

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

Decided and Entered: January 25, 2018

108406

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

JOHN MURDIE,

Appellant.

Calendar Date: December 13, 2017

Before: Devine, J.P., Clark, Mulvey, Rumsey and Pritzker, JJ.

Susan Patnode, Rural Law Center of New York, Castleton
(Cynthia Feathers of counsel), for appellant.

Gary M. Pasqua, District Attorney, Canton (Matthew L.
Peabody of counsel), for respondent.

Appeal from a judgment of the County Court of St. Lawrence
County (Richards, J.), rendered April 11, 2016, which resentenced
defendant following his conviction of the crime of criminal sale
of a controlled substance in the third degree (two counts).

The underlying facts are more fully set forth in our prior
decision in this matter (134 AD3d 1353 [2015]). Briefly,
defendant pleaded guilty to an indictment charging him with
criminal sale of a controlled substance in this third degree (two
counts) with the understanding that he would enter a judicial
diversion program and faced up to 24 years in prison if he did
not complete it. Defendant was charged with violating the terms
and conditions of the program, and then admitted that he had done
so. Defendant did so with the understanding that he would be
sentenced, as a second felony offender, to an aggregate prison

term of seven years to be followed by three years of postrelease supervision.

Upon appeal, defendant argued that his prior felony conviction in New Hampshire was not the equivalent of a felony in New York and that he should not have been adjudicated as a second felony offender. This Court found that defendant's argument on this point was unpreserved and affirmed the judgment of conviction (id. at 1354). Defendant then successfully moved to set aside his sentence pursuant to CPL 440.20. County Court resentenced him, as a felony drug offender, to an aggregate prison term of five years followed by two years of postrelease supervision, to be served under parole supervision pursuant to CPL 410.91 (see Penal Law § 70.70 [2] [d]). Defendant now appeals.

Defendant's claim that the resentence imposed is harsh and excessive is predicated in large measure upon the fact that the original sentence of seven years in prison was one year more than the minimum term allowed for a second felony drug offender in his position (see Penal Law §§ 70.70 [4] [b] [i]; 220.39 [1]). He reasons that he should have been resentenced to an aggregate prison term of two years, the minimum allowable term plus one year, and that any period of incarceration in excess of two years is harsh and excessive (see Penal Law § 70.70 [2] [a] [i]).

We disagree. After considering the pertinent factors, including defendant's positive program accomplishments while confined and his criminal history, we cannot say that County Court abused its discretion in resentencing defendant in the middle of the permissible sentencing range or that defendant has presented any extraordinary circumstances that would warrant a reduction of the sentence in the interest of justice (see People v Smith, 135 AD3d 1248, 1248-1249 [2016]; People v Cruz, 131 AD3d 724, 728 [2015], lv denied 26 NY3d 1087 [2015]). Accordingly, the judgment of conviction is affirmed.

Devine, J.P., Clark, Mulvey, Rumsey and Pritzker, JJ., concur.

ORDERED that the judgment is affirmed.

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