

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

D25852  
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Submitted - December 1, 2009

REINALDO E. RIVERA, J.P.  
HOWARD MILLER  
JOHN M. LEVENTHAL  
CHERYL E. CHAMBERS, JJ.

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2007-05139

DECISION & ORDER

The People, etc., respondent,  
v Layshawn Mitchell, appellant.

(Ind. No. 2559/03)

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Lynn W. L. Fahey, New York, N.Y. (Paul Skip Laisure of counsel), for appellant, and appellant pro se.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano, Johnnette Traill, and Suzanne H. Sullivan of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Eng, J.), rendered November 13, 2006, convicting him of attempted sodomy in the first degree, upon his plea of guilty, and imposing sentence.

ORDERED that the judgment is modified, on the law, by vacating the sentence imposed; as so modified, the judgment is affirmed, and the matter is remitted to the Supreme Court, Queens County, for resentencing in accordance herewith.

The defendant's contention that his plea was not voluntary because it was coerced is unpreserved for appellate review, since he did not move to withdraw his plea on that basis (*see People v Clarke*, 93 NY2d 904, 906; *People v Lopez*, 71 NY2d 662, 665-666; *People v Bolton*, 63 AD3d 1087, *lv denied* 13 NY3d 834; *People v Antoine*, 59 AD3d 560). In any event, his plea of guilty was knowingly, voluntarily, and intelligently entered (*see People v Garcia*, 92 NY2d 869, 870-871; *People v Harris*, 61 NY2d 9, 17).

However, on the record before us, it is not clear whether the court sentenced the defendant as a persistent violent felony offender (*see* Penal Law § 70.08), or as a persistent felony offender (*see* Penal Law §70.10). Accordingly, we vacate the sentence and remit the matter to the Supreme Court, Queens County, for resentencing, including a determination and adjudication of the defendant's status under article 400 of the Criminal Procedure Law.

In light of our determination, we do not reach the defendant's remaining contention raised in his supplemental pro se brief.

RIVERA, J.P., MILLER, LEVENTHAL 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