

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1092

KA 08-00842

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RUFUS KEARSE, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SHIRLEY K. DUFFY OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (JODI A. DANZIG OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered March 28, 2008 pursuant to the 2005 Drug Law Reform Act. The order granted defendant's application for resentencing upon defendant's 2004 conviction of criminal possession of a controlled substance in the second degree and specified the sentence that would be imposed.

It is hereby ORDERED that the order so appealed from is unanimously affirmed and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from an order pursuant to the 2005 Drug Law Reform Act ([DLRA-2] L 2005, ch 643, § 1) granting his application for resentencing upon his conviction of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [former (1)]) and specifying that County Court would impose a determinate sentence of 11½ years plus a period of post release supervision of five years. We previously reversed an order granting defendant's application for resentencing, and we remitted the matter to County Court to determine defendant's application in compliance with DLRA-2 (*People v Kearse*, 46 AD3d 1436).

We reject defendant's contention that the proposed new sentence is harsh and excessive. The court upon remittal properly set forth in its decision the reasons for the proposed new sentence, taking into consideration the magnitude of the crime and defendant's role in the drug trafficking operation in question, defendant's prior criminal history, and the advantageous terms of the plea bargain (*see generally People v Boatman*, 53 AD3d 1053; *People v Anonymous*, 33 AD3d 336). We thus conclude that the court properly exercised its discretion in determining the length of the proposed new sentence. We further reject defendant's contention that the proposed new sentence was unauthorized as a matter of law. Even assuming, arguendo, that

defendant's contention is properly raised on an appeal from a specifying order (see L 2005, ch 643, § 1), we conclude that the proposed new sentence falls within the sentencing parameters of Penal Law § 70.71 (3) (b) (ii). We therefore affirm the order and remit the matter to County Court to afford defendant an opportunity to withdraw his application for resentencing before the proposed new sentence is imposed, as required by DLRA-2 (see *Boatman*, 53 AD3d at 1054).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court