

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

D27395
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_____AD3d_____

Argued - April 19, 2010

PETER B. SKELOS, J.P.
FRED T. SANTUCCI
JOHN M. LEVENTHAL
L. PRISCILLA HALL, JJ.

2008-10775

DECISION & ORDER

The People, etc., respondent,
v Dean Pacquette, appellant.

(Ind. No. 4787/07)

Lynn W. L. Fahey, New York, N.Y. (Steven R. Bernhard of counsel), for appellant.

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

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Marrus, J.), rendered November 12, 2008, convicting him of criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing (Ingram, J.), of that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement officials.

ORDERED that the judgment is modified, as a matter of discretion in the interest of justice, by vacating the sentence imposed; as so modified, the judgment is affirmed, and the matter is remitted to the Supreme Court, Kings County, for resentencing.

Contrary to the defendant's contention, any error in not suppressing his statements to law enforcement officers was harmless beyond a reasonable doubt since the evidence of the defendant's guilt, without reference to the alleged error, was overwhelming, and there is no reasonable possibility that the alleged error might have contributed to the defendant's conviction (*see People v Crimmins*, 36 NY2d 230, 237).

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However, the remarks of the sentencing court demonstrated that it improperly considered the crime of which the defendant was acquitted as a basis for sentencing (*see People v Romero*, 71 AD3d 795; *People v Schrader*, 23 AD3d 585, 585-586; *People v Errington*, 307 AD2d 325; *People v Smith*, 305 AD2d 432; *People v Ramsay*, 288 AD2d 240; *see also People v Maula*, 163 AD2d 180). Accordingly, we vacate the sentence and remit the matter to the Supreme Court, Kings County, for resentencing.

In light of the foregoing, the defendant's remaining contention is academic.

SKELOS, J.P., SANTUCCI, LEVENTHAL and HALL, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive style with a large, looping initial "J".

James Edward Pelzer
Clerk of the Court