NEW (RE)SENTENCING OPTIONS FOR DEFENDANTS WHO ARE VICTIMS OF DOMESTIC VIOLENCE

Tim Franczyk

CLE Director, Assigned Counsel Program

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Thirty-six years ago, in one of the first Western New York homicide cases to involve a claim of self-defense based on evidence of Battered Wife Syndrome stemming from an extended history of domestic abuse, Leslie Anne Emick, age 22, was convicted as charged by a jury in Allegany County of Manslaughter 1st Degree for which she was sentenced to an indeterminate prison term of two to six years in prison. The conviction was subsequently reversed on appeal (People v Emick,103 AD2d 643 [4th dep't 1984]) based on the admission of unduly prejudicial hearsay testimony into evidence and an improper jury instruction regarding duty to retreat. (The defendant was in her own home when she killed her husband). Thereafter, in 1985, the defendant pled guilty to Manslaughter 2d degree for which she was sentenced to probation.

The initial charge (Manslaughter on the theory of Extreme Emotional Disturbance rather than Murder 2d degree) and the ultimate outcome (probation), appeared to reflect the realization that this defendant was the victim of long-term and serious physical, sexual and psychological abuse at the hands of her husband with whom she lived in a trailer in Cuba NY. The evidence revealed that the night before the defendant woke up at 4:00am and shot her sleeping husband five times in the head, he had told her to kill herself or he would do it for her and then kill their two young children. Despite years of violent assaults, some bordering on torture, the defendant had not, until very recently, informed anyone of her predicament, or sought help. (The defense theory was that she was, for all intents and purposes, a prisoner who had been beaten down to the point that this was her only way to protect herself from what she believed was her impending death).

Although Leslie Anne Emick eventually received a favorable sentence via the appellate process, recent changes in the Penal Law (PL 60.12) and Criminal Procedure Law (CPL 440.47 which takes effect on August 11th, 2019), should make it a little easier for defendants/DV victims to pursue less draconian sentences in the first instance, and allow already-sentenced offenders who are also DV victims who meet the elements of 60.12, to petition the court for resentencing in accordance with a more appealing range of sentence possibilities.

The impetus for these changes (outlined below), according to the Legislative History to Senate Bill S1077 (entitled: Domestic Violence Survivor Justice Act [DVSJA] eff. 1/10/19), appears to be a recognition of the unfairness of imposing harsh penalties on offenders (many of whom have no criminal history, were themselves physically or sexually as children or adults, and show little likelihood of recidivism), who are, at the time of their crime, victims of familial or household domestic violence which played a substantial part in their criminal behavior. The Act also seeks to redress certain perceived deficiencies in the Sentence Reform Act of (1995) which allowed for alternative indeterminate sentencing (in lieu of determinate sentencing otherwise required by PL 70.02) for DV survivors convicted of a violent felony,

but failed to achieve much success in practice. Consequently, the amended statute allows for sentences ranging from probation and/or a definite sentence of one year in jail to lesser determinate terms of imprisonment for felonies.

Under PL 60.12(1) as amended, where a court imposes a sentence upon a defendant convicted of a felony (PL 70.00), a violent felony (PL 70.02) a second felony (PL 70.06), a Class A drug felony (PL 70.71[2] or [3]) (but excluding second violent felony offenders [PL 70.04}, Aggravated Murder [PL 125.26], Murder first degree, [PL 125.27], Murder 2d degree [PL125.25,(5), (18 or more-year old offender intentionally causes death of victim, age 14 or less, during the course of designated sex offenses), acts of terrorism (PL 490.00) or registerable sex offenses (Article 6c of Corrections Law), and is authorized or required by CPL 70.00. 70.02, 70.06 or 70.71 (2) or (3) to impose a prison sentence for such offense, may, provided certain conditions are met, impose probation, a definite, one -year sentence or lesser terms of imprisonment set forth in PL 60.12 (2a-d)

For defendants convicted of a violent felony (PL 70.02), the alternative determinate terms of imprisonment (assuming the judge does not see fit to impose probation or local jail time), are now from at least one to five years for a B felony, one to three-and-a-half years for a C Felony, one to two years for a D felony and one to one-and-a-half years for an E felony.

For second felony offenders (this conviction is violent but the first is not), the range of determinate sentences is: three to eight years for a B felony; two-and-a-half to five years for a C felony; two to three years for a D felony and one-and-a-half to two years for an E felony. (PL 70.06[6]).

The period of post release supervision (PRS) is one-and-a-half to three years for Class D and E violent felonies and two-and-a-half to five years for Class B and C violent felonies.

Defendants convicted of non-violent felonies (PL 70.00) are now subject to sentencing under PL 70.70(2) which includes determinate terms of one to nine years for a B felony, one to five-and-a-half years for a C felony; one to two-and-a-half years for a D felony and one to one-and-half years for an E felony. (The statute heretofore imposed indeterminate sentences of imprisonment).

For second felony offenders (excluding Class A second felony offenders under PL 70.71), the range of determinate sentences is: two to 12 years for a B felony; one-and-a-half to eight years for a C felony; one and a half to four years for a D felony and one-and-a-half to two years for an E felony.

The period of PRS is one year for Class D and E non-violent felonies and one to two years for Class B and C non-violent felonies.

For second felony offenders the PRS ranges are one to two years for Class D and E felonies and one and a half to three years for Class B and C felonies.

(There are other sentencing alternatives in PL 60.12 (1)-(11) not set forth in this monograph).

In order to qualify for alternative discretionary sentencing, the defendant must demonstrate to the court at a hearing that:

1. At the time of the instant offense, she/he was a victim of domestic violence, subjected to substantial, physical, sexual or psychological abuse inflicted by a member of the same family or household (see CPL 530.11)

2. Such abuse was a SIGNIFICANT CONTRIBUTING FACTOR to the defendant's criminal behavior

3. Having regard for the nature and circumstances of the crime, and the character and condition of the defendant, a sentence of imprisonment under PL 70.00, 70.02 or 70.06 would be unduly harsh.

Significantly, the court may determine that the abuse was a significant contributing factor WHETHER OR NOT the defendant raised a defense of Justification (PL Art. 35.00), Mental Disease or Defect (PL Art. 40.00) at trial or claimed Extreme Emotional Disturbance.

Procedurally, in determining whether the defendant should be sentenced in accordance with this section, the court must consider oral and written argument and take testimony from witnesses offered by both sides. The court must consider all relevant evidence and may consider "reliable hearsay." The statute does not define what constitutes reliable hearsay. In the context of a trial, hearsay statements are generally admitted for their truth (as exceptions to the rule against hearsay such as excited utterances, statements made for diagnosis and treatment, declarations against penal interest) because they have indicia of reliability (e.g. excitement that stifles the opportunity for studied reflection and fabrication, an incentive to be truthful in matters of one's own health, the unlikelihood of falsely incriminating oneself). In certain post-conviction proceedings (e.g. SORA hearings to determine a defendant' sex offender level), the concept of what constitutes reliable hearsay appears to take on a more expansive meaning so as to include case summaries and presentence reports (with no foundational testimony) which are prepared with the expectation of future reliance by the courts. (See, for example, People v Keegan, 92 Ad3d 1228 [4th dept 2012], statements of defendant to police, charging documents and transcripts of Grand Jury testimony in People's file deemed sufficiently reliable to determine the number of defendant's victims for purposes of Sex Offender designation). In contrast, unsworn or speculative statements or information otherwise lacking in apparent reliability may not qualify. In the context of resentencing hearings under 60.12, counsel should be prepared to point out those factors that make certain hearsay evidence (whether testimonial or documentary) sufficiently reliable to be worthy of the court's consideration in deciding your client's fate.

A SECOND CHANCE AT SENTENCING

Under CPL 440.47, persons confined to the Department of Corrections and Community Supervision (DOCCS) who are serving a minimum or determinate term of eight years for an offense committed before the effective date of this statute (8/11/19), and who are eligible for alternative sentencing under PL 60.12 may, (on or after the effective date), submit to the original sentencing judge (or to whomever is assigned by the Court in the event the sentencing judge is no longer available), a REQUEST TO APPLY for re-sentencing in accordance with 60.12.

Such request must include documentary proof of the person's confinement in DOCCS (or Community Supervision) for a conviction resulting in a minimum or determinate, eight-year sentence for an offense that qualifies for re-sentencing consideration.

If the person meets these threshold requirements, the court will notify him/her that he/she may apply for re-sentencing and be assigned counsel to assist in the process. If the request is deficient, the court will dismiss it without prejudice and notify the applicant.

Upon receipt of an application for resentencing, the court will notify the District Attorney and provide a copy of the application.

An application for re-sentencing must include AT LEAST TWO pieces of evidence corroborating the claim that the applicant was a victim of Domestic Violence within the meaning of PL 60.12. At least one of those items must be either a court record, pre-sentence report (PSR), social services record, hospital report, or order of protection. Other such evidence may include: local or state corrections records, documentation created at or near the time of the offense tending to support the claim, verified consultation with a licensed medical or mental health provider, court employee (acting within scope of employment), clergy member, attorney, social worker, crisis counsellor, Domestic Violence advocate. FAILURE TO MEET THESE REQUIREMENTS WILL RESULT IN DISMISSAL OF THE APPLICATION.

If the application is deemed sufficient, the court must CONDUCT A HEARING to determine whether the applicant should be re-sentenced in accordance with PL 60.12.

At the hearing, the court may consider ANY FACT OR CIRCUMSTANCE relevant to the imposition of a new sentence based on evidence submitted by both sides (including reliable hearsay). The court may also consider the applicant's institutional record of confinement (including participation in rehabilitative programs), BUT MAY NOT ORDER A NEW PRE-SENTENCE REPORT OR ENTERTAIN ANY MATTER THAT CHALLENGES THE UNDERLYING BASIS OF THECONVICTION.

The court must then issue and provide the parties with a written order (including written findings of fact and reasons for its determination), either denying or the granting the application for resentencing.

If the application is granted, the court must notify the applicant that, unless the application is withdrawn (or the applicant appeals), the court will enter an order (with written findings and reasons) vacating the original sentence and setting forth the new sentence to be imposed pursuant to PL 60.12.

AN APPEAL AS OF RIGHT may be taken from either an order denying resentencing or from a new sentence imposed under this section. As to the latter, the grounds may be that the new sentence is harsh and excessive or otherwise unauthorized under the law. A defendant may also argue that a proposed re-sentence would be harsh and excessive. Upon remand following an appeal, the defendant will be given an opportunity to withdraw the application before the new sentence is imposed. Eligible applicants are entitled to Assigned Counsel throughout the process. (Further details regarding the appeals process are set forth in section four of the statute).

In the event of re-resentencing, pursuant to CPL 390.50 (as amended), at least one day before re-sentencing, (unless waived by the parties), the court must make the pre-sentence report PSR available to the defendant and to counsel for examination and copying, and to the People as well. The court has discretion to redact any irrelevant or confidential information contained therein. The court must state its reasons for excepting any information, and its decision to do so is reviewable on appeal. Upon request of the defendant, the court shall make the PSR available to the defendant for use before the Parole Board.

How many sentenced prisoners will seek re-sentencing under CPL 440.47, (or new defendants will seek to be sentenced under the updated version of PL 60.12), will remain to be seen. For some defendants at least, it appears to offer some measure of hope for spending less time in prison.