People v Simmons
2012 NY Slip Op 32252(U)
July 5, 2012
Supreme Court, Kings County
Docket Number: 5310/03
Judge: Patricia DiMango
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SUPREME COURT : KINGS COUNTY (Criminal Term, Part 15)

- -X

PEOPLE OF THE STATE OF NEW YORK,

By: DI MANGO, J.

- against -

Dated: July 5, 2012

ALFRED L. SIMMONS,

Defendant.

Indictment No. 5310/03

- -X

The defendant, *pro se*, has moved, pursuant to CPL § 440.20, for an order setting aside the indeterminate sentence imposed upon him under the captioned indictment, and is seeking to be re-sentenced under the "Rockefeller Drug Law Reform Legislation" and "New Penal Law § 70.71" to a determinate term instead. In the alternative, the defendant requests a hearing to determine whether his sentence should be set aside. The People have opposed the motion in all respects.

As will be discussed *infra*, the court has determined that the motion is denied.

In deciding this motion, the court has considered the papers (and attachments) submitted by each side in support of and in opposition to the motion, as well as the official court file.

<u>Factual and Procedural Background and Analysis</u>

On January 14, 2004, the defendant pleaded guilty to Criminal Possession of a Controlled Substance in the Second degree, under former Penal Law § 220.18(1), a class

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A-II felony[1], in full satisfaction of the captioned indictment. On February 25, 2004, the court sentenced Mr. Simmons to the agreed upon term of imprisonment of a minimum of four years to a maximum of Life.

The defendant was released on parole on December 8, 2005.

Less than three years later, the defendant was arrested, charged, and subsequently indicted upon charges of rape and other crimes arising from events which allegedly took place between May and July of 2008 (Indictment No. 9535/2008). On February 9, 2010, the defendant pleaded guilty to Rape in the Second Degree, a class D violent felony offense, in full satisfaction of that indictment, and on March 8, 2010, he was sentenced thereon, to a determinate term of five years' imprisonment to be followed by a period[2] of post-release supervision.

The People allege, based upon information obtained from personnel at the correctional institution where the defendant is presently incarcerated, that Mr. Simmons was declared delinquent and his parole (upon his drug felony sentence) was revoked, effective May 1, 2008, due to the latter rape charge and conviction.

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[1] At the time, this offense was established by the possession of two or more ounces of a preparation containing a narcotic drug. The defendant was charged with committing this crime on April 22, 2003.

[2] In their papers, the People indicate that Simmons was sentenced to five years' post-release supervision; however, the court's CRMS database reflects that the defendant received 10 years of post-release supervision to follow his five-year rape prison term.

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Thus, the defendant currently remains incarcerated pursuant to both his rape conviction as well as his drug felony conviction following the revocation of his parole.

In light of subsequent amendments to the Penal Law, brought about due to drug sentencing reforms, the defendant has brought the instant motion seeking to eliminate the maximum term of life imprisonment from his drug felony conviction and to obtain a reduced sentence.

However, contrary to his assertion in his supporting affidavit, this defendant has previously sought re-sentencing relief under the Rockefeller Drug Law reform legislation.

Indeed, the defendant had first moved for re-sentencing under the 2004 Drug Law Reform Act ("DLRA") (L 2004, ch 738, § 23), which was enacted on December 14, 2004. By decision dated July 22, 2005, this court denied that motion on the ground that there was no authority for re-sentencing Mr. Simmons, a class A-II felony drug offender, under the 2004 DLRA as he was not a class A-I felony drug offender serving a term of incarceration of 15 years to Life or greater.

In the fall of 2005, the defendant brought another motion for re-sentencing, this one under the 2005 DLRA (L 2005, ch 643). That motion was withdrawn by assigned counsel on February 10, 2006, presumably because counsel realized that the defendant was not eligible for the relief sought. Under the provisions of the then current Correction Law § 851 (2), the defendant's impending release date rendered him ineligible for re-sentencing relief under the 2005 DLRA (L 2005, ch 643, § 1).

Thereafter, following his 2008 arrest on the rape charges, the defendant again moved for re-sentencing of his four years to Life drug felony imprisonment sentence pursuant to the 2005 DLRA. This court denied that motion because the defendant's 2005 parole on his drug conviction made him ineligible for re-sentencing on that same felony, and his re-incarceration did not change that status (*see*, Decision dated August 6, 2009; Di Mango, J.).

Now, by the instant motion, the defendant is once again seeking a re-sentence upon his class A-II felony drug conviction term. The defendant contends that under the provisions of "New Penal Law § 70.71,"[3] which provides for determinate, reduced sentences for class A drug felony convictions, his current indeterminate sentence of four years to Life is illegal and unauthorized. Indeed, the defendant maintains that "per New Penal Law § 70.71, . . . the maximum term of imprisonment that may be imposed upon [him] is 6 years."[4]

The defendant also asserts that he has not previously appealed the judgment or sentence under the captioned indictment. Finally, the defendant attaches to his motion,

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[3] Penal Law § 70.71 was added to the Penal Law under the 2004 DLRA (L 2004, ch 738, § 36), and was amended under the 2009 DLRA (L 2009, ch 56, pt AAA, § 26).

[4] The court observes that the defendant is mistaken in this assertion. A first time offender convicted of a Class A-II drug felony faces a maximum determinate sentence of 10 years' imprisonment, with the minimum being three years.

without explanation, the case of *People ex rel Rosa v Warden*[5] (80 AD3d 525 [2011, 1st Dept]).

The People oppose this motion in its entirety on the ground that the defendant provides no legal basis for disturbing his lawfully imposed sentence, and they urge that the motion be summarily denied without a hearing.

The People assert that the defendant remains ineligible for re-sentencing because he was previously released on parole and further, is currently serving a sentence on a conviction for rape. Regarding the defendant's indirect citation to *People ex rel Rosa v Warden*, the People also contend that the defendant is additionally not entitled to early termination of his drug felony sentence because he, a Class A drug felon, did not complete three years of unrevoked parole.

This court finds that the defendant is still ineligible for relief under the 2005 DLRA, and has raised no meritorious grounds for setting aside or reducing his drug felony sentence. Furthermore, there is no basis for granting him any hearing on his current application.

As this court previously held, and which still obtains today, the defendant's parole on his class A-II felony drug conviction in 2005 renders him ineligible under the terms of the 2005 DLRA for relief from his sentence under that conviction, and his re-

[5] This case held that an amendment to Executive Law § 259-j (3-a) was to be given retroactive effect such that the petitioner therein, who had been convicted of a Class B drug felony, was entitled to have his sentence terminated because he had had more than two years of unrevoked presumptive release.

incarceration does not restore or renew eligibility for such re-sentencing relief (*see, People v Mills*, 11 NY3d 527, 537 [2008]).

In any event, the defendant is further ineligible for re-sentencing under the 2005 DLRA because he is currently serving a sentence upon a conviction for second-degree rape, an offense for which "merit time" is unavailable (*see* L 2005, ch 643, § 1, requiring that inmates also be eligible to earn "merit time" under Correction Law § 803[1][d] in order to qualify for 2005 DLRA re-sentencing).

Insofar as the defendant does not meet the statutory criteria for re-sentencing eligibility under the DLRA of 2005, *as a matter of law* the relief requested is not available to him, and therefore no hearing thereon is required here.

Finally, to the extent the defendant seeks early termination of his class A-II felony sentence pursuant to Executive Law § 259-j (3-a) by virtue of his attaching *People ex rel Rosa v Warden* to his motion papers, such relief is unavailable to him because his parole on that felony offense was revoked less than three years[6] after his release. Thus, the defendant did not complete the requisite three years of unrevoked parole which would garner early termination of such sentence.

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[6] Former Executive Law § 259-j (3-a) had provided, in pertinent part: "The division of parole must grant termination of sentence after three years of unrevoked presumptive release or parole to a person serving an indeterminate sentence for a class A felony offense defined in article two hundred twenty of the penal law…" (L 2005, ch 486, § 38-g, amending Executive Law § 259-j [3-a]).

Subdivision 3-a of Executive Law Section 259-j has since been deleted and replaced by Correction Law § 205 (4), which latter provision is essentially the same as the former statute.

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Accordingly, the motion for re-sentencing is, respectfully, denied in its entirety, without a hearing.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

ENTERED
2012
NANCY T. SUNSHINE
COUNTY CLERK

You are hereby advised that your right to an appeal from the order determining your motion is not automatic except in the single instance where the motion was made under CPL § 440.30(1-a) for forensic DNA testing of evidence. For all other motions under Article 440, you must apply to a Justice of the Appellate Division for a certificate granting leave to appeal. This application must be filed within 30 days after your being served by the District Attorney or the court with the court order denying your motion.

The application must contain your name and address, indictment number, the questions of law or fact which you believe ought to be reviewed, and a statement that no prior application for such certificate has been made. You must include a copy of the court order and a copy of any opinion of the court. In addition, you must serve a copy of your application on the District Attorney.

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