

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

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W/hu

_____AD3d_____

Argued - December 9, 2008

WILLIAM F. MASTRO, J.P.
STEVEN W. FISHER
HOWARD MILLER
EDWARD D. CARNI, JJ.

2006-08011

DECISION & ORDER

The People, etc., respondent,
v Wilfredo Velazquez, appellant.

(Ind. No. 1602/05)

Steven Banks, New York, N.Y. (Nancy E. Little of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano,
Sharon Y. Brodt, and Howard D. McCallum of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Knopf, J.), rendered July 17, 2006, convicting him of burglary in the third degree and criminal possession of a weapon in the third degree, upon a jury verdict, and imposing an indeterminate sentence of 15 years to life imprisonment on each count, to run concurrently with each other.

ORDERED that the judgment is modified, as a matter of discretion in the interest of justice, by vacating the adjudication of the defendant as a persistent felony offender, adjudicating him a second felony offender, and reducing his sentences from an indeterminate term of 15 years to life imprisonment to an indeterminate term of 3½ to 7 years of imprisonment on the count of burglary in the third degree and from an indeterminate term of 15 years to life imprisonment to an indeterminate term of 3½ to 7 years of imprisonment on the count of criminal possession of a weapon in the third degree, to run concurrently with each other.

The totality of the evidence adduced at the persistent felony offender hearing, although

January 13, 2009

Page 1.

PEOPLE v VELAZQUEZ, WILFREDO

warranting the defendant's adjudication as a second felony offender, did not warrant his adjudication as a persistent felony offender (*see* Penal Law § 70.10[2]; *People v Greene*, _____AD3d_____, 2008 NY Slip Op 10636, *2 [2d Dept 2008]). Accordingly, we reduce the sentences imposed for burglary in the third degree and criminal possession of a weapon in the third degree—both class D felonies—to concurrent indeterminate terms of imprisonment of 3½ to 7 years, which is the maximum permissible sentence for a second felony offender convicted of those crimes (*see* Penal Law § 70.06[3][d]).

The defendant's remaining contentions are without merit, do not require reversal, or need not be reached in light of our determination.

MASTRO, J.P., FISHER, MILLER and CARNI, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court