of a controlled substance in the third degree (P.L. § 220.39 [1]); three counts of criminal possession of a controlled substance in the third degree (P.L. § 220.16 [1]), and three counts of criminal possession of a controlled substance in the seventh degree (P.L. § 220.03).

Then on December 5, 2002, at 7:30 a.m., Police Officer Patrick Lantry and other officers executed a search warrant for apartment 1L and the basement of a six-family residential building at 277 Menahan Street in Brooklyn, New York. After entering the location, Officer Lantry observed the defendant sitting on the kitchen floor of apartment 1L. After asking him if he lived there, the defendant responded that he had been living there for a few months. The officer observed nine empty yellow bottles with black tops, as well as fifty empty green ziplock bags on the kitchen table. Additionally he observed a key located on the stove. Using this key, Officer Lantry was able to open the padlock on the basement door. Entering the basement, the officer observed a clear ziplock bag of cocaine, four clear plastic bags of cocaine, two clear plastic bags of heroin, nine glasses envelopes of heroin, twelve glassine envelopes of cocaine, sixteen green ziplock bags of cocaine, and twelve black-topped yellow bottles of cocaine. The heroin weighed over three-quarter ounce, and the cocaine weighed over two and one-eighth ounce. Additionally found in the basement was one clear plastic ziplock bag containing one hundred empty green ziplock bags, an electronic scale, and two mixers with residue.

For this conduct, defendant was indicted under Kings County Indictment Number 8669/02 with criminal possession of a controlled substance in the second degree (P.L. § 220.18 [1]), three counts of criminal possession of a controlled substance in the third degree (P.L. § 220.16 [1], [12]), two counts of criminal possession of a controlled substance in the seventh degree (P.L. § 220.03)' and two counts of criminally using drug paraphernalia in the second degree (P.L. § 220.50 [2], [3]).

On January 24, 2003, the defendant pleaded guilty to criminal possession of a controlled substance in the third degree under Indictment number 8669/02 and to criminal sale of a controlled substance in the third degree under Indictment Number 7054/02, both class B drug felonies, in satisfaction of both indictments. Under the plea agreement, defendant was promised concurrent indeterminate prison terms of three to nine years for the possession under Indictment Number 8669/02 and one to three years for the sale under Indictment 7054/02.

On February 20, 2003, the defendant was sentenced as promised (Garry, J. at plea; Sullivan, J. at sentence). Defendant did not appeal from his judgment of conviction.

Defendant entered the state prison for the instant offenses on February 28, 2003. At that time he entered the New York State Department of Correctional Services ("DOCS") with eighty five days of jail credited to his sentence.

Defendant was paroled on these offenses on September 25, 2003. However, on June 1, 2005, a parole warrant was issued for defendant's arrest because he had been failing to report to his parole officer and had changed his address without permission. On November 10, 2006, the defendant pleaded guilty to the charge of failure to report, his parole was revoked, and he was sent to the Willard Drug Treatment Campus. On March 6, 2007, defendant was again released from custody to parole supervision.

Thereafter, defendant was charged with another violation of parole on April 20, 2007. This violation was based on the following three specifications: 1) failure to report to his parole officer; 2) leaving his residential program without permission or consent; and 3) failure to attend his outpatient treatment program.

Additionally, on June 10, 2007, defendant was arrested in Palm Beach County, Florida, and charged with possession of cocaine (Fla. Stat. § 893.13 [6] [A]), a felony in the third degree, use or possession of drug paraphernalia (Fla. Stat. § 893.147 [1]), a misdemeanor in the first degree, and carrying a concealed weapon (Fla. Stat. § 790.01 [1]), a misdemeanor in the first degree. It appears from defendant's criminal history record that the possession of cocaine, as well as the possession of drug paraphernalia were dropped by the Florida District Attorney on July 9, 2007. Subsequently, on July 10, 2007, defendant pleaded guilty to the weapon charge. Defendant was sentenced to "CONFINEMENT-IN COUNTY." As a result of these incidents, defendant's parole was revoked for a second time on July 27, 2007. He was restored to the Willard Drug Treatment Campus. On December 31, 2007, defendant was released from custody to parole supervision for a third time. As part of his release, the defendant was required to participate in a drug treatment program at Cumberland Diagnostics in Brooklyn, New York.

Defendant then was charged with further violation of parole on April 11, 2008. This violation was based on the following five specifications: 1) failure to report to his parole officer; 2) failure to notify his parole officer of a change in residence; 3) failure to abide by his curfew; 4) failure to participate in a substance abuse treatment program as mandated; and 5) removal of two diamond rings from Melissa Cartagena. As a result of these activities, the defendant's parole was revoked for a third time and he was readmitted into DOCS's custody.

During his time in prison, the defendant committed a Tier II disciplinary infraction for Violent Conduct and Unhygienic Act July 10, 2003. The infraction was based upon shoving and spitting on another inmate. Mr. Velez then completed the Shock Incarceration program at Moriah. As part of the program, he completed courses in alcohol and substance abuse treatment, community living and socialization skills, remedial education, basic high school equivalency classes and testing, and intensive instruction in military, courtesy, drills and physical training. He further graduated from the program at the Willard Drug Treatment Campus, where he was sent after his parole had been revoked. Since being re-incarcerated on October 14, 2008 he has worked as a dorm porter and as a kitchen helper in food services. An Inmate Progress Report issued on July 14, 2009 describes Mr. Velez as a good worker, with "good work habits" and a "good attitude" who "does what is asked without asking any questions." The date of defendant's next parole hearing is March 2011. Defendant's conditional release date is January 9, 2012. Defendant's maximum expiration date is September 4, 2013.

Conclusions of Law

Criminal Procedure Law §440.46 is the codification of the Drug Law Reform Act of 2009, which allows defendants convicted of a class B, C, or D drug felony to apply to the court for re-

sentence pursuant to Penal Law §§ 60.04 and 70.70. The statute explicitly limits the applicability of the sentencing provisions to those defendants who are presently in the custody of the Department of Corrections (“DOCS”). *See*, CPL § 440.46 (1). This statute is similar in nature to the 2004 and 2005 Drug Reform Act which permitted defendants on a class A-I or A-II drug felony offense to apply to the sentencing court to be resentenced pursuant PL §70.71. (L 2004, ch. 738, §23, [DLRA1], L 2005, ch 643, §1, [DLRA2]). The court notes that CPL §440.46(3) specifically states that “the provisions of section 23 of chapter seven hundred thirty eight of the laws of 2004 (DLRA1) shall govern the proceedings on and determination of a motion brought pursuant to this section.”

With regard to the instant matter, the People oppose the defendant’s motion, contending first that the defendant is not eligible for resentencing as he was “not in the custody” of DOCS within the meaning of the drug reform legislation. The People contend that defendant is ineligible because the cause of his incarceration at the time he applied for resentencing was the revocation of the parole to which he had previously been released. The People further argue that if the defendant were eligible, “substantial justice” dictates that he not be resentenced. Defendant counter argues that a defendant on parole supervision, or even one who has violated parole and has been returned to custody, continues to serve the original sentence. Thus, defendant argues that the language of CPL §440.46 applies to individuals returned to custody on parole violations (as well as to persons who have not yet been released to parole supervision). The defendant further argues that “substantial justice” dictates that the defendant be resentenced.

The court has carefully reviewed the moving papers, related documents, and relevant court decisions pertaining to this matter. Additionally, on February, 1, 2011, the court heard oral arguments by the parties. Initially, the appellate courts have held that a defendant becomes ineligible for resentencing under DLRA 2004 and DLRA 2005 when he is released to parole from incarceration and remains ineligible even if he is later incarcerated for violating the conditions of his parole. (*See, People v. Mills/Then*, 11 N.Y.3d 527 [2008]; *People v. McCloud*, 38 A.D.3d 1056 [3rd Dep’t 2007], *lv. dismissed*, 8 N.Y.3d 947 [2007]). In *Mills*, the Court of Appeals specifically held that “once a defendant has been released to parole supervision for a class A-II drug felony conviction, he or she no longer qualifies for 2005 DLRA relief for that particular conviction.” (*Mills/Then*, 11 N.Y.3d at 536-537).

Similarly, the First Department concluded that the 2009 Drug Law Reform Act (L.2009, ch.56), “was not intended to apply to those offenders who have served their term of imprisonment, have been released from parole supervision, and whose parole is then violated, with a resulting period of incarceration” (*People v. Pratts*, 74 A.D.3d 536 [1st Dep’t 2010], *leave to appeal granted*, 2010 N.Y. LEXIS 3406 [October 1, 2010] [Jones, J.]). (*See also, People v. Cuello*, 908 N.Y.S.2d 586 [1st Dep’t 2010] [citing *Pratts*]; *People v. Paulin*, 74 A.D.3d 685 [1st Dep’t [citing *Pratts*], *leave to appeal granted*, 15 N.Y.3d 854 [2010] [Pigott, J.]). The ameliorative provisions of the 2009 DLRA were enacted to reduce the period of incarceration a person would serve for committing a crime involving the sale or possession of controlled substances. Holding that “there is no reason to believe that the Legislature intended parole violations to trigger resentencing opportunities,” the Court determined that, “if defendant had not violated his parole conditions, he would not have been in the

custody of the Department of Correctional Services when he moved to be resentenced, and he would therefore have been ineligible for resentencing” (*People v. Pratts*, 74 A.D.3d at 537, citing, *People v. Rodriguez*, 68 A.D.3d 676 [2009]; *People v. Mills*, 11 N.Y.3d at 537; *People v. Bagby*, 11 Misc.3d at 887).

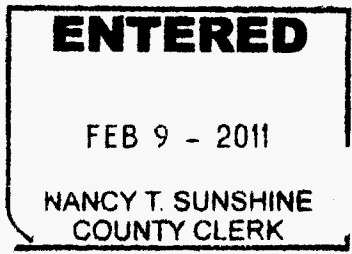
Thus, as of this time, there is no Appellate Division, Second Department, or Court of Appeals decision on this issue, the First Department’s decision is binding on this court. *See, Mountain View Coach Lines v. Storms*, 102 A.D.2d 663 (2d Dep’t 1984). Therefore, this court finds that the provisions of DLRA 2009 do not apply to defendant, Irving Velez, who was released on parole from custody on his drug conviction on three occasions, but was reincarcerated due to a revocation of his parole on November 10, 2006, July 27, 2007, and October 14, 2008. Accordingly, the court finds that the defendant is not eligible for resentence under DLRA 2009. *People v. Pratts*, 74 A.D.3d at 536.

Even though this court has held that defendant is not eligible for resentencing pursuant to C.P.L. § 440.46, if the defendant were eligible this court would deny the application in the interests of “substantial justice.” In light of defendant’s repeated refusals to comply with the terms of his parole, his instances of failing to report to his parole officer, his absconding, his re-arrest while on parole, and his unwillingness to participate in mandated treatment when he is released to parole, the court finds that if the defendant were eligible for resentencing, “substantial justice” dictates that Mr. Velez’s application should be denied.

Therefore, defendant’s motion for resentencing pursuant to CPL §440.46 is denied. Defendant’s original sentence remains in effect.

This constitutes the decision and order of the court.

Dated: February 9, 2011



JP
James P. Sullivan, J.S.C.