

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER
Indictment No.: 03618-2006

E.G.,

Defendant

JOANNE D. QUIÑONES, J.:

By motion dated February 27, 2024,¹ the defendant moves to vacate his judgment of conviction and be resentenced pursuant to Criminal Procedure Law (CPL) section 440.47. The People served opposition on May 21, 2024. The defendant served reply papers on June 7, 2024,² and a supplemental affirmation on August 1, 2024.³

BACKGROUND

The defendant was charged under indictment number 3618-2006 with Attempted Murder in the Second Degree and other related charges in connection with an incident that occurred on May 10, 2006 (People's Aff ¶ 3). The underlying facts are as follows:

On May 10, 2006, at approximately 2:15 P.M., Dennis Moore arrived outside a construction site located on Carroll Street in Brooklyn, carrying a large amount of cash, as he routinely did, in order to pay his workers. The defendant, acting with another, demanded Moore's money. When Moore refused, the defendant and his accomplice pistol-whipped and shot him. An off-duty detective, Larry Young, intervened, announcing that he was a police officer and displaying his badge. The defendant and his accomplice shot at Young, and Young returned fire ... Young observed the defendant and his accomplice flee the scene of the shooting ... Approximately 15 minutes after the defendant and his accomplice fled the scene of the shooting, the defendant entered Kings County Hospital complaining of a gunshot wound. While at the hospital only 20 to 30 minutes after the shooting, Young identified the defendant as one of the shooters

¹ NY St Cts Elec Filing (NYSCEF) Electronic Document Delivery System (EDDS) Doc ID EFRCQZ.

² NYSCEF EDDS Doc ID THQ1A2.

³ NYSCEF EDDS Doc ID TEF6Y9.

(*People v Grant*, 94 AD3d 1139, 1139 [2d Dept 2012]). The defendant was 21 years old at the time of the offense (People's Aff ¶ 4; Defense's Aff ¶ 5).

On January 15, 2008, after a jury trial, the defendant was convicted of Attempted Murder in the Second Degree and Attempted Robbery in the First Degree for his acts against Moore, Attempted Aggravated Assault Upon a Police Officer for his acts against Young, and Criminal Possession of a Weapon in the Second Degree (see *People v Grant*, 123 AD3d 942, 942-943 [2d Dept 2014]; *Grant*, 94 AD3d at 1139; People's Aff ¶ 6; Defense's Aff ¶ 5). On February 27, 2008, the defendant was sentenced upon the jury verdict (see *Grant*, 94 AD3d at 1139).

The defendant appealed the February 27, 2008 judgment to the Appellate Division, Second Department. On April 24, 2012, the Second Department vacated the sentence imposed and remitted the matter to the Supreme Court, Kings County because "[c]ertain remarks made by the [trial court] demonstrate[d] that it improperly considered crimes of which the defendant was acquitted as a basis for sentencing" (*Grant*, 94 AD3d at 1141-1142).

On September 24, 2012, the defendant was resentenced by another Justice of this court to determinate terms of imprisonment of 25 years followed by five years of postrelease supervision for Attempted Murder in the Second Degree, 15 years followed by five years of postrelease supervision for Attempted Robbery in the First Degree, 15 years followed by 5 years of postrelease supervision for Attempted Aggravated Assault Upon a Police Officer, and 15 years followed by 5 years of postrelease supervision for Criminal Possession of a Weapon in the Second Degree (see *Grant*, 123 AD3d at 942-943). The resentencing court directed that the terms of imprisonment for Attempted Murder in the Second Degree, Attempted Robbery in the First Degree, and Attempted Aggravated Assault Upon a Police Officer run consecutively to each other and concurrently with the term of imprisonment for Criminal Possession of a Weapon in the Second Degree (see *Grant*, 123 AD3d at 942-943). The defendant appealed the September 24, 2012 resentence to the Second Department. On December 17, 2014, upon his appeal, the Second Department modified the resentence to the extent that "the terms of imprisonment imposed upon the convictions of attempted murder in the second degree and attempted robbery in the first degree are to run concurrently with each other," but otherwise affirmed the resentence (*Grant*, 123 AD3d at 943).

The defendant is currently incarcerated at Green Haven Correctional Facility with an earliest release date of November 15, 2040, and a maximum expiration date of August 5, 2046 (see People's Aff ¶ 8; Defense's Aff ¶ 5).

DISCUSSION

Effective May 14, 2019, the Domestic Violence Survivors Justice Act (DVSJA) permits the court to impose more lenient sentences in appropriate cases where the defendant is a survivor of domestic violence (see PL § 60.12). An individual is eligible for relief under the DVSJA where, after a hearing, it is proven by a preponderance of the evidence that,

(a) at the time of the instant offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the defendant ... ; [and]

(b) such abuse was a significant contributing factor to the defendant's criminal behavior; [and]

(c) having regard for the nature and circumstances of the crime and the history, character and condition of the defendant, that a sentence of imprisonment pursuant to section 70.00, 70.02, 70.06 or subdivision two or three of section 70.71 of [the Penal Law] would be unduly harsh

(PL § 60.12[1]; see *People v Addimando*, 197 AD3d 106, 112 [2d Dept 2021] [applying preponderance of the evidence standard]).

A currently incarcerated domestic violence victim may apply for resentencing under CPL 440.47 if the individual was sentenced prior to the effective date of the statute to a term of imprisonment of at least eight years, and otherwise meets the specific criteria outlined in PL section 60.12 (see CPL 440.47[1][a]). The application for resentencing “must include at least two pieces of evidence corroborating the applicant's claim that [the applicant] was, at the time of the offense, a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the applicant” (CPL 440.47[2][c]). One piece of evidence *must* include “either a court record, pre-sentence report, social services record, hospital record, sworn statement from a witness to the domestic violence, law enforcement record, domestic incident report, or order of protection” (CPL 440.47[2][c] [emphasis added]). If the applicant makes a proper evidentiary showing, then a hearing shall ensue (CPL 440.47[2][e]). On the other hand, an applicant’s failure to comply with the requirements of CPL 440.47 shall result in dismissal of the application without prejudice (CPL 440.47[2][d]).

Here, it is undisputed that the defendant “is confined in an institution operated by the department of corrections and community supervision serving a sentence with a minimum or determinate term of eight years or more for an offense committed prior to the effective date of [CPL

440.47] and that [the defendant] is serving such sentence for [an eligible offense]” (CPL 440.47[1][a]). The People acknowledge that the defendant is currently incarcerated and housed at Green Haven Correctional Facility on a sentence with an aggregate term of imprisonment of 40 years, and the sentence for each offense exceeds the eight-year statutory minimum. Moreover, each of the defendant’s convictions was committed before August 12, 2019, the effective date of CPL 440.47, and are eligible convictions for resentencing pursuant to PL section 60.12(1).

Turning to the factors the court must consider, the gravamen of the dispute here is whether a defendant who is a victim of substantial childhood abuse by family members, and who experiences ongoing trauma from said abuse, qualifies for relief under the DVSJA where the qualifying offense was committed against third parties when the defendant was a young adult. This court concludes that a defendant makes a sufficient showing under the DVSJA to warrant a hearing where the application demonstrates that the defendant was a victim of substantial childhood abuse by a family member, continued to experience trauma from that abuse at the time of the qualifying offense, and there is a sufficient nexus between the ongoing trauma and commission of the qualifying offense.

The first factor, whether, at the time of the offense, the defendant was subjected to substantial physical, sexual or psychological abuse by a member of the same family or household as the defendant, is highly disputed. The defendant, in support of his application for resentencing paints a picture of a childhood replete with various forms of abuse by multiple family members dating back to 1989 (Defense Exhibit H at 2). The defendant alleges that as a child he was physically abused by his father in Kingston, Jamaica, which included the father throwing a cup of boiling hot water on the defendant resulting in burns to the defendant’s stomach and left hip (*id.* at 2-3). The defendant also recounts how his father used to force the defendant to drink alcohol to calm the defendant’s hyper energy (*id.* at 4). In one instance, the defendant recalls having too much to drink to the point of vomiting and being beaten by his father as a result (*id.* at 4). Then, as young boy living with his grandparents in Jamaica, when the defendant failed to get water fast enough, his grandfather beat him with a “switch”⁴ which caused bruises to the defendant’s back, arms, and legs (*id.* at 4).

The defendant further detailed an extensive history of childhood sexual abuse beginning at the age of five years old by his uncle (*see* Defense Exhibit H at 7). The defendant recalled one instance where his uncle joined the defendant while showering and inserted his finger in the

⁴ The defendant described a “switch” as a slim tree branch stripped of all its leaves, one which “adults use to beat kids” (Defense Exhibit H at 3-4).

defendant's anus while the uncle masturbated himself (*id.* at 7-8). In another instance, the defendant recalls drinking and smoking with his uncle as a child, passing out, waking up lying face down naked with his uncle on top of him grunting and thrusting while penetrating the defendant (Defense Exhibit H at 8-9). The uncle's sexual advances continued repeatedly "for a few years" (*id.* at 9). The defendant further contends that the uncle threatened to kill the defendant and his mother and sister if the defendant ever reported the encounters (*id.* at 9). As a result, the defendant submits that he wrote his mother, who resided in New York at that time, to "come get me before they kill me" (*id.* at 9).

In or around August 1995, the defendant and his sister relocated to New York to reside with his mother and father again (Defense Exhibit H at 4-5). One winter when the defendant was in junior high school, he recalls his father smacking him hard across the face and beating him "severely" for going to the park to play basketball after school with some classmates (*id.* at 5). In other instances, the father beat the defendant for not doing chores to the point where he ran away and slept in his school's park, punched the defendant in the face for going to basketball tryouts and not picking up his sister, and verbally berated the defendant by, for example, telling the defendant that he wishes the defendant was never born and that the defendant will never be anything (*id.* at 5). As a teen, the defendant and his father had a physical altercation where the father slammed the defendant through a coffee table (*id.* at 6). The defendant submits that the father's abuse continued until approximately 2000 to 2001, and he has not spoken to his father in over 20 years (*id.* at 7).

The defendant submits that he first met his aunt, his father's sister, in or around 1995 at the age of 11 (Defense Exhibit H at 10). From that point forward, the aunt began making subtle sexual advances, including leaving the door ajar while she had sexual intercourse with her husband (*id.* at 10-12). In the winter of 1996, the defendant and the aunt first engaged in oral and vaginal intercourse (*id.* at 12-13). The aunt sexually abused the defendant countless times for the following two years (*id.* at 12-13).

Then, from 2002 to 2006, the defendant asserts that his mother's boyfriend (Senior), whom he resided with at the time, physically, verbally, and psychologically abused him (see Defense Exhibit N at 9). The abuse included using the defendant and his sister as a punching bag when Senior drank alcohol, smashing the defendant's head against a television screen for not going to the store to buy Senior Newport cigarettes, throwing a pot of cold water on defendant while sleeping because Senior believed the defendant to have a CD that belonged to Senior, and calling the defendant derogatory slurs (*id.* at 9-10). The defendant submits that he was first introduced to crime by Senior and was

first arrested in October 2005 possessing Senior's gun (*id.* at 9). For the instant crime, the defendant alleges that it was Senior and his friends who saw the complainant, planned the robbery, and forced the defendant to participate (*id.* at 10-11). The defendant further contends that he remained silent as to Senior's participation due to Senior's threats to kill the defendant and his family (*id.* at 10-11). According to the defendant, Senior, in an effort to show that he was serious about his threats, kidnapped and robbed the defendant's grandmother in 2007 (*id.* at 11).

Despite the allegations of abuse, the People submit that the defendant "only alleges past abuse, and therefore, cannot provide corroboration of substantial physical, sexual or psychological abuse inflicted upon [the] defendant by someone whom defendant was actively engaged in a relationship ... at the time of the commission of the crime" (People's Memo at 3). The People argue that "[t]o suggest that ongoing trauma from prior abuse is included in the DVSJA is an overly broad reading of the statute that specifically puts limiting language in for just this reason" (People's Memo at 6 [emphasis in original]).

There is no doubt that, if proven by a preponderance of the evidence at a hearing, the abuse detailed by the defendant demonstrates that he was a victim of domestic violence subjected to substantial physical and sexual abuse by his father, uncle, and aunt, and mother's boyfriend (*see* PL § 60.12[1]; CPL 530.11[1][a] [persons related by consanguinity or affinity satisfy requirement that the abuser be a member of the same family or household]). Accepting the allegations as true for the purposes of this application, they tell a horrifying account of childhood abuse inflicted by individuals entrusted with the defendant's care.

The People's interpretation of the statutory requirement that the abuse occurs "at the time of the instant offense" is misguided for two reasons. First, the narrow interpretation that the People ask this court to adopt, which in effect seeks this court to hold that the abuse be contemporaneous with the offense, was not adopted by the Appellate Division Second Department (*see Addimando*, 197 AD3d at 112). In the *Addimando* case, the trial court rejected a similar argument by the People, stating, in relevant part,

The legislature clearly intended that the defendant must be affected by physical, sexual or psychological abuse before the criminal event, and within a reasonable amount of time during which she would still be under the influence of such abuse. The defense is correct that there need not be actual physical abuse at the time of the homicide to satisfy Penal Law § 60.12. However, alleged events that occurred years earlier may be given more limited weight. As the defense argues, the spirit of the statute requires the Court to consider the culmination of the abuse endured by the domestic violence victim

(*People v Addimando*, 67 Misc 3d 408, 440 [Dutchess County Ct 2020]). The trial court's error, however, was affording "limited weight" to past events, among other things, and finding that the abuse was "undetermined" (*id.* at 440). The Second Department modified the trial court and held that the defendant's proof established abuse where the defendant testified "that she was repeatedly physically and sexually abused by [decedent], as well as by other men in her past, and reportedly was sexually assaulted at the age of five" (*Addimando*, 197 AD3d at 118). Thus, consistent with the Second Department's ruling, history of abuse is properly considered.

The Third Department also squarely rejected the argument suggested by the People on this application (see *People v Liz L.*, 221 AD3d 1288, 1290 [3d Dept 2023]). In *Liz L.*, the Court held,

To be sure, the statutory language must create the requirement that some temporal nexus exist between the abuse and the offense, otherwise it would be rendered meaningless. However, nothing in the DVSJA requires a finding that the abuse and the offense occur contemporaneously, and to hold otherwise would be tantamount to requiring that a defendant make a showing akin to a justification defense in order to be entitled to its ameliorative sentencing scheme, which is inapposite to the legislative history

(221 AD3d at 1290). Finally, in *People v. D.L.*, a defendant was eligible for resentencing under the DVSJA where the facts demonstrated that the defendant was sexually abused by his uncle from age 8 to approximately 14 years old and as a result suffered trauma which continued throughout his adult life including at the time of the 2008 burglary for which he sought resentencing (see *People v D.L.*, 72 Misc 3d 257, 259 [Columbia County Ct 2021]). Therefore, contrary to the People's contention, an applicant may satisfy the "at the time of the offense" requirement where it is shown that there is a temporal nexus between the abuse and the commission of the offense.

Second, in any event, the People's interpretation of the facts at issue here glosses over one important fact – the defendant's application asserts that Senior, who resided with the defendant as the defendant's mother's boyfriend, abused him and said abuse continued through the date of the crime. The defendant also alleges that it was Senior who forced him to commit the offenses and to remain silent through the abusive tactics that occurred prior to the instant offense. Thus, irrespective of the abuse by the father, uncle, and aunt, the defendant alleges abuse contemporaneous with the crime. Thus, falling squarely within the DVSJA.

The defendant has also made a proper showing that the abuse was a significant contributing factor to his criminal behavior. The analysis in this regard "is cumulative, requiring the court to

consider the cumulative effect of the abuse together with the events immediately surrounding the crime, paying particular attention to the circumstances under which [the] defendant was living and adopting a ‘full picture’ approach in its review” (*People v Smith*, 69 Misc 3d 1030, 1038 [Erie County Ct 2020]; see *People v Burns*, 207 AD3d 646, 649 [2d Dept 2022] [determining cumulative effect of abuse together with surrounding circumstances]; *Addimando*, 197 AD3d at 116 [considering detailed history of repeated abuse and ongoing effects of such abuse]). The abuse Senior purportedly inflicted upon the defendant, which was generally corroborated by the annexed exhibits, is inextricably linked to the defendant’s participation in and commission of the 2006 crime. The defense’s position is that, under the totality of the circumstances, the father’s, uncle’s, and aunt’s abusive behavior taken together with Senior’s abuse, viewed in the context of the defendant’s ongoing behavioral issues, addiction to drugs and alcohol, and the coercion and fear inflicted upon the defendant by Senior before, during, and after the offense make the requisite showing for resentencing consideration under the DVSJA. This court agrees.

Furthermore, the defendant’s application is supported by the required minimum of at least two forms of corroborative evidence. For example, the defendant attached an affirmation from his mother (Exhibit B); an affirmation from his sister (Exhibit C); a July 18, 1998 letter from the New York State Office of Children and Family Services (Exhibit D); and a Domestic Incident Report dated July 24, 1999 (Exhibit G), among other documents. The defense also attached various social services reports describing the reported abuse, its effects, and the defendant’s course of treatment.

CONCLUSION

For the reasons set forth above, the defendant has complied with the provisions of CPL 440.47(2)(c) and is entitled to a hearing to aid the court in making its determination of whether the defendant should be resentenced in accordance with PL section 60.12.

The parties shall appear in Part 9 on November 13, 2024 to schedule a CPL 440.47 hearing.

This constitutes the Decision and Order of the court.

Dated: Brooklyn, New York
October 22, 2024

HON. JOANNE D. QUIÑONES

Hon. Joanne D. Quiñones, J.S.C.