S T A T E O F N E W Y O R K

5169

2009-2010 Regular Sessions

I N A S S E M B L Y

February 10, 2009

Introduced by M. of A. LAVINE -- read once and referred to the Committee on Codes

AN ACT to amend the penal law and the criminal procedure law, in relation to increasing the sentences for class B armed violent felony offenses, eliminating the consecutive sentence provision for criminal use of a firearm in the first degree convictions, and requiring that the counts of criminal use of a firearm in the first degree and its predicate class B violent felony offense be submitted to a jury whenever such charges are supported by legally sufficient trial evidence

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Paragraph (a) of subdivision 3 of section 70.02 of the penal law, as amended by chapter 765 of the laws of 2005, is amended to read as follows:

(a) For a class B felony, the term must be at least five years and must not exceed twenty-five years, provided, however, that the term must be: (i) at least ten years and must not exceed thirty years where the sentence is for the crime of aggravated assault upon a police officer or peace officer as defined in section 120.11 of this chapter; and (ii) at least ten years and must not exceed thirty years where the sentence is for the crime of aggravated manslaughter in the first degree as defined in section 125.22 of this chapter; AND (III) AT LEAST TEN YEARS AND MUST NOT EXCEED THIRTY YEARS WHERE THE SENTENCE IS FOR A CLASS B VIOLENT FELONY OFFENSE AS DEFINED IN PARAGRAPH (A) OF SUBDIVISION ONE OF THIS SECTION AND SUCH OFFENSE IS ALSO AN ARMED FELONY AS DEFINED IN SECTION 1.20 OF THE CRIMINAL PROCEDURE LAW;

S 2. Paragraph (a) of subdivision 3 of section 70.04 of the penal law, as amended by chapter 3 of the laws of 1995, is amended to read as follows:

(a) For a class B felony, the term must be at least ten years and must not exceed twenty-five years, PROVIDED, HOWEVER, THAT THE TERM MUST BE

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD08922-02-9

AT LEAST FIFTEEN YEARS AND NOT EXCEED THIRTY YEARS WHERE THE SENTENCE IS FOR A CLASS B VIOLENT FELONY OFFENSE AS DEFINED IN THIS CHAPTER AND SUCH OFFENSE IS ALSO AN ARMED FELONY AS DEFINED IN SECTION 1.20 OF THE CRIMINAL PROCEDURE LAW;

S 3. Paragraph (a) of subdivision 3 of section 70.04 of the penal law, as added by chapter 481 of the laws of 1978, is amended to read as follows:

(a) For a class B felony, the term must be at least twelve years and must not exceed twenty-five years, PROVIDED, HOWEVER, THAT THE TERM MUST BE AT LEAST FIFTEEN YEARS AND NOT EXCEED THIRTY YEARS WHERE THE SENTENCE IS FOR A CLASS B VIOLENT FELONY OFFENSE AS DEFINED IN THIS CHAPTER AND SUCH OFFENSE IS ALSO AN ARMED FELONY AS DEFINED IN SECTION 1.20 OF THE CRIMINAL PROCEDURE LAW;

S 4. Paragraph (a) of subdivision 6 of section 70.06 of the penal law, as added by chapter 3 of the laws of 1995, is amended to read as follows:

(a) For a class B violent felony offense, the term must be at least eight years and must not exceed twenty-five years, PROVIDED, HOWEVER, THAT THE TERM MUST BE AT LEAST THIRTEEN YEARS AND NOT EXCEED THIRTY YEARS WHERE SUCH OFFENSE IS ALSO AN ARMED FELONY AS DEFINED IN SECTION 1.20 OF THE CRIMINAL PROCEDURE LAW;

S 5. Section 265.09 of the penal law, as amended by chapter 650 of the laws of 1996, is amended to read as follows:

S 265.09 Criminal use of a firearm in the first degree.

[(1)] A person is guilty of criminal use of a firearm in the first degree when he OR SHE commits any class B violent felony offense as defined in paragraph (a) of subdivision one of section 70.02 OF THIS CHAPTER OTHER THAN AN ARMED FELONY AS DEFINED IN SECTION 1.20 OF THE CRIMINAL PROCEDURE LAW and he OR SHE either:

(a) possesses a deadly weapon, if the weapon is a loaded weapon from which a shot, readily capable of producing death or other serious injury may be discharged; or

(b) displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm.

Criminal use of a firearm in the first degree is a class B felony.

[(2) Sentencing. Notwithstanding any other provision of law to the contrary, when a person is convicted of criminal use of a firearm in the first degree as defined in subdivision one of this section, the court shall impose an additional consecutive sentence of five years to the minimum term of an indeterminate sentence imposed on the underlying class B violent felony offense where the person convicted of such crime displays a loaded weapon from which a shot, readily capable of producing death or other serious injury may be discharged, in furtherance of the commission of such crime, provided, however, that such additional sentence shall not be imposed if the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, finds on the record that such additional consecutive sentence would be unduly harsh and that not imposing such sentence would be consistent with the public safety and would not deprecate the seriousness of the crime. Notwithstanding any other provision of law to the contrary, the aggregate of the five year consecutive term imposed pursuant to this subdivision and the minimum term of the indeterminate sentence imposed on the underlying class B violent felony shall constitute the new aggregate minimum term of imprisonment, and a person subject to such term shall be required to serve the entire aggregate minimum term and shall not be eligible for release on parole or condi-

tional release during such term. This subdivision shall not apply where the defendant's criminal liability for displaying a loaded weapon from which a shot, readily capable of producing death or other serious injury may be discharged, in furtherance of the commission of crime is based on the conduct of another pursuant to section 20.00 of the penal law.]

S 6. Subdivision 3 of section 300.40 of the criminal procedure law, the opening paragraph as amended by chapter 1 of the laws of 1995, is amended to read as follows:

3. If a multiple count indictment contains concurrent counts of murder in the first degree, the court must submit every such count. In any other case, if a multiple count indictment contains concurrent counts only, the court must submit at least one such count, and may submit more than one as follows:

(a) With respect to non-inclusory concurrent counts, the court may in its discretion submit one or more or all thereof;

(b) With respect to inclusory concurrent counts, the court must submit the greatest or inclusive count and may or must, under circumstances prescribed in section 300.50, also submit, but in the alternative only, one or more of the lesser included counts. A verdict of guilty upon the greatest count submitted is deemed a dismissal of every lesser count submitted, but not an acquittal thereon. A verdict of guilty upon a lesser count is deemed an acquittal upon every greater count submitted[.];

(C) NOTWITHSTANDING ANY OTHER PROVISION OF LAW TO THE CONTRARY, IN ANY CASE WHERE A COUNT OF CRIMINAL USE OF A FIREARM IN THE FIRST DEGREE, AS DEFINED IN SECTION 265.09 OF THE PENAL LAW, IS SUPPORTED AT TRIAL BY LEGALLY SUFFICIENT EVIDENCE, THAT COUNT MUST BE SUBMITTED TOGETHER WITH THE COUNT CHARGING ITS PREDICATE CLASS B VIOLENT FELONY OFFENSE FOR A VERDICT TO BE RENDERED ON EACH.

S 7. This act shall take effect immediately; provided that the amendments to subdivision 3 of section 70.04 of the penal law made by section two of this act shall be subject to the expiration and reversion of such subdivision pursuant to section 74 of chapter 3 of the laws of 1995, as amended, when upon such date the provisions of section three of this act shall take effect; and provided further that the amendments to subdivision 6 of section 70.06 of the penal law made by section four of this act shall not affect the repeal of such subdivision and shall be deemed repealed therewith.