2017 WL 10296325
County Court, New York,
Monroe County.

The PEOPLE of the State of New York, Plaintiff,
v.
Jamie MULLEN, Defendant.

2016-3447
|
Decided on December 14, 2017

Attorneys and Law Firms

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Opinion

John L. DeMarco, J.

***1** Defendant has been unsuccessfully terminated from the Judicial Diversion Program (JDP), and stands convicted of burglary in the third degree (Penal Law [PL] § 140.20). The Court has indicated to the parties in advance of sentencing that it is considering referral to the shock incarceration program as a component of the sentence (*see* Correction Law § 865; 867). The People have indicated their intent to oppose said sentence, contending, in the main, that defendant is not an eligible inmate (*see* Correction Law § 865), and further that the parameters of the plea bargain prohibit judicial referral to the program.

Upon consent of the People (*see* Criminal Procedure Law [CPL] § 216.00 [1] [b]), and pursuant to plea negotiations entered into by the parties, on or about November 16, 2016 defendant pleaded guilty to burglary in the third degree (PL § 140.20) in satisfaction of the remaining count of the superior court information, to wit: criminal mischief in the third degree (PL § 145.05 [2]). Defendant, by way of a written and duly executed contract (*see* CPL § 216.05 [5]), agreed to abide by a number of conditions set by the Court, and further acknowledged that upon unsuccessful termination from JDP the Court would impose an indeterminate term of imprisonment between 2 to 4 years and 3 ½ to 7 years (*see* PL §§ 70.06 [3] [d]; [4] [b]) without the possibility of initial placement at the Willard drug treatment campus (*see* CPL § 410.91). During the plea colloquy, the Court further advised defendant it would be without discretion to impose placement at the "Willard shock camp" upon unsuccessful termination from JDP.

As is customary practice, the parties initially negotiated a resolution which involved a waiver plea to a superior court information and placement of defendant in JDP. Subsequently, the parties conferenced the matter with the Court in chambers, outside the presence of defendant, wherein the People provided to the Court a JDP worksheet intended to outline the terms negotiated by the parties. In pertinent part, the worksheet form indicated that upon defendant's unsuccessful termination from JDP, the Court would be precluded from sentencing defendant to the Willard program (*see* CPL § 410.91) and shock incarceration (*see* Correction §§ 865; 867). Following the chambers conference, and prior to plea, the sentencing parameters were transferred to a written contract (JDP contract). In pertinent part, the JDP contract — unlike the JDP worksheet — was silent with respect to the Court's sentencing discretion to impose shock incarceration. The JDP contract was ultimately signed by defendant and his attorney in the presence of the Court.

The People construe the proceedings and record as sufficiently narrowing the scope of available sentences upon unsuccessful termination to preclude shock incarceration and explicitly advising defendant of this condition. Conversely, defendant contends that the record is devoid of a clear indication that shock incarceration would be unavailable to him, and any such ambiguity should be resolved in his favor. Both parties submitted memorandums in support of their respective positions for the Court's consideration, and the following constitutes its decision.

***2** At the outset, the Court finds defendant to be an eligible inmate for the shock incarceration program (*see* Correction Law §§ 865; 867). In relevant part, Correction Law § 865 defines an eligible inmate as one "who has not previously been convicted of a violent felony as defined in article seventy of the penal law, or a felony in any other jurisdiction which includes all of the essential

elements of any such violent felony, **upon which an indeterminate or determinate term of imprisonment was imposed**" (Correction Law § 865 [emphasis added]). Contrary to the People's contention, defendant's prior violent felony conviction of attempted burglary in the second degree (*see* PL §§ 10.00; 140.25; 70.02 [1] [b]; 70.02 [1] [c]) does not render him ineligible for shock incarceration as he served only a definite term of one year upon a re-sentence following a violation of probation (*see* PL §§ 60.01 [2] [a] [i]; 60.01 [2] [b]; 60.01 [3] [a]; 70.00 [4]; CPL § 410.20).

The People misapprehend the grammatical construction of the disputed portion of the statute by applying the qualifying phrase "upon which an indeterminate or determinate..." only to the latter clause pertaining to outside jurisdictions. However, such an interpretation is belied by the comma placement in which the qualifying phrase is separated from the antecedents, thereby suggesting its applicability to both, not just the immediately preceding phrase. Furthermore, both logic and reason dictate that the qualifying phrase is equally germane to both the New York and outside jurisdiction clauses. The interpretation advanced by the People — that the sentence of imprisonment component only applies to outside jurisdictions in determining shock incarceration eligibility — would result in unequal application among defendants seeking admission to the program depending upon the jurisdiction in which he was previously convicted. Hypothetically, two defendants in different jurisdictions who engaged in the same conduct, convicted of a crime with the same essential elements, and sentenced identically to probation would result in divergent findings; while a defendant convicted in an outside jurisdiction would be shock camp eligible, a defendant convicted in New York would not. Certainly, this absurdity was not intended by Legislature.

Such a conclusion is further affirmed by tracking the progression of the amendments to Correction Law § 865, which at times narrowed or broadened the scope of eligibility, all while leaving in tact the requirement that a term of imprisonment must be imposed in conjunction with the disqualifying offense. [1] Viewing the statute in light of its history, it is apparent that the most recent amendment was intended to expand its reach to include offenses occurring outside New York's jurisdiction. Furthermore, the regulations enacted in conjunction with shock incarceration eligibility are instructive in this regard by reiterating that eligibility is precluded upon a prior felony conviction only when a term of imprisonment is imposed (7 NYCRR 1800.4 [a] [4]). [2]

***3** In consideration of the foregoing, the Court now turns to the propriety of judicial referral of defendant to shock incarceration inasmuch as there exists a discrepancy between the JDP contract, the Waiver Plea form and the record. If a contract is unambiguous, the instrument should be enforced according to its terms (*Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324, 834 N.Y.S.2d 44, 865 N.E.2d 1210 [2007] [citations omitted]). "Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d 157, 162, 565 N.Y.S.2d 440, 566 N.E.2d 639 [1990] [citations omitted]). Here, the JDP contract is abundantly clear in that the only enumerated sentencing restriction precludes the Court from directing the execution of the sentence as parole supervision, AKA Willard (*see* CPL § 410.91). As the contract unequivocally sets forth the sentencing parameters, the framework therein stated is controlling, and the Court must look no further for guidance. Notably, the Court assiduously reviewed each term and condition of the JDP contract with defendant and confirmed that he independently reviewed it with his attorney prior to his execution thereof.

Nevertheless, were the Court to consider extrinsic evidence, it is unpersuasive in establishing that the component precluding shock incarceration was a condition of defendant's plea. The People primarily rely upon the chambers conference and JDP Waiver form in support of their contention that defendant was adequately apprised of the condition pertaining to shock incarceration. Yet, the conjecture that defendant's attorney conveyed the plea bargain to him verbatim as discussed by the Court and counsel is entirely unsupported by the record. Even the plea colloquy, which referenced "Willard shock camp," is not sufficiently clear and unambiguous so as to render the exclusion of shock incarceration a valid component of defendant's plea.

In circumstances such as this, to the extent the JDP contract diverges from the intent of the parties to exclude shock incarceration as an available sentencing component, it should not be held against defendant. Off-the-record discussions concerning the plea bargaining

process should not be recognized when, as here, they are unsupported by the record (*see generally* *Benjamin S. v. Kuriansky*, 55 N.Y.2d 116, 447 N.Y.S.2d 905, 432 N.E.2d 777 [1982]; *rearg denied* 56 N.Y.2d 570, 450 N.Y.S.2d 186, 435 N.E.2d 403 [1982], *stay denied* 56 N.Y.2d 807 [1982]). For all the reasons herein stated, shock incarceration is both a legal sentence and within the discretion of the Court to impose should equities so dictate.

The above constitutes the decision of the Court.

All Citations

--- N.Y.S.3d ----, 2017 WL 10296325, 2017 N.Y. Slip Op. 27461

Footnotes

1 Since its enactment in 1987, Correction Law § 865 has been amended, in relevant part, by the addition of the following language as so denoted by emphasis:

Added L.1987, c. 261, § 15; Amended L.1987, c. 262, § 3

> "**[w]ho has not been previously convicted of a felony upon which an indeterminate term of imprisonment was imposed**"

Amended L. 2004, c. 738, § 14, eff. Jan. 13, 2005

> "[w]ho has not previously been convicted of a felony upon which an indeterminate **or determinate** term of imprisonment was imposed"

Amended L. 2010, c. 377, § 1, eff. Aug. 13, 2010)

> "[w]ho has not previously been convicted of a **violent** felony as defined in article seventy of the penal law, **or a felony in any other jurisdiction which includes all of the essential elements of any such violent felony**, upon which an indeterminate or determinate term of imprisonment was imposed"

2 The Court is acutely aware that this provision has not been amended since the language pertaining to outside jurisdictions was added to its Correction Law counterpart. Nevertheless, it certainly lends credence to the conclusion that the Legislature intended the imprisonment component of the eligibility guidelines to apply to any disqualifying conviction regardless of jurisdiction.