

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

D23952
Y/cb

_____AD3d_____

Submitted - June 9, 2009

A. GAIL PRUDENTI, P.J.
HOWARD MILLER
JOSEPH COVELLO
LEONARD B. AUSTIN, JJ.

2005-02603

DECISION & ORDER

The People, etc., respondent,
v Darrin Johnson, appellant.

(Ind. No. 6240/03)

David L. Rich, White Plains, N.Y., for appellant, and appellant pro se.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Linda Breen of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Del Giudice, J.), rendered February 15, 2005, convicting him of criminal possession of a weapon in the third degree, upon his plea of guilty, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant contends that he was denied his right to the effective assistance of counsel. In support of his contention, the defendant alleges that before he entered his plea of guilty, his attorney improperly advised him regarding how a period of incarceration in another state would affect his adjudication as a persistent violent felony offender. However, because the defendant's claim of ineffective assistance of counsel is based upon matter de hors the record, the defendant's claim is not properly before this Court on direct appeal (*see People v Maldonado*, 61 AD3d 1220; *People v James*, 269 AD2d 845, 846; *People v Juhans*, 147 AD2d 658). The defendant's claim may properly be reviewed only in the context of a postjudgment motion to vacate pursuant to CPL article 440 (*see*

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People v Maldonado, 61 AD3d at 1220; *People v James*, 269 AD2d at 846; *People v Juhans*, 147 AD2d at 658; *see also People v Harris*, 109 AD2d 351, 360; CPL 440.10[1][h]).

PRUDENTI, P.J., MILLER, COVELLO and AUSTIN, JJ., concur.

ENTER:

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

James Edward Pelzer
Clerk of the Court