

People v Howard

2012 NY Slip Op 30456(U)

January 6, 2012

Supreme Court, Kings County

Docket Number: 3851-00

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-

DARREN HOWARD,

Defendant.

Indictment No. 3851-00

-----X
JAMES P. SULLIVAN, J.

Defendant appealed this court’s August 19, 2010 order denying his motion for resentencing of his conviction for criminal sale of a controlled substance in the third degree (P.L. § 220.39 [1]), a class B drug felony, pursuant to C.P.L. § 440.46. The Appellate Division, Second Department, citing *People v. Paulin*, 17 N.Y.3d 238 (2011), held that this court erred in denying the defendant’s motion on the ground that he was ineligible due to his parole violator status. The Appellate Division remitted the matter to this court “for further proceedings and a new determination of the defendant’s motion.”

This court has thoroughly reviewed the new submissions of the parties and the court file. A hearing was conducted and the court heard oral arguments by the parties on October 31, 2011. After submissions by the prosecutor and defense counsel, Mr. Howard had an opportunity to address the court.

Procedural History

As indicated in the court’s initial decision, this matter stems from an incident occurring on April 24, 2000, at 688 MacDonough Street in Brooklyn, New York, where the defendant sold two vials of crack cocaine to an undercover police officer for pre-recorded buy money. The defendant was arrested, and buy money as well as an additional \$144 in U.S. currency were recovered from the defendant’s person. Further, seven vials of crack cocaine were recovered from a CD player in the car, and sixteen vials of crack cocaine were recovered in the vehicle’s ashtray. Both sets of vials matched the vials that defendant sold.

With respect to this transaction, defendant was charged under indictment No. 3851/00 with criminal sale of a controlled substance in the third degree (P.L. § 220.39 [1]), criminal sale of a controlled substance in the fifth degree (P.L. § 220.31), two counts of criminal possession of a controlled substance in the third degree (P.L. § 220.16 [1]), criminal possession of a controlled substance in the fifth degree (P.L. § 220.06 [5]), and two counts of criminal possession of a controlled substance in the seventh degree (P.L. § 220.03).

The defendant was convicted, upon his plea of guilty, to criminal sale of a controlled substance in the third degree (P.L. § 220.39 [1] (Marrero, J. on plea). On September 28, 2000, the defendant was sentenced, as a second felony offender, to an indeterminate prison term of seven and one-half to fifteen years (Lott, J, at sentence). Defendant did not appeal his judgment of conviction.

Defendant was paroled on this offense on May 15, 2005. However, on February 8, 2007, he was arrested for an incident occurring at 424 Bainbridge Avenue in Kings County, New York. In this matter, after entering the residence of the victim, a police officer observed defendant exiting the gate of a building at this location while carrying a bag. The bag contained a computer, a play station, jewelry, and bolt cutters. Upon further investigation, the police officer determined that these items belonged to the complainant who had an apartment in the building. The apartment had a broken skylight which was not broken when the complainant had left for work that morning.

For this incident, the defendant was charged under Kings County Indictment Number 1559/07 with burglary in the second degree (P.L. § 140.25 [2]) and lesser charges. On May 24, 2007, the defendant pled guilty to attempted burglary in the third degree (P.L. § 110.00/14.20) in full satisfaction of the indictment. On June 12, 2007, the defendant was sentenced, as a second felony offender, on the attempted burglary to a prison term of one and one-half to three years (Mangano, J. at plea and sentence). Defendant did not appeal this judgment of conviction.

As a result of this new case, the defendant's parole on the instant conviction was revoked, and he was returned to state prison. However, Mr. Howard is presently released from custody and has been continued on parole supervision.

With respect to defendant's criminal history, he has an extensive record dating back to 1982. Excluding the felony conviction in the instant case, defendant has six convictions for felonies and four convictions for misdemeanors. Three of defendant's felonies were committed while he was on parole. Only two of defendant's seven felonies were for selling drugs. Rather, defendant has two prior violent felony convictions. Aside from his recent conviction for attempted burglary in the third degree, defendant's criminal conduct includes two robbery convictions, a conviction for grand larceny, and a conviction involving gun possession.

Further, defendant has a history of parole violations. Previously, the defendant was released on parole on three occasions, including the instant case. Each time, defendant's parole was revoked. His most recent revocation occurring as recently as 2007 due to his conviction of attempted burglary in the third degree.

Defendant received one Tier II violation during his original incarceration in this case between October 2000 and May 2005. Since his return to prison on the parole violation, the defendant has not received any disciplinary citations. In July, defendant completed the Alcohol and Substance Abuse Treatment ("ASAT") program. Defendant also completed ASAT in 2003. Additionally, while Mr. Howard was incarcerated his most recent "inmate progress reports" from 2008 and 2009 were very positive, indicating that the defendant received all "excellent" or "above average" grades. Mr.

Howard has become employed since his release from prison. The court was further informed that defendant was recently promoted on his job cleaning vents at restaurants during the evening. Further, it appears that defendant is involved in a relationship where he helps to support his girlfriend's three children, none of whom are his.

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. 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 re-sentenced 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.”

According to C.P.L. §440.56 (3), the defendant shall be resentenced pursuant to Penal Law §§ 60.04 and 70.70 unless “substantial justice dictates” that resentencing be denied, referencing § 23 of chapter 738 of the laws of 2004 (the “Drug law Reform Act of 2004”). (*See, People v. Love*, 46 A.D.3d 919 []). In determining whether to grant or deny and eligible defendant resentencing, C.P.L. § 440.46 (3) directs that the court may consider defendant’s participation in “treatment or other programming while incarcerated and such person’s disciplinary history.” In making its determination, a court may consider any relevant circumstances, including a defendant’s criminal history, his prior use of violence; his status as a parole violator, and subsequent convictions (*see, People v. Avila*, 84 A.D.3d 1259 [2d dept. 2011], *lv. denied* 17 N.Y.3d 804 [2011]; *People v. Curry*, 52 A.D.3d 732 [2d Dept. 2008]; *People v. Vega*, 40 A.D.3d 1020 [2d Dept. 2007], *lv. denied*, 9 N.Y.3d 852 [2006]; *People v. Stamps*, 50 A.D.827 [2d Dept. 2008], *lv. denied*, 10 N.Y.3d 939 [2008]).

With regard to the instant matter, the People oppose the defendant’s motion, contending that “substantial justice” requires that the defendant’s application be denied. They point out that defendant’s extensive criminal history which aside from his instant drug felony conviction, includes six felony convictions, and four misdemeanor convictions dating back to 1982. Three of defendant’s seven felonies were committed while on parole. This court notes that this continuous array of arrests and convictions include two convictions for robbery; a conviction for attempted criminal possession of a weapon; grand larceny from an individual; and an attempted burglary of a residence. Additionally, some of defendant’s arrest for new felonies occurred while he was a liberty pending a prior charge. On September 22, 1992, while defendant’s robbery case was pending, defendant was arrested in Kings County for criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the seventh degree. On December 17, 1992, defendant pled guilty to attempted criminal possession of a weapon in the third degree, a class E violent felony. In

addition to his history of criminal convictions, defendant also has a history of parole violations. Previously, the defendant was released on parole on three occasions, including the instant case. Each time, defendant's parole was revoked.

More disturbing to this court is that after again being released to parole on May 15, 2005, in the present case, defendant committed the acts resulting in him being charged with burglary in the second degree. With respect to this charge defendant ultimately pled guilty to the charge of attempted burglary in the third degree. In this case, the defendant entered into the residence of the victim and was seen by the police leaving the premises carrying a bag containing items belonging to the complainant. After this incident, the defendant was once again held to be in violation of his parole status. Thus, his parole was revoked for the third time and the defendant was once more incarcerated on the instant case. A further review by the court of defendant's lengthy record demonstrates that although he was subject to increasingly longer sentences, defendant continued his criminal career committing the drug sale in the instant case, and then subsequently a burglary of a residence.

The court has considered the evidence of rehabilitation while defendant was incarcerated, and recognizes that the defendant has done very well since his release from prison. However, the court does not believe that these positive factors outweigh the defendant's lengthy criminal history, where most of his charges have been for non-drug crimes. Additionally, as to his criminal history, defendant has two prior violent felony convictions, and he has repeatedly preyed upon victims by engaging in theft-related crimes. Further, the court is concerned that defendant's repeated history of parole violations demonstrates that defendant needs to be restricted by the structured lifestyle mandated by the conditions of parole and that a lack of this support structure would serve no purpose other than to relieve him of the organization and structure he so desperately needs.

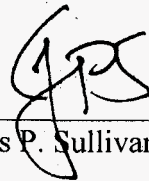
Thus, in light of the foregoing, namely, defendant's lengthy criminal history including prior violent felony convictions, his history of parole violations, the fact that as recently as 2007 he committed a new felony while on parole for the instant conviction, this court finds that "substantial justice" dictates that Mr. Howard's motion is denied (*see, People v. Curry, supra*).

Additionally, the People reassert that defendant was previously adjudicated a second violent felony offender under Kings County Indictment Number 11087/92 rendering him ineligible for resentencing under C.P.L. § 440.46 (5) (b) as it constitutes an exclusion offense. Upon reflection the court agrees with the People's position. Based upon a review of the original case file including the court action sheet, the comments in the court record, and a review of the imposed sentence, this court finds that defendant was previously adjudicated a second violent felony offender and is precluded for resentencing on this basis (C.P.L. § 440.46 [5] [b]).

Therefore, for all the above reasons, 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: January 6, 2012


James P. Sullivan, J.S.C.

ENTERED
JAN 6 2012
NANCY T. SUNSHINE
COUNTY CLERK