

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff,

v.

D.L., Defendant.

08-042.

County Court, Columbia County.

Decided March 22, 2021.

Louise G. Roback for defendant.

John W. Hillman, Special District Attorney, for plaintiff.

OPINION OF THE COURT

RICHARD M. KOWEEK, J.

Preamble to Findings of Fact and Conclusions of Law on Behalf of D.L.

1. Defendant D.L. filed an application for resentencing pursuant to the Domestic Violence Survivors Justice Act (DVSJA) (L 2019, ch 31, §§ 1-3; CPL 440.47; Penal Law § 60.12). Mr. L. seeks a reduction in his sentence for a 2008 burglary conviction in this court in which then Judge Czajka sentenced him in 2009 to 9½ years in prison and five years' postrelease supervision.
2. This is a request to reduce both the sentence of imprisonment and postrelease supervision (PRS). Mr. L. seeks a reduction in his sentence to no more than five years' incarceration, and 2½ years' PRS pursuant to Penal Law § 60.12. The basis for Mr. L.'s request is that he was repeatedly sexually abused by his uncle for several years as a child from age eight, and as a result suffered trauma which continued throughout his adult life through the time of the 2008 burglary for which he seeks resentencing pursuant to the DVSJA.
3. By written decision dated June 5, 2020, this court determined that Mr. L. met the threshold for relief under the DVSJA and ruled that he was entitled to a hearing.
4. The court conducted a hearing on Mr. L.'s application on October 2, 2020, and December 16, 2020.
5. At the close of the hearing, the court directed the attorneys to submit proposed findings of fact and conclusions of law 30 days after receipt of the transcripts. The attorneys conferred and agreed to submit

proposed findings of fact and conclusions of law simultaneously on March 1, 2021, due to the 30-day period falling on the prior weekend.

Findings of Fact

6. D.L. is 52 years old. (Hearing exhibit A at 1.)

7. In 2008, Mr. L. pleaded guilty and was convicted of burglary in the second degree, a class C violent felony, in Columbia County Court. (See ct order dated June 5, 2020.) In 2009, then Judge Czajka imposed a sentence on Mr. L. of 9½ years' determinate prison sentence and five years' PRS. (Hearing tr, Dec. 16, 2020 [Dec. tr], at 49; exhibit C.)

8. Mr. L. was released from prison in March 2017. (Dec. tr at 51.) He was arrested and returned to prison for a PRS violation and released again on October 2, 2018. (Dec. tr at 53.)

9. Mr. L. was charged with burglary in Albany County in 2019. He pleaded guilty and was sentenced to 1½ to 3 years, sentence to run consecutive to the 2009 sentence. (Ct order dated June 5, 2020.)

10. Mr. L. filed an application for resentencing under the DVSJA in Albany County Court, and then in this court on the basis that the DVSJA entitles him to resentencing as a victim of domestic violence, in his case severe sexual abuse.

11. When Mr. L. was eight years old, his uncle started abusing him sexually. (Dec. tr at 32.) Mr. L.'s uncle would take him camping and on other activities on the weekend, give him beer, and sexually abuse him. (Dec. tr at 32-33, 35.) The sexual abuse consisted of his uncle making the young D.L. touch his uncle's penis, and engage in masturbation, oral sex and anal sex. (Dec. tr at 33-34.)

12. The uncle sexually abused Mr. L. two or three times each week for five or six years until Mr. L. was 13 or 14 years old. (Dec. tr at 33-34.)

13. At age 13, Mr. L. started to get into trouble which allowed him to avoid spending weekends with his uncle. (Dec. tr at 34.) At age 13, Mr. L. starting drinking alcohol separate from his uncle and using marijuana. (Dec. tr at 36, 38.) This helped numb the pain Mr. L. experienced from the sexual abuse. (Dec. tr at 38.)

14. As a teenager, Mr. L. engaged in criminal mischief and was sent to the Division for Youth at age 13 or 14, where he remained until shortly before turning 16. (Dec. tr at 34-35, 36.) He returned to his adoptive parents' home for a few weeks and then left home permanently. (Dec. tr at 36-37.)

15. Except to his sister years ago, Mr. L. did not reveal to anyone, prior to recently, that he had been sexually abused. His sister, when told of the abuse, advised him that that happens to all kids. (Dec. tr at 37.) He left home shortly after this conversation and was homeless most of his life. (Dec. tr at 37, 45.)

16. From age 16 through adulthood, Mr. L. used crack cocaine and became addicted. (Dec. tr at 38, 48.) Mr. L. testified that crack cocaine took away the hurt and loneliness he felt. (Dec. tr at 38-39.) He felt guilt and shame about the sexual abuse he experienced from his uncle. (Dec. tr at 39-40.) Using

drugs helped Mr. L. not care and numbed him. (Dec. tr at 48.) Mr. L. testified that using drugs "took away" the sexual abuse. (Dec. tr at 47-48.)

17. Mr. L. committed burglaries to get cash to buy crack cocaine. (Dec. tr at 50-51.) He used crack cocaine throughout his life up to March 2019. (Dec. tr at 48.)

18. In 2019 when Mr. L. filed an application to Albany County Court for sentencing under the DVSJA, he wrote an affidavit in which he disclosed the sexual abuse he experienced. (Dec. tr at 41-43.) Writing about the sexual abuse brought up for him feelings of shame, guilt and hurt. (Dec. tr at 43.)

19. In late 2019, Mr. L. asked for help to deal with the sexual abuse he experienced. (Dec. tr at 41.)

20. Prison personnel put Mr. L. in contact with the Crime Victims Treatment Center. (Dec. tr at 41.)

21. In January 2020, Mr. L. started trauma therapy with Moriah Cohen, LCSW, a PREA (Prison Rape Elimination Act) therapist with the Crime Victims Treatment Center. (Hearing tr, Oct. 2, 2020 [Oct. tr], at 39; Dec. tr at 20, 44.)

22. Mr. L. had weekly therapy sessions with Ms. Cohen primarily with respect to sexual abuse. (Dec. tr at 44.)

23. In therapy with Ms. Cohen, Mr. L. identified his feelings related to the sexual abuse he suffered, was able to talk about his feelings related to the sexual abuse, and learned a healthy way to cope with his feelings. (Dec. tr at 45-46.) Mr. L. testified that in therapy with Ms. Cohen, he learned to be honest about how the sexual abuse affected him. (Dec. tr at 47.)

24. Ms. Cohen testified as to her therapeutic work with Mr. L., in which he processed his feelings about having been sexually abused, and the emotional trauma he experienced as a child and continued to experience as an adult. (Oct. tr at 42, 43-44, 46-48.)

25. Ms. Cohen testified that Mr. L. was impressively committed to the therapeutic work and made great progress. (Oct. tr at 48-49; Dec. tr at 14-15.) She testified that Mr. L. is now able to recognize and process his feelings without being reactive. (Oct. tr at 47-48.)

26. Ms. Cohen testified that prior to Mr. L. being engaged in therapy in 2020, he carried the trauma he experienced as a boy with him throughout his adult life. (Oct. tr at 46-47.)

27. Carrying the trauma led to Mr. L. suppressing or running away from his feelings, and feeling trapped in the feelings of trauma as if he were back as a young boy. (Dec. tr at 24-25.) Mr. L. was still suffering the effects of trauma at the time of the burglary for which he seeks resentencing. (Dec. tr at 26.)

28. Mr. L. was released from prison on August 12, 2020. (Dec. tr at 64; exhibit B.)

29. Very shortly after being released, Mr. L. connected with Second Chance Opportunities and started a multi-pronged program of recovery from drugs, and has been free of drugs and alcohol since then. (Dec. tr at 30, 64.)

30. Second Chance exists to help people in recovery. (Oct. tr at 7.) Brian Roe, the director of operations, is a certified recovery coach. (Oct. tr at 8-9.)

31. Mr. L. lives in sober, supportive housing owned by Second Chance, in Albany. (Oct. tr at 8; Dec. tr at 28.) Mr. L. attends self-help recovery meetings five to six times each week—AA, NA and HA. (Oct. tr at 19; Dec. tr at 31, 60.)

32. Mr. L. has a recovery coach, Dan Whelan, through Second Chance. (Dec. tr at 29, 30-31.) Mr. L. meets with his recovery coach once a week, and also sees him outside of formal meetings three to five times a week. (Dec. tr at 30-31.)

33. Mr. L. attends outpatient drug treatment at Hope House—attending group meetings, a relapse prevention group, one-on-one meetings with a counselor, and biweekly meetings with a psychologist. (Oct. tr at 18; Dec. tr at 29, 30-31, 60.) At the end of every day, Mr. L. has a video call with Kelly Roe, the director of Second Chance. (Dec. tr at 59.)

34. Mr. L. attends self-help recovery meetings with Brian Roe. (Oct. tr at 7, 19.) Mr. Roe testified to his attending three recovery meetings each week with Mr. L. (Oct. tr at 19.) Mr. Roe checks on Mr. L. daily or nearly every day to see that he is doing well in his recovery. (Oct. tr at 19, 26.)

35. Mr. L. is employed by Second Chance to do maintenance on the 20 buildings Second Chance owns on his block in Albany. (Oct. tr at 21; Dec. tr at 29, 59.) He also disinfects SUNY buses three nights a week. (Dec. tr at 59.) He cleans the Office of Court Administration office in Albany once a week, and the Irish Museum in Albany once a week. (Dec. tr at 59.) He works 40 to 45 hours per week for Second Chance. (Oct. tr at 20; Dec. tr at 59-60.) Mr. L.'s work performance is excellent and his attendance is perfect. (Oct. tr at 21-22.)

36. Mr. L. has not used drugs since he was released from prison in August 2020. (Dec. tr at 60, 64.)

37. Mr. L. testified that he is happy, has a life that he likes, and is committed to recovery. (Dec. tr at 60-61, 64.)

38. Mr. L. testified that a big difference in his life from the past is that he is now honest. (Dec. tr at 57.) He communicates with people, has people involved in his life, attends recovery meetings with people, and feels part of the community in which he lives. (Dec. tr at 58.) Mr. L. meets daily with Rudy Fernandez, who is employed as a counselor at Second Chance and Hope House. (Dec. tr at 58-59.)

39. Mr. Roe testified that Mr. L. is doing well in his recovery. (Oct. tr at 20, 23-25, 27-28.) Mr. Roe testified that Mr. L. is compliant with, and engaged in, his recovery program. (Oct. tr at 24-25, 27.)

40. Mr. Roe testified that a large proportion of people in recovery from substance abuse were sexually or physically abused as children, as Mr. L. was. (Oct. tr at 22-23.)

41. Mr. Roe believes that Mr. L. has a favorable prognosis with respect to maintaining his sobriety and leading a productive life. (Oct. tr at 20.) Mr. Roe bases his assessment on seeing the surrender by Mr. L. and his perfect work attendance. (Oct. tr at 20.) He sees Mr. L. attend recovery meetings, talk with his sponsor, and evidence humility, willingness and surrender. (Oct. tr at 27-28.) He has seen no evidence

of criminal behavior on the part of Mr. L. (Oct. tr at 23-24.) Mr. Roe testified that Mr. L. is doing well and seems at peace and that his therapy has made a big difference. (Oct. tr at 23.)

42. Moriah Cohen, Mr. L.'s therapist, also opined about Mr. L. having a favorable prognosis: She is very confident that Mr. L. will continue to improve; she has seen tremendous changes in him in their work together, and she is confident those changes will stick. (Oct. tr at 51.) The changes Ms. Cohen believes will endure for Mr. L. include maintaining his sobriety, building more trusting relationships, not having to use drugs or alcohol anymore and therefore not having to be involved in crime to sustain a drug habit. (Oct. tr at 51.)

Conclusions of Law

1. The Domestic Violence Survivors Justice Act (DVSJA) (L 2019, ch 31, §§ 1-3, adding CPL 440.47 and amending Penal Law § 60.12), effective in August 2019, creates less harsh sentencing for victims of domestic violence and sexual assault. This legislation was based on the realization that domestic violence and incarceration are inextricably linked. (See People v Smith, 69 Misc 3d 1030 [Erie County Ct 2020].)

2. Mr. L. falls within the scope of the DVSJA: he was a victim of domestic violence, having been sexually abused as a boy for five or more years by his uncle. (CPL 440.47[2][c].) Moreover, he is eligible for relief under the DVSJA because he had a sentence of eight years or more for an offense committed before August 2019, and would have been eligible for an alternative sentence under the revised Penal Law § 60.12. (CPL 440.47[1][a].)

3. There is still time remaining in Mr. L.'s 2009 Columbia County Court sentence of incarceration, and he seeks a reduction of that sentence. The 2009 sentence is not complete or expired. This is reflected in DOCCS records, and, by operation of law, due to aggregation with the subsequent sentence imposed in Albany County Court: Upon being sentenced for a later crime for a term to run consecutively (or concurrently) to the earlier sentence, an aggregate maximum sentence is calculated and the sentences are made into one sentence. (Penal Law § 70.30[1][d]; People v Buss, 11 NY3d 553 [2008]; People v New York State Dept. of Correctional Servs., 2012 NY Slip Op 31300[U] [Sup Ct, Wyoming County 2012].) The 2009 Columbia County Court sentence was aggregated with a later sentence such that there still is an outstanding sentence of nine months' incarceration and 2½ years' PRS. (Dec. tr at 50; exhibit C; see Penal Law § 70.30[1][d].) Neither sentence is considered over until both are over, and they are not.

4. By enacting the DVSJA in 2019, the NY Legislature authorized and directed courts to consider the full picture of a defendant to include the impacts from domestic violence on the defendant, and provided for lighter sentences than traditional sentences for crimes in recognition that the defendant is a victim. (See Smith, 69 Misc 3d at 1032.)

5. The DVSJA requires the following analysis: (1) Did the defendant experience domestic abuse? (2) Did the defendant suffer trauma as a result of that abuse? (3) Has that trauma affected the defendant's functioning and behavior so as to be a "significant contributing factor" to the defendant's criminal

behavior? (Penal Law § 60.12[1].)

6. Domestic violence can have "ravaging effects" on its victims, causing trauma and having severe effects on victims' thought processes and behaviors. (*Smith*, 69 Misc 3d at 1037.) The trauma of sexual abuse and exploitation affects a victim's behavior and choices, and the DVSJA provides courts with a new perspective through which to view and assess a defendant's criminal conduct. (*Smith*, 69 Misc 3d at 1037.) "[V]ictims of domestic violence should be viewed by our criminal justice system in a manner that recognizes not only their status as offenders but as their status as survivors." (*Smith*, 69 Misc 3d at 1040.) "The DVSJA was never intended to hold a defendant blameless for [their] actions or excuse [their] criminal conduct. It instead both recognizes the severity of an offense while also affording some measure of mercy for the offender." (*Smith*, 69 Misc 3d at 1040.)

7. A court is authorized to reduce a sentence under the DVSJA where the domestic violence or sexual abuse is a "significant contributing factor" to the crime. In order to do so, the court need not find that the abuse was the exclusive or even the overriding factor. (*Smith*, 69 Misc 3d at 1037.)

8. The trauma need not be the *causal* factor of the crime. "Significant contributing factor" means the domestic violence was sufficiently significant to have likely helped bring about the defendant's criminal behavior. In changing the language of Penal Law § 60.12 in 2019, the legislature changed the standard from one of *causation* to one of *contributing factor*. (Compare new Penal Law § 60.12, as amended by L 2019, ch 31, § 1, with former Penal Law § 60.12, as added by L 1998, ch 1, § 1.) This change eliminates the causal nexus requirement, replacing it with a contributing factor standard. This is seen by the fact that the amendment shifts from covering offenses only directed at the abuser, to a much broader array of offenses, including conduct directed at non-abusing third parties. Hence, the legislature directed a shift from a strict causation standard to the lower standard of a mere "contributing factor."

9. In sentencing under the DVSJA, the final step for the sentencing judge is to determine whether a sentence under the traditional sentencing scheme would be unduly harsh so as to warrant a less punitive sentence. (Penal Law § 60.12[1].) Here, appropriately applying hindsight, a sentence of 9½ years is "unduly harsh" in considering the history, character and condition of Mr. L.

10. Considering the abuse, trauma and character of Mr. L.— including his progress made recently in overcoming trauma and being actively engaged in recovery from drug addiction— the court finds that the sentence previously imposed is unduly harsh, and the court resents Mr. L. under the DVSJA and Penal Law § 60.12(1).

11. The alternate sentence provided in the DVSJA for the 2008 conviction of burglary is a determinate sentence of between 2½ to 5 years (Penal Law § 60.12[8][b]), plus a term of PRS of between 2½ and 5 years. (Penal Law § 70.45[2][f].)

12. Mr. L. suffered trauma as a result of the sexual abuse by his uncle. As Ms. Cohen, Mr. L.'s treating therapist, testified, the impacts and effects of Mr. L.'s trauma were long-lasting and life-altering. The effects were not ameliorated until late 2020 in trauma therapy with Moriah Cohen for sexual abuse.

13. Although the sexual abuse Mr. L. experienced is removed in time from the 2008 crime for which he seeks a reduced sentence, the continuing trauma he experienced was a contributing factor to his drug

use and addiction and related burglaries.

14. In 2019, Mr. L. made an application through the Albany County Public Defender to Albany County Court for a reduced sentence under the DVSJA. A hearing was held before Albany County Court Judge Peter Lynch on February 13, 2020. (A transcript of those proceedings was submitted with the application for resentencing in this court.)

15. In ruling on Mr. L.'s application for resentencing, Judge Lynch found that Mr. L. was a victim of sexual abuse by a family member for five years as a child, and that this abuse along with the drugs he turned to constitutes a significant contributing factor to Mr. L.'s criminal behavior. (Tr at 26-28.) Judge Lynch ruled that the abuse need not be contemporaneous with the crime for the DVSJA to apply. (Tr at 34.)

16. Sentencing under the Penal Law is based on the prescribed purposes: "To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the *rehabilitation* of those convicted, the *promotion of their successful and productive reentry and reintegration into society*, and their confinement when required in the interests of public protection." (Penal Law § 1.05[6] [emphasis added].)

17. Based on Mr. L.'s successful trauma therapy, his current diligent participation in a recovery program for drug addiction, and all that has been revealed at the hearing, a determinate period of incarceration of between 2½ to 5 years' incarceration is a more appropriate sentence than the 9½ years imposed on him in 2009.

Conclusion

Pursuant to CPL 440.47, defendant D.L. has met his burden that he is eligible for an abbreviated sentence. The sentence of 9½ years' incarceration on the count of burglary in the second degree is vacated. An abbreviated and determinate sentence of five years is imposed in its stead. (Penal Law § 60.12[8][b].) Postrelease supervision shall be for an amended term of four years (Penal Law § 70.45[2][f]). All other terms of the original sentencing imposed by this court (Czajka, J.) shall remain in full force and effect.

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