

People v Simon

2011 NY Slip Op 32777(U)

July 25, 2011

Supreme Court, 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

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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

By Decision and Order dated June 18, 2010, this Court held that defendant was ineligible for resentencing pursuant to CPL § 440.46 based on the controlling legal authority at the time, People v Pratts, 74 AD3d 536 (1st Dept 2010).¹ On March 15, 2011, the Second Department handed down the decision People v Phillips, 82 AD3d 1011 (2d Dept 2011), which rejects the holding in Pratts, and finds that a movant’s status as a parole violator does not make them ineligible to apply for resentencing. Id. at 1012.

By motion papers dated April 8, 2011, defendant has moved this Court for leave to reargue his prior motion for resentencing on the basis that there has been a change in the law since the Court’s initial decision. Prior to receiving the People’s opposition papers, defendant filed a supplemental memorandum of law arguing that certain Legislative changes to the organization of the Executive branch of New York State government removed all procedure hurdles for defendant to be deemed eligible for resentencing. On June 28, 2011, the Court of Appeals issued two decisions, People v Paulin, 2011 NY Slip Op 05544, and People v Santiago, 2011 NY Slip Op 05545, which have rendered this argument moot.

¹ Because of the recent passage of CPL § 440.46 by the Legislature, the First Department had addresses the eligibility question prior to the Second Department resolving that question, as such, this court followed the holding in People v Pratts, 74 AD3d 536 (1st Dept 2010) pursuant to Mountain View Coach Lines, Inc v Storms, 102 AD2d 663 (2d Dept 1984), and People v Turner, 5 NY3d 476, 482 (2005).

The People filed opposition papers on May 24, 2011, wherein they concede the change in law and argue that despite defendant's eligibility under CPL § 440.46, substantial justice dictates that the defendant's application be denied on the merits. Defendant filed a reply memorandum of law on June 2, 2011, which speaks specifically to the merits of the underlying application.

The Court, grants defendant leave to renew his argument pursuant to CPLR § 2221(e), and will consider the merits of the underlying application. Having reviewed all of the paperwork submitted by the parties in association with this application, as well as having reviewed the prior application and associated exhibits, the Court finds that substantial justice dictates the denial of defendant's application for resentencing pursuant to CPL § 440.46.

FINDING OF FACTS

The Court has granted leave to defendant to renew his application for resentencing pursuant to CPLR § 2221(e) on the grounds that there has been a change in the law that would change the prior determination on his eligibility for resentencing. In the Court's previous Decision and Order it had included a finding of facts, as required by CPL § 440.46. Defendant has included that opinion as Exhibit A to his moving papers. Insofar as the facts remain the same, and only the law has been changed, the Court will incorporate the original finding of facts as applicable to the instant decision.

LEGAL ANALYSIS

Defendant has moved this court to reargue the earlier denial of his motion for resentencing on the grounds that there was a change in the law that would change the prior determination on his eligibility for resentencing. Motions which pertain to prior orders of the court are properly brought under CPLR § 2221. Where the grounds for seeking a new decision are as described above, the proper vehicle for such a motion is CPLR § 2221(e), a motion for leave to renew.

A motion to renew pursuant to CPLR § 2221(e) has three enumerated requirements. The motion to renew must be identified as such. CPLR § 2221(e)(1).² The motion must be based upon new facts not offered on the prior motion that would change the prior determination, or a subsequent change in law which would change the prior determination. CPLR § 2221(e)(2). And finally, it must contain reasonable justification for the failure to present such facts on the prior motion. CPLR § 2221(e)(3). However, because this application deals with a change in the law, the third requirement is unnecessary for defendant to advance his motion in the instant matter.

In assessing the previous motion, this Court relied on the decision of the First Department in People v Pratts, *supra*, and concluded that defendant was not eligible for resentencing based on his status as a parole violator. When that decision was made, the Second Department had not rendered a decision on the matter of parole violator eligibility for resentencing, and this Court was bound by the First Department's determination. *See, Mountain View Coach Lines, Inc v Storms*, 102 AD2d 663 (2d Dept 1984), and People v Turner, 5 NY3d 476, 482 (2005).

In People v Phillips, *supra*, the Second Department explicitly rejected the reasoning in Pratts, and held that a movant's status as a parole violator had no bearing on their eligibility for resentencing under CPL § 440.46. This Court, being in the jurisdiction of the Second Department is now bound by the holding in Phillips.

Additionally, during the pendency of this motion, the Court of Appeals clarified what was a clear split between the First and Second Departments on the issue of parole violator eligibility. In

²Though defendant titled his application as a motion to reargue, the contents of the moving papers made clear that the application was more properly a motion to renew. The People answered the motion accordingly, and this court will proceed as if the defendant had identified the moving papers as a motion to renew.

People v Paulin, NY Slip Op 05544 (2011) the Court of Appeals reversed the First Department's determination that parole violator's were ineligible for resentencing holding, "There is no need to read into the 2009 DLRA a non-textual exception for parole violators." Paulin, NY Slip Op at 4.

Based on the new holdings in People v Phillips, *supra*, and People v Paulin, *supra*, there has been a fundamental change in the law since defendant's motion for resentencing pursuant to CPL § 440.46 was denied which changes the outcome of that decision. Accordingly, defendant has satisfied the requirements for a motion to renew under CPLR § 2221(e).

With no procedural barriers to defendant's application for resentencing pursuant to CPL § 440.46, the Court will now examine that application on the merits.

A motion for resentencing pursuant to CPL § 440.46 should be granted unless substantial justice dictates that it should be denied. *See*, People v Avila, 84 AD3d 1259 (2d Dept 2011); People v Braithwaite, 62 AD3d 1019 (2d Dept 2009); People v Beasley, 47 AD3d 639 (2d Dept 2008). "In making its determination, a court may consider any relevant facts, including, but not limited to, the defendant's institutional disciplinary record and his willingness to participate in treatment while incarcerated." People v Avila, 84 AD3d at 1259 (*citing* L.2004, ch 738, § 23; CPL § 440.46[3]; and People v Vega, 40 AD3d 1020 [2d Dept 2007]). Additionally, "a person's status as a parole violator may be relevant in determining whether 'substantial justice dictates that the application should be denied' on the merits." People v Phillips, 82 AD3d at 1012 (*quoting* L.2004, ch 738, § 23; and CPL § 440.46[3]).

In the instant matter, defendant was arrested on September 8, 1999, after selling ten dollars worth of crack cocaine to an undercover police officer. 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 completed the program his felony would be dismissed and he would have only a misdemeanor conviction on his record.

After his guilty plea, defendant was placed in three different drug treatment programs and yet did not complete any of those programs. After absconding from one of his court mandated treatment programs, 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. Some four and one-half years after defendant was arrested in connection with this case, he was sentenced 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 with the felony charge.

Defendant entered the custody of the Department of Correctional Services (DOCS) on February 10, 2004, and was released to parole supervision on June 1, 2005. While on Parole defendant was convicted of two crimes in Jersey City, New Jersey. On April 3, 2007, defendant was found guilty of failure to give a controlled substance to the police, and eight months later defendant was found guilty of shoplifting on December 14, 2007. 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.

In his motion papers, defendant now asserts that he is sober and fully compliant with his parole obligations. In addition to those positive changes, defendant is also currently employed and living the life of a law-abiding citizen. These are positive accomplishments which the Court

acknowledges are very meaningful in light of defendant's past history and struggles with substance abuse. However, it is those past struggles which instruct this Court that substantial justice dictates that the instant application be denied.

Had defendant successfully completed any one of the three drug treatment programs he was afforded the opportunity to participate in, he would have avoided this felony conviction. The sentencing court gave defendant considerable slack in his attempts to complete the programs, and yet defendant could not do so. Defendant pled guilty to one drug charge after his guilty plea on April 12, 2000, and was found guilty of another following his sentencing, incarceration, and release to parole supervision. Defendant's inability to comply with the conditions of his plea, or of his parole illustrate why he needs to be tethered to a structured lifestyle as mandated by the conditions of parole. Releasing defendant without that support system would serve no purpose other than to relieve him of the organization and structure he so desperately needs. Accordingly, defendant's motion to be resentenced is denied.

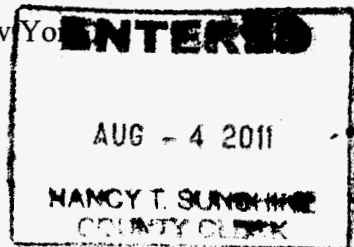
CONCLUSION

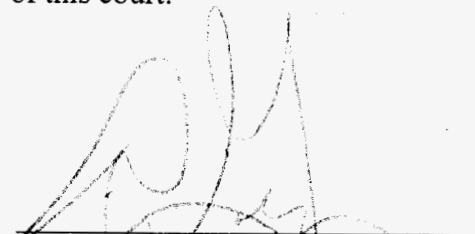
For the foregoing reasons, defendant's motion for resentencing pursuant to CPL § 440.46 is denied.

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

Dated: July 25, 2011

Brooklyn, New York




RAYMOND GUZMAN
Justice of the Supreme Court

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York 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 such 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. See 22 NYCRR §671.5.



RAYMOND GUZMAN
Justice of the Supreme Court

