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THE TRIAL COURT ERRED WHEN IT SENTENCED MR. LIEBESMAN TO ONE YEAR IN JAIL AS THE SENTENCE IS HARSH AND EXCESSIVE AND THE SENTENCE SHOULD BE REDUCED TO TIME SERVED.

Background

The agreed upon sentence was to be three years probation with a cap of 15 days in jail and a possibility of 7 days in jail if the probation report was good.

Mr. Liebesman, prior to this case, had never been sentenced to serve any jail time, he is Forty-one years old and holds a bachelor's degree in accounting. He has had mental health issues with depression suicidal ideations.

Presently, there is an Order of this Court in place which stayed the sentence imposed by the Trial Court. However, prior to obtaining the stay Mr. Liebesman was incarcerated for some time and served the equivalent, thus far, of a 96 day sentence.

Given Mr. Liebesman's background, the circumstances of this case and the erroneous assumptions of the Trial Court at sentencing, the sentence here should be vacated and the case remanded to the Trial Court with the instruction that Mr. Liebesman be sentenced to time already served.

Applicable Legal Principles

Criminal Procedure Law §470.15(2)(c) states that upon a determination that a sentence imposed upon a valid conviction is illegal or unduly harsh or severe, the court may modify the judgment by reversing it with respect to the sentence and by otherwise affirming it.

Criminal Procedure Law §470.15(3) states that a reversal or a modification of a judgment, sentence or order must be based upon a determination made: (a) upon the law; (b) upon the facts; or (c) as a matter of discretion in the interest of justice; or (d) upon any two or all three of the bases specified in paragraphs (a), (b) and (c).

Even where a sentence imposed was legally proper the Appellate Court retains the discretion to modify the sentence. *People v. Daly*, 20 A.D.3d 542, 799 N.Y.S.2d 537 (2d Dept. 2005).

Generally, a sentencing court is allocated wide latitude to dispense proportionate and fair punishment. *People v. Day*, 73 N.Y.2d 208, 538 N.Y.S.2d 785, 535 N.E.2d 1325 (1989).

However, a court's discretion in sentencing is not without limits. Generally, as a matter of due process, an offender may not be sentenced on the basis of materially untrue assumptions or misinformation, the court must assure itself that the information upon which it bases the sentence is reliable

and accurate. *People v. Naranjo*, 89 N.Y.2d 1047, 659 N.Y.S.2d 826, 681 N.E.2d 826 (1997); *People v. Metellus*, 46 A.D.3d 578, 846 N.Y.S.2d 623 (2d Dept. 2007).

Discussion and Analysis

In the instant case the agreed upon sentence had been a maximum of 15 days incarceration and three years probation, with a minimum of 7 days incarceration if the probation report was good.

Mr. Liebesman did not intentionally fail to cooperate with the probation department.

Probation sent out a letter to the wrong address for Mr. Liebesman to come in for an interview before the December 4, 2008 sentencing date; Mr. Liebesman never received that letter.

When the sentencing date was postponed a new date was set for Mr. Liebesman to go for his interview at probation; probation cancelled that appointment just prior to the sentencing date.

Mr. Liebesman was more than willing to attend any interview and was not given the time to reschedule the interview that probation had cancelled. That Mr. Liebesman was uncooperative with the probation department is an inaccurate and unfair depiction of what happened.

Additionally, the Trial Court stated that the police had to visit Mr. Liebesman's residence prior to his being sentenced. While it is true that the police did visit his residence, he was not arrested and the police took no action – they did not even issue a ticket or summons for anything.

The fact that the police were there and found nothing wrong and made no arrest and did not issue any kind of summons is not a reason to enhance Mr. Liebesman's sentence.

The information that the Trial Court relied on was fundamentally flawed in that Mr. Liebesman was not uncooperative with the probation department and a police visit to one's house is not indicative of anything especially when no action was taken by the police.

The Trial Court erred when it sentenced Mr. Liebesman to the enhanced sentence of one year incarceration as it was overly harsh and excessive. Mr. Liebesman's sentence should be vacated and the case remanded to the Trial Court with the instruction that Mr. Liebesman be sentenced to time served.

POINT IV

THE TRIAL COURT ERRED IN IMPOSING THE MAXIMUM SENTENCE OF ONE YEAR IN JAIL IN THAT IT WAS UNFAIR AND EXCESSIVE IN LIGHT OF MR. LIEBESMAN'S MENTAL HEALTH ISSUES.

Background

Mr. Liebesman's mental health issues were well documented for the Trial Court and both the Trial Court and the District Attorney's office were well aware of them. Documentation had been provided to the Trial Court so that the Judge was aware of the pernicious effect that a prolonged sentence would inevitably have on Mr. Liebesman (A21-A22).

Given the frailty of Mr. Liebesman's mental health and the diagnosis of his doctors, which were all provided to the Trial Court, a fundamentally unfair and excessive sentence was imposed by the Trial Court when it sentenced him to the maximum under the law to one year in jail.

The sentence of the Trial Court was harsh and excessive in light of the facts of this case and the well documented mental health issues of Mr. Liebesman.

Applicable Legal Principles

It is well settled that an Appellate Court may reduce a sentence imposed because of mental health issues suffered by the defendant or where the period of incarceration would be deleterious to his health. *People v.*

Wilt, 18 A.D.3d 971, 794 N.Y.S.2d 724 (3d Dept. 2005); *People v. Damato*, 120 A.D.2d 780, 501 N.Y.S.2d 514 (3d Dept. 1986); *People v. Romano*, 45 A.D.3d 910, 845 N.Y.S.2d 151 (3d Dept. 2007); *People v. Strawbridge*, 299 A.D.2d 584, 751 N.Y.S.2d 606 (3d Dept. 2002); *People v. Mortimore*, 96 A.D.2d 1063, 466 N.Y.S.2d 491 (2d Dept. 1983).

Discussion and Analysis

In the instant case the medical documentation was provided to the Trial Court where a Medical Doctor expressed his opinion that after having treated Mr. Liebesman for some time and being aware of all his mental health issues that Mr. Liebesman would be at great risk if he were to serve a prolonged prison sentence.

This opinion was provided to the Trial Court in letter form from Doctor Mitchell Banks (A21).

Mr. Liebesman had been diagnosed with major depression, generalized anxiety disorder and schizoid personality disorder. Additionally, Mr. Liebesman had been prescribed medication to treat these mental health issues: he had been prescribed Prozac, Remoron, Celexa, Librium, Zoloft, Klonopin and Paxil to treat his disorders. This was also documented and provided to the Trial Court (A21).

Doctor Banks also opined in his letter that in a prison setting Mr. Liebesman would mentally decompensate and become suicidal and/or psychotic because of his intense schizoid symptoms (A21). The Doctor highly recommended that he participate in an out patient rehabilitation program. All this was clearly documented for the Trial Court (A21).

In this case the medical prognosis for Mr. Liebesman in a prison setting is grave. To put Mr. Liebesman in a setting where he would become suicidal and decompensate mentally was clear error on the part of the Trial Court. Mr. Liebesman's sentence must be vacated and the case remanded to the Trial Court with the directive that he be sentenced to time served because of the severe mental health issues he suffers from.