

MEMORANDUM

**SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART K-16**

-----X
THE PEOPLE OF THE STATE OF NEW YORK

BY: BARRY KRON, AJSC

-against-

DATED: March 14, 2008

DARYL BEASLEY,

IND. NO.: N10358-02

Defendant.

-----X

Defendant moved on December 20, 2007 for an order to be resentenced pursuant to the Drug Law Reform Act (hereinafter “DLRA”) upon his conviction of Criminal Possession of a Controlled Substance in the Second Degree (P.L. § 220.18), a class A-II felony offense (see Laws 2004, ch. 738 § 23, as amended by Laws 2005, ch. 643 on August 30, 2005; P.L. § 70.71). If resentence were to be granted, and if it was determined that defendant is a predicate felon, the statute would mandate a determinate sentence of between 6 and 14 years with 5 years post-release supervision.¹ Defendant seeks to receive the minimum sentence available to him upon a resentence, 6 years with 5 years post-release supervision.

Defendant was indicted for Criminal Possession of a Controlled Substance in the First Degree (P.L. § 220 [21]); Criminal Possession of a Controlled Substance in the Third Degree (P.L. § 220.16 [1]); Unlawful Possession of Marihuana (P.L. § 221.05); and Operating a Motor Vehicle without Safety Belts. On November 21, 2003, defendant pled guilty, as a second felony offender, to Criminal Possession of a Controlled Substance in the Second Degree, a class A-II felony, in exchange for a promised

¹Defendant’s argument that he should receive a determinate sentence of between 3 and 10 years as a non- predicate felon is rejected (see footnote 6, *supra*).

indeterminate sentence of eight years to life. Defendant was sentenced on December 12, 2003.

Defendant had a prior April 5, 1988 conviction for Criminal Possession of a Controlled Substance in the First Degree, a class A-1 felony, and Criminal Use of Drug Paraphernalia in the Second Degree, for which he received an aggregate indeterminate term of imprisonment of 15 years to life (Indictment 1329/86)(Clabby, J.). However, on March 17, 2005, defendant moved to be resentenced under that Indictment pursuant to Chapter 738 § 23 of the Laws of 2004, the enactment of which provided for resentencing eligibility for defendants convicted of and in custody for A-I felony drug offenses. On September 21, 2005, defendant's motion for resentencing was denied (Grosso, J.). Subsequently, on January 8, 2008, the Appellate Division reversed the lower court's decision and directed that defendant be resentenced under the new law. On February 20, 2008, defendant was resentenced to a determinate term of imprisonment of 14 years and 5 years post-release supervision under Indictment 1329/86 (Grosso, J.).

The 14 year determinate sentence received by defendant on his resentence had been served by the time defendant committed the instant offense on March 9, 2002. In the instant matter, defendant is entitled to receive prison credit from March 9, 2002; therefore, his parole eligibility date has been recalculated to March 3, 2010, since his minimum sentence is 8 years for the instant matter.² Notably, prior to defendant's resentence for his A-I conviction, defendant's parole eligibility date was February 17, 2011. Before his resentence on the previous conviction, his motion would have been timely and he would have been eligible for resentencing since he would have had a parole release date more than three years away .

²This unofficial recalculation is based upon conversations with the New York State Department of Corrections, which is responsible for recalculating defendant's parole eligibility date. Should the March 3, 2010 date change and should defendant believe he is thus eligible, defendant can renew his application at that time without prejudice.

In determining this motion, the Court has considered the moving papers of defendant, the response of the Assistant District Attorney and the court file.

The DLRA provides that individuals are eligible for resentencing when they are in the custody of the New York State Department of Corrections, have been convicted of a class A-II felony offense committed prior to October 29, 2005 (the effective date of the revision), and have been sentenced to an indeterminate term of imprisonment of three or more years to life (L. 2005, ch. 643 §1). Additionally, the prisoner must be more than twelve months from being an eligible inmate as defined by Correction Law § 851(2)³ and must be eligible for good behavior allowances under Correction Law § 803(1)(d). The DLRA, when read in conjunction with Correction Law § 851(2) provides that an inmate must be more than three years away from being eligible for parole in order to qualify for resentencing.

In this case, as a result of the defendant's successful application for a reduced sentence on his prior A-I drug conviction, the date that defendant initiated the instant motion, December 20, 2007, is less than three years from his eligibility date for release on parole. As such, he does not qualify for resentencing under the law for A-II drug convictions (see L. 2005 ch. 643, § 1; Correction Law § 851[2]; People v. Dathan, 849 N.Y.S.2d 901 [2d Dept. 2008]; People v. Nolasco, 37 A.D.3d 622 (2d Dept. 2007); People v. Hernandez, 46 A.D.3d 1425 [4th Dept. 2007]).

Defendant argues that the Court should refer back to his initial A-I sentence to determine his eligibility for release on parole, and thus use his old sentence, which would give him a parole eligibility date of February 17, 2011 for the purposes of his current application. Defendant notes that using this date, his application is more than three years away from his release date, and he would be eligible for resentencing in this matter.

³See also People v. Bautista, 26 A.D.3d 230 (1st Dept. 2006).

Defendant cannot circumvent the eligibility requirements of the 2005 DLRA by attempting to have the Court base its decision on what has now become a non-existent release date. The defendant moved for and received the benefits of a more lenient 14 year sentence for his prior A-I drug offense, a resentence he had an option to accept or reject under the statute (Chapter 738 § 23 of the Laws of 2004). This Court will not abide defendant reaping the benefits under the 2004 DLRA of receiving a shorter sentence under his prior conviction, and then disregarding the further consequence associated with the new sentence so that he can take advantage of the eligibility requirements of the 2005 DLRA (People v. Paniagua, 45 A.D.3d 98 (1st Dept. 2007) for his subsequent application.⁴ The Legislature, as part of the compromise and negotiation process in enacting the legislation, by the 2005 Act, sought to increase judicial discretion over sentencing in drug cases. It also significantly circumscribed the group of class A-II felony offenders who could qualify for resentence. The promulgation of the eligibility requirements in Correction Law §803(1)(d) in the 2005 DLRA demonstrates the intent to limit the availability of resentencing relief to class A-II offenders (People v. Paniagua, *supra* at 109; see also People v. Smith, 45 A.D.3d 1478 [4th Dept. 2007])[in order to be eligible for resentencing pursuant to DLRA-2, a class A-II felony offender cannot be eligible for parole]).

To reiterate, defendant's argues that because he was eligible for resentencing here at the time he initiated his motion, the subsequent amendment of his initial sentence on his 1986 conviction should be disregarded for making the eligibility application on the instant matter. On the one hand, he has taken full

⁴In Paniagua, the court stated: "Even if defendant could achieve eligibility for resentencing on the class A-II felony conviction only by obtaining a reinstatement of his original 15-to-life sentence on his class A-I felony conviction, we would not countenance the vacatur of a favorable class A-1 felony resentence to accommodate a defendant's circuitous attempt to take advantage of the eligibility requirements of the 2005 DLRA and then permit the reimposition of that very same sentence" (Paniagua, *supra* at 102). This is closely analogous to what defendant is attempting to do here.

advantage of the ameliorative aspects of the DLRA by receiving a 14 year *nunc pro tunc* sentence. Having achieved this goal, he now seeks to disregard the part of the DLRA which limits access to its remedial nature by his attempted technical reading of the statute, to be read with blinders, to avoid the reality that as this decision is rendered he is within three years of parole eligibility. He wants to accept the benefit of the ameliorative nature of the statute while ignoring the compromise reached in excluding certain classes of applicants from eligibility. Once defendant's application for resentencing was granted and he received a lower sentence which he accepted, his parole eligibility date changed favorably as a result. Furthermore, the statute does not contain language which specifically calculates parole eligibility dates from the time the application is filed. Defendant's argument would have this Court base its determination on an incorrect parole eligibility date that no longer exists so that he could obtain both benefits, a reduced sentence upon his first felony drug conviction while at the same time retaining eligibility for resentence here by having this Court ignore his receipt of a sentence reduction for his prior conviction (see People v. Bautista, supra). This Court will not permit defendant to manipulate the legislative intent of the DLRA by entertaining a reading of the statute giving him the benefit of retaining eligibility for a sentence reduction when he has already received the benefit intended to be provided by the statute.⁵

Under these circumstances, there can be no dispute that defendant's actual eligibility for release on parole is less than three years from his application to be resentenced for his A-II conviction. Accordingly,

⁵Arguably, defendant, based upon this second conviction whereby within a day of being released on furlough he was arrested and convicted in the instant matter, is not the type of low-level drug offender the statute is directed at benefitting. However, at this juncture, the Court need not reach such a determination since, as outlined herein, defendant is not an eligible inmate under the DLRA.

defendant's application for resentencing is denied⁶.

Order entered accordingly.

BARRY KRON, A.J.S.C.

⁶The Court also rejects defendant's claim that if he were to be resentenced, he could not be deemed a predicate felon because the date of the resentence for his 1988 A-I drug conviction occurred after the date of the offense in this matter. There was no reversal of the conviction or sentence because of a legal error, but rather a new law was enacted to allow defendant to apply for a resentence on the conviction. Additionally, the resentence is a *nunc pro tunc* sentence reverting to the original date of conviction. Thus, for the purposes of resentence on this matter, the Court would be authorized to adjudicate the defendant a predicate felon based upon his 1988 conviction under Indictment 1329/86(see People v. Bell 73 N.Y. 2d 153, 165 [1989], citing to dissent in People v. Bell, 138 A.D.2d 298, 299-300).