

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

D20432  
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Submitted - June 23, 2008

ROBERT A. SPOLZINO, J.P.  
ROBERT A. LIFSON  
THOMAS A. DICKERSON  
CHERYL E. CHAMBERS, JJ.

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2006-01396

DECISION & ORDER

The People, etc., respondent,  
v Anthony Wayne Smith, appellant.

(Ind. No. 905-01)

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Anna N. Howell, Lynbrook, N.Y., for appellant.

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Ronnie Jane Lamm of counsel),  
for respondent.

Appeal by the defendant from a resentence of the County Court, Suffolk County (Weber, J.), imposed January 13, 2006, upon remittitur from this Court (*see People v Smith*, 23 AD3d 415).

ORDERED that the resentence is affirmed.

The defendant was convicted of assault in the second degree and sentenced, as a second felony offender, to a term of seven years imprisonment and five years postrelease supervision. Upon the direct appeal from the judgment, this Court agreed with the defendant that he was improperly adjudicated a second felony offender, as the predicate conviction had been obtained in violation of his constitutional rights, and the matter was remitted to the County Court for resentencing (*see People v Smith*, 23 AD3d 415, 415-416).

Upon remittitur, the defendant was resentedenced to a term of six years imprisonment and three years postrelease supervision. On appeal from the resentence, the defendant contends that Penal Law § 70.45, the statute mandating that “[e]ach determinate sentence also includes, as a part thereof, an additional period of post-release supervision” (Penal Law §70.45[1]), is unconstitutional.

September 23, 2008

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This contention is without merit (see *United States v Booker*, 543 US 220; *Blakely v Washington*, 542 US 296; *Apprendi v New Jersey*, 530 US 466; *People v Sparber*, 10 NY3d 457; *People v Rivera*, 5 NY3d 61, *cert denied* 546 US 984). We note that the Attorney General of the State of New York was notified pursuant to Executive Law § 71 that the defendant was challenging the constitutionality of Penal Law § 70.45, but determined not to intervene.

SPOLZINO, J.P., LIFSON, DICKERSON and CHAMBERS, JJ., concur.

ENTER:

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

James Edward Pelzer  
Clerk of the Court