ALM | LAW.COM

New York Law Journal

Precedent-Setting Decisions Show the Promise of New York's Domestic Violence Survivors Justice Act

By Karin Portlock and Brian Yeh

March 11, 2024

New York State courts have recently broken new ground under the Domestic Violence Survivors Justice Act (DVSJA), with two major decisions from the Third Department that promise a more searching review of lower court denials of DVSJA applications and swifter release from incarceration for successful applicants.

The first, *People of the State of New York v. Liz L.*, 201 N.Y.S.3d 514 (3d Dept. 2023), is a powerful ruling that led to the applicant's immediate release from prison and represents an evolution in the rigor expected of resentencing courts' DVSJA decisions and those of appellate courts reviewing lower court sentencing determinations under the statute.

The *Ayala* decision is the first case in the state in which an appellate court directly modified the sentence of an applicant who sought resentencing under the DVSJA in a collateral proceeding, and it confirms that intermediate appellate courts' broad authority to modify sentences on direct appeal extends to applications for resentencing under the DVSJA as well.

The second decision, *People v. Brenda WW.*, —N.Y.S.3d—, 2023 WL 8824791 (3d Dept. Dec. 21, 2023), also involved a direct modification of the applicant's sentence. There, the court held that a court owes no "deference to the sentence or resentence under review," significantly expanding DVSJA courts' authority to reverse lower courts' factual determinations underlying sentencing and resentencing determinations under the statute. Practitioners should take note of the path for DVSJA relief that these two decisions have paved.

Photo: Ryland West/ALM

Appellate Division, Third Department courthouse in Albany, New York.

Enacted in 2019, the DVSJA permits courts to impose more lenient sentences in certain cases where a survivor of domestic violence commits offenses against their abuser, recognizing that survivors should be met with compassion and understanding, rather than punishment. The DVSJA was designed and ultimately adopted with the explicit purpose of remedying the shortcomings of prior domestic violence resentencing legislation. *See* N.Y. State Assembly Memorandum in Support of Legislation, Bill No. A3974, *available at* https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A03974&term=2019&Memo=Y.

Prior to the adoption of the DVSJA, survivors of domestic violence charged with offenses related to

Courtesy Photo

Karin Portlock, partner at Gibson Dunn.

Courtesy Photo

Brian Yeh, associate at Gibson Dunn

their abuse found little refuge in the law. An exception was the 1998 Sentencing Reform Act, known as Jenna's Law, which allowed courts to impose indeterminate sentences on survivors of domestic violence. *Id*. However, because of the law's narrow scope, it was relied on only infrequently, and sometimes counterintuitively. *Id*.

In one case, for example, a domestic violence survivor was sentenced to a term of incarceration that was longer than the minimum term allowed for individuals not sentenced under the law, and was then denied parole twice. *Id*. The DVSJA was enacted to replace this regime with a "comparable ameliorative provision" that would allow courts to impose less harsh determinate sentences on survivors of domestic violence. *Id*.

Under the DVSJA, survivors who meet certain threshold eligibility requirements may apply for resentencing, if the court finds, among other things, that the survivor's current sentence is "unduly harsh." *See* CPL 440.47. Several months after the DVSJA was enacted, Liz L. ("Liz") submitted a request for and was granted permission to apply for resentencing under the DVSJA. Originally charged with Murder in the Second Degree for causing the death of her abusive ex-partner, Liz pleaded guilty to Manslaughter in the First Degree and was sentenced to a determinate sentence of ten years' incarceration followed by five years of post-release supervision. In her application for resentencing, Liz detailed the years of horrific physical, psychological, and emotional abuse she suffered, which began when she was only 18 years old and continued over the course of 10 years. At the resentencing hearing, Liz called five witnesses who corroborated her accounts. Despite the overwhelming unrebutted evidence of her abuse, the prosecutor opposed the application, arguing that Liz's domestic violence history "was already getting factored into" her plea agreement.

The court agreed in a brief, four-page decision denying Liz's application, holding that Liz met all the statutory requirements except that she was not "involved in an episode of domestic violence" at the time of the offense and her sentence was not unduly harsh because: "This was a negotiated disposition. This history of domestic violence was already factored into this disposition."

On appeal, the Third Department sternly rebuked the county court's decision, and unanimously reversed. Among other things, it sharply criticized the lower court for its lack of analysis of the salient aspects of Liz's personal background in considering the "unduly harsh" prong—including her lack of criminal history, and the fact that she is a mother of two—noting that "no discussion is devoted to these circumstances or what weight they should be afforded in considering her resentencing application."

The court also recognized Liz's age, noting that Liz's abuse began "while her decision-making skills were still developing from adolescence through youth adulthood"—in recognition of the fact that her abuse began when she was eighteen years old and still in high school.

Liz L. is a strong reminder to prosecutors that the DVSJA is the law in New York and must be applied by its terms regardless of its impact on negotiated dispositions and prosecutorial concerns for finality. The decision makes clear that relief cannot be denied to DVSJA applicants who pleaded guilty, even if prosecutors claim that the applicant's abuse was considered as part of the plea agreement. The Third Department held that whether a survivor's domestic violence history is "factored into" her negotiated disposition is "not relevant to the application of the DVSJA" and that a court must determine whether a sentence is unduly harsh by considering *only* the factors under the statute—not, as the lower court did, "merely weighing the merits of the original sentence and plea agreement in light of a defendant's domestic violence history."

Brenda WW., which followed closely on the heels of *Liz L.*, is similarly instructive and has the potential to expand the availability of relief to DVSJA applicants. The applicant ("Brenda") was convicted of Manslaughter in the First Degree and related offenses and sentenced to twenty years' imprisonment followed by five years of supervised release.

Following an unsuccessful direct appeal of her conviction, Brenda applied for resentencing under the DVSJA. The lower court denied her application, rea-

soning, among other things, that the domestic abuse she suffered was neither substantial nor a significant contributing factor in her commission of the offense.

A divided panel of the Third Department reversed. In holding that the abuse Brenda endured was "substantial," the court recounted in detail Brenda's own testimony about the abuse she endured, as well as corroborating evidence such as eyewitness testimony from the resentencing hearing and hospital records that Brenda submitted with her application. Based on this evidence, the court "disagree[d] with the County Court's determination that defendant's abuse was anything less than 'substantial.'"

The Third Department's extensive discussion of the evidence was supported in part by its conclusion, set forth in an important footnote, that "the DVSJA entails that a reviewing court—whether that be the court that imposed the original sentence or an appellate court—engage in a review of the sentence imposed without deference to the sentence or resentence under review." In this regard, the court noted that due to an "evol[ution]" in its "interest of justice jurisdiction," its "prior determination" on direct appeal that Brenda's sentence "was not harsh and excessive" did "not foreclose [her] eligibility for relief pursuant to the since-enacted DVSJA and its goal of offering compassionate consideration to domestic violence survivors who can establish entitlement to such relief by a preponderance of the evidence."

This appears to be the first time *any* Appellate Division has articulated the relevant standard of review of DVSJA applications—and according to the *Brenda WW.* court, that standard is *de novo* for both factual and legal determinations.

Additionally, like *Liz L.*, the court's extensive recitation of the evidence underscores the importance for practitioners of developing a robust record of the abuse endured by the applicant during the resentencing hearing. And notably, the court importantly rejected the notion that a "mutually abusive" relationship "foreclose[s] a determination that [an applicant] was a victim of abuse."

Finally, in assessing the "unduly harsh" prong of the analysis, the court noted that while Brenda had an extensive criminal history, "a close inspection of that history reflects that the majority of her convictions were attributable to her longstanding struggle with substance abuse, which is not uncommon for those persons subjected to substantial domestic abuse." To the extent an applicant's criminal history can be explained by their history of abuse or similar factors, DVSJA practitioners should rely, as the court did in *Brenda WW.*, on scholarly articles and research for support.

Moreover, and perhaps most notably, the Third Department in both *Liz L.* and *Brenda WW.* directly modified the sentences under review rather than remand to the lower court to make new determinations. Although the Appellate Division has directly modified sentences pursuant to the DVSJA on direct appeal, it had not done so for an applicant who applied for DVSJA resentencing in a collateral proceeding, until the Third Department's decision in *Liz L.* and later *Brenda WW*. This practice is consistent with the broad, plenary authority of intermediate appellate courts to modify sentences directly under CPL 470.15, and extends that same authority to applications for DVSJA relief in collateral proceedings.

Notably, the statute is not limited to proceedings on direct appeal, and DVSJA applicants can and should request—with the decisions in *Liz L.* and *Brenda W.W.* as support—that the Appellate Division modify their sentences directly. And they should do so even if, as in *Brenda WW.*, an applicant's sentence was determined not to be harsh or excessive on direct appeal.

Following this procedural route spares DVSJA applicants from having to endure the time-consuming process of awaiting a further decision from the lower court once DVSJA relief has been granted. And this issue is not merely an academic one.

In some cases, such as Liz's, the applicant has already served longer than the maximum sentence allowed under the DVSJA for their offense under the DVSJA, or under the modified sentence as determined by the Appellate Division. Each day the courts delay in resentencing an applicant in accordance with the statute represents another day that the applicant is unlawfully incarcerated.

People v. Liz L. and *People v. Brenda WW.* mark a watershed moment in the burgeoning DVSJA jurisprudence that gives new force to this powerful law and provide a meaningful new path to justice for incarcerated survivors.

Karin Portlock *is a partner at Gibson Dunn.* Brian Yeh *is an associate at the firm.* Amanda Bello, *also an associate at the firm, assisted in the preparation of this article.*