

People v Gonzalez
2012 NY Slip Op 32585(U)
September 21, 2012
Supreme Court, Kings County
Docket Number: 5649/96 & 5350/97
Judge: Deborah A. Dowling
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MEMORANDUM

SUPREME COURT: KINGS COUNTY
(Criminal Term, Part 1)

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PEOPLE OF THE STATE OF NEW YORK,

DECISION AND ORDER

By: Justice Deborah A. Dowling

-against-

Dated: September 21, 2012

Indictment No: 5649/96 & 5350/97

MARIO GONZALEZ,

Defendant(s).

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The defendant submitted this instant motion seeking for re-sentencing pursuant to 2009 Drug Law Reform Legislation, Chapter 56 of the Laws of New York, section 9 (hereinafter DLRA 3). The defendant contends he is entitled to re-sentencing in this matter pursuant to Criminal Procedure Law §440.46. The defendant argues he should be re-sentenced to the low end of the range now applicable under Penal Law§60.04, Penal Law§70.70 and Criminal Procedure Law § 440.46 . After review of the papers submitted by the defendant and the People, the defendant's motion is **denied** for the reasons stated herein.

PROCEDURAL HISTORY

On April 29, 1996, the defendant was arrested in connection with a buy and bust operation. The defendant was charged under Indictment 5649/96 with Criminal Possession

of a Controlled Substance in the Third Degree, Criminal Sale of a Controlled Substance in the 3rd Degree, Criminal Sale of a Controlled Substance in the 5th Degree and Criminal Possession of Controlled Substance in the 7th Degree. While this matter was still pending, the defendant was again arrested, on May 11, 1997, for selling heroin and charged under Indictment 5350/97, with Criminal Sale of a Controlled Substance in the 3rd Degree, Criminal Possession of a Controlled Substance in the Third Degree and Criminal Possession of a Controlled Substance in the 7th Degree.

On July 22, 1997, the defendant entered a guilty plea to Criminal Possession of a Controlled Substance in the 3rd Degree and Criminal Possession of a Controlled Substance in the 7th Degree, under indictment 5350/97, in full satisfaction of the charges therein. The defendant was sentenced to undergo drug rehabilitation at a treatment facility. A condition to the plea agreement was successful completion of a drug treatment program. If the defendant failed to successfully complete the treatment program he would be subject to a sentenced of five (5) to ten (10) years incarceration.

On August 21, 1997, the defendant also entered a guilty plea to Criminal Sale of a Controlled Substance in the 3rd Degree and Criminal Possession of a Controlled Substance in the 7th Degree. The defendant was also sentenced to submit to a drug treatment program. The plea required the defendant to successfully complete a drug treatment program and failure to complete the program would subject the defendant to five (5) to ten (10) years incarceration to run concurrent with the first sentence. The defendant entered a drug

treatment program, in September, 1998.

The defendant did not successfully complete treatment and was terminated by the program, on April 22, 1999. In 2000, the defendant was returned to the court based upon a warrant for his arrest in connection with another misdemeanor drug possession offense. The defendant plead guilty to disorderly conduct and was sentenced to ten days in jail. Upon his release, a month later, the defendant was involved in an altercation with his then girlfriend. It was alleged the defendant punched his girlfriend, in the nose, and broke property in her apartment. The altercation ensued after the defendant became enraged at his girlfriend, believing she may have become involved in another relationship. The defendant plead guilty to Assault in the Third Degree as a result of this incident and was sentenced to four months in jail.

On July 12, 2000, the defendant appeared before this court based upon his inability to complete a drug treatment program, a condition to his original sentence. This Court sentenced the defendant to the agreed upon sentence of five (5) to ten (10) years incarceration based upon the defendant's inability to successfully complete the terms of the plea. The defendant was incarcerated at that time. The defendant was incarcerated for a period of three years during which the defendant committed three disciplinary infractions.

The defendant was released to parole, on September 24, 2003, but has since had his parole status revoked five times. On July 19, 2005, the defendant's parole was revoked because he absconded from parole supervision. The defendant was incarcerated for four (4) months as a result of this violation and released on November 23, 2005. The defendant's

parole was again revoked, on December 19, 2007, when the defendant failed to notify his parole officer of his current residence. The defendant's parole status was restored but he was required to attend a drug treatment program at the Willard Drug Treatment Program based upon that violation.

In May of 2008, the defendant again violated the terms of his parole by failing to report to his parole officer. A warrant was issued for the defendant's arrest, on June 20, 2008. On August 6, 2008, the defendant was arrested in Rhode Island and charged with domestic felony assault and being a fugitive. The defendant plead guilty to domestic felony assault in Rhode Island and sentenced to five years probation. The defendant was returned to New York jurisdiction based upon violating the terms of parole. The defendant was sentenced to serve five (5) months in prison at that time and released on June 19, 2009.

However, by the summer of 2010, the defendant resumed his drug use. The defendant's parole was again revoked on September 2, 2010, based upon the defendant's use of opiates. The defendant received treatment at a forty-five (45) day residential treatment program. On January 18, 2011, the defendant again violated the terms of his parole when he entered a plea of guilty to trespass in an unrelated matter. A revocation hearing was not conducted as a result of this violation.

On January 31, 2012, the defendant submitted a motion seeking re-sentencing. This court denied the motion, in a decision dated, May 8, 2012, finding the defendant absconded from custody and therefore was not within reach of the court's jurisdiction. At that time, the

defendant's parole officer's reported the defendant had failed to report to parole and during the defendant's last contact with parole he tried to falsify a urine test by mixing water with his urine sample.

During the pendency of the initial motion, the defendant was arrested, on April 20, 2012, in Bronx County and charged with Criminal Trespass in the Second Degree. The defendant's parole was again revoked, on June 15, 2012, and he was returned to a New York State correctional facility. The defendant submitted this motion, on June 28, 2012, seeking re-sentencing pursuant to drug reform law. The defendant contends he meets the criteria for re-sentencing. The People do not oppose the defendant's motion based upon the contention the defendant only has three months remaining until the expiration of the maximum term of his sentence. The People argue while there exists factors weighing against re-sentencing, society has little to gain by keeping the defendant incarcerated for the remaining three months until the expiration of the maximum time of his sentence.

CONCLUSIONS OF LAW

The issue presented for the court's consideration is whether the defendant is entitled to re-sentencing of his drug conviction pursuant to DLRA 3 codified as Criminal Procedure Law § 440.46. CPL § 440.46 provides in pertinent part:

any person in the custody of the department of correctional services convicted of a class B felony offense defined in article two hundred twenty of the penal law which was committed prior to January thirteenth, two thousand five, who is serving an indeterminate sentence with a maximum term of more than three years, may, except as provided in subdivision five of this section, upon notice to get the appropriate district attorney, apply to be re-sentenced to a

determinate in accordance with sections 60.04 and 70.70 of the penal law in the court which imposed the sentence.

The legislature enacted the drug re-sentencing laws for the purposes of readdressing the wrongs of the draconian Rockefeller-era drug laws which imposed lengthy prison terms for nonviolent drug offenses often perpetrated by drug addicted individuals who committed crimes to further their drug habit. The legislative intent was to reform the sentencing structure of drug laws in New York State while providing non-violent drug offenders with the opportunity to reduce their sentences to more conscionable prison terms. To that end the statute creates a presumption in favor of granting a motion for re-sentencing absent a showing that substantial justice dictates the application ought be denied. *See People v. Beasley*, 47 A.D. 2d 639 (2nd Dept 2008), *People v. Myles*, 90 A.D.3d 952 (2nd Dept 2011).

In determining whether there exists factors leading to a finding that substantial justice dictates a particular motion seeking re-sentence under the drug law reform be denied, the court is empowered to exercise judicial discretion. In exercising its discretion the court is presented with the dilemma of what constitutes substantial justice in favor of denying a motion for re-sentencing. Relevant factors on the issue of substantial justice which would dictate denial of a motion seeking re-sentencing are the defendant's institutional record of confinement, the defendant's prior criminal history, the quantity of drugs underlying the current offense, whether the current offense was committed while the defendant was on parole or probation, whether the defendant has shown remorse and whether the defendant has

a history of parole violations. *See People v. Overton*, 86 A.D.3d 4 (2nd Dept. 2011).

Furthermore, the Court may consider a defendant's institutional record in determining whether to grant the re-sentencing motion. Specifically, C.P.L. §440.46(3) provides, the court determination shall include consideration of a defendant's institutional record but shall not be limited to the defendant's willingness to participate in treatment or other programming. The court may also consider the defendant's disciplinary record while incarcerated and a defendant's parole violation status, if any. However, the factors detailed are to be considered but no one factor is dispositive on the issue of whether to grant re-sentencing.

The Legislature did not intend for the automatic re-sentencing of felony drug sentences. There is a strong presumption in favor of re-sentencing, but, the Court is empowered with the discretion to look at the particular facts and circumstances of each defendant who seeks to be re-sentenced and determine whether there are any factors in the record which would outweigh that presumption. It is a difficult balancing act in determining when the particular history of a defendant leads to a finding that substantial justice dictates a particular defendant's motion for re-sentencing be denied.

In this case, the defendant's criminal history is marked by constant parole violations and replete with an ongoing and persistent inability to overcome his addiction. The defendant has had countless opportunities to obtain treatment for his addiction. Treatment has proved ineffective, as time and again, the defendant has found himself back in the

strangle hold of his addiction.

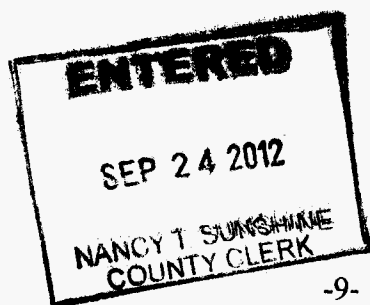
The defendant's criminal record contains at least two assault convictions against women, with whom he was involved in a relationship and repeated violations of the conditions of parole despite countless opportunities to take advantage of parole. The defendant also fled the jurisdiction when on parole. However, more significantly the defendant was afforded numerous opportunities to reap the benefits of treatment while out of prison. The defendant failed to take advantage of those opportunities and failed to fully commit to treatment. The defendant as he sits in prison now is still encumbered by the disease of addiction. It would be a simple solve to conclude since the defendant has three months on his sentence, re-sentencing should be granted. However, there are significant factors which mitigate against the conclusion for re-sentencing.

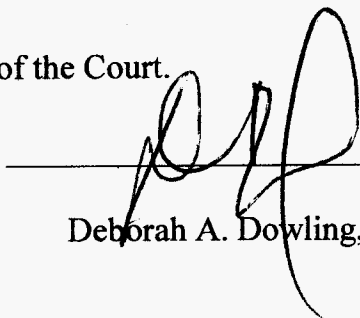
The defendant has benefitted from simple solves in the past but, failed to meaningful take advantage of those opportunities. The defendant has taken the easy way out of his addiction by failing to truly address his condition. The defendant now implores the court to also take the easy way out, as he has done. However, the Court is required to make the difficult decisions in adherence to the statute. Substantial justice dictates the defendant's motion be denied even over the seeming acquiescence of the People. The defendant's assault convictions, countless parole violations, flight out of the jurisdiction all establish substantial justice dictates denial of the defendant's motion. The most critical factor being the defendant's inability to meaningfully participate in treatment.

The record reveals the defendant is only able to remain drug free when incarcerated. While three months is a short time remaining, on the defendant's sentence, it is a time frame in which the defendant will more probably than not remain drug free. The defendant is not to be punished for his inability to effectively treat and manage his disease of addiction. The findings herein are the consequences of the defendant's failure to avail himself of the opportunities afforded to him over the years.

Further, the intent of the Drug Reform Legislation is to give a defendant an opportunity to be relieved of the burden of a draconian sentence as established by the Rockefeller Drug Laws. Here, the defendant's criminal history and conduct does not warrant re-sentencing. While it may appear that the Court's refusal to re-sentence the defendant is punitive, it is not. Looking at the totality of the criminal history of the defendant since his sentencing on the instant case, the facts establish the defendant has no regard for the law, the courts or anyone else. The defendant is not entitled to the benefit of re-sentencing given the particular circumstances presented herein. This is the defendant's second request for this relief since having absconded during the pendency of his first request. There are no factors which warrant re-sentencing. As such, the defendant's motion is denied.

This shall constitute the decision and order of the Court.




Deborah A. Dowling, J.S.C