

State of New York  
Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: December 29, 2011

103505

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THE PEOPLE OF THE STATE OF  
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

TYRONE HARVEY,

Appellant.

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Calendar Date: November 16, 2011

Before: Peters, J.P., Rose, Kavanagh, McCarthy and Garry, JJ.

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Anna E. Remet, Kingston, for appellant.

Robert M. Carney, District Attorney, Schenectady (Gerald A. Dwyer of counsel), for respondent.

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Rose, J.

Appeal from a judgment of the County Court of Schenectady County (Giardano, J.), rendered April 6, 2010, which denied defendant's motion for resentencing pursuant to CPL 440.46.

In 2003, defendant was convicted of criminal sale of a controlled substance in the third degree and sentenced to 4½ to 9 years in prison. In February 2010, he filed an application for resentencing under the Drug Law Reform Act of 2009 (see L 2009, ch 56, as codified in CPL 440.46). County Court denied the application on the ground that defendant was scheduled to be released on parole. This appeal ensued.

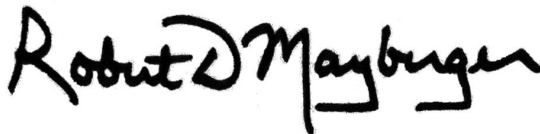
The record establishes, and the People agree, that defendant is entitled to a hearing on the merits of his

resentencing application. Parole release is not a bar to obtaining resentencing where, as here, defendant was in prison at the time the application to be resentenced was made (see People v Santiago, 17 NY3d 246, 249 [2011]).

Peters, J.P., Kavanagh, McCarthy and Garry, JJ., concur.

ORDERED that the judgment is reversed, on the law, and matter remitted to the County Court of Schenectady County for further proceedings not inconsistent with this Court's decision.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger  
Clerk of the Court