

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D12508
Y/cb

_____AD3d_____

Submitted - September 27, 2006

ANITA R. FLORIO, J.P.
STEPHEN G. CRANE
DANIEL F. LUCIANO
ROBERT A. SPOLZINO
JOSEPH COVELLO, JJ.

2004-09628

DECISION & ORDER

The People, etc., respondent,
v John L. Whaley, appellant.

(Ind. No. 2627B/03)

Robert C. Mitchell, Riverhead, N.Y. (Alfred J. Cicale of counsel), for appellant, and appellant pro se.

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Marcia R. Kucera and Steven A. Hovani of counsel), for respondent.

Appeal by the defendant from a judgment of the County Court, Suffolk County (Ohlig, J.), rendered August 9, 2004, convicting him of attempted burglary in the third degree, upon his plea of guilty, and imposing sentence. Assigned counsel has submitted a brief in accordance with *Anders v California* (386 US 738), in which he moves to be relieved of the assignment to prosecute the appeal.

ORDERED that the motion is granted, and Robert C. Mitchell is relieved as the attorney for the defendant and is directed to turn over all papers in his possession to new counsel assigned herein; and it is further,

ORDERED that Steven P. Flaumenhaff, 93 West Main Street, West Sayville, N.Y., 11796, is assigned as counsel to perfect the appeal; and it is further,

ORDERED that the People are directed to furnish a copy of the stenographic minutes to the new assigned counsel; and it is further,

October 31, 2006

Page 1.

PEOPLE v WHALEY, JOHN L.

ORDERED that the new counsel shall serve and file a brief on behalf of the defendant within 90 days of the date of this decision and order and the People shall serve and file their brief within 120 days of the date of this decision and order; by prior decision and order on motion of this Court, the defendant was granted leave to prosecute the appeal on the original papers (including the typewritten stenographic minutes) and the typewritten briefs of the parties, who were directed to file nine copies of their respective briefs and to serve one copy on each other.

Upon this Court's independent review of the record, we conclude that potentially nonfrivolous issues exist with respect to, inter alia, whether the defendant was properly adjudicated as a second felony offender (*see* CPL 400.21; *People v Horsley*, 251 AD2d 427; *People v Rembert*, 153 AD2d 959; *People v Morrison*, 100 AD2d 976). Accordingly, assignment of new counsel is warranted (*see People v Stokes*, 95 NY2d 633; *People v Casiano*, 67 NY2d 906, *People v Gonzalez*, 47 NY2d 606).

FLORIO, J.P., CRANE, LUCIANO, SPOLZINO and COVELLO, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court

A handwritten signature in black ink that reads "James Edward Pelzer". The signature is written in a cursive, flowing style.