

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

D27431
G/ct

_____AD3d_____

Submitted - April 26, 2010

JOSEPH COVELLO, J.P.
THOMAS A. DICKERSON
RANDALL T. ENG
LEONARD B. AUSTIN, JJ.

2004-06201

DECISION & ORDER

The People, etc., respondent,
v Efren Nieves, appellant.

(S.C.I. No. 04-00141)

John De Chiaro, Larchmont, N.Y., for appellant.

Janet DiFiore, District Attorney, White Plains, N.Y. (Valerie A. Livingston and Anthony J. Servino of counsel; Justin L. Tolbert on the brief), for respondent.

Appeal by the defendant from a judgment of the County Court, Westchester County (Alessandro, J.), rendered June 14, 2004, convicting him of attempted assault in the second degree, upon his plea of guilty, and imposing sentence.

ORDERED that the judgment is reversed, on the law, the plea is vacated, Superior Court Information No. 04-0141 is dismissed, and the matter is remitted to the County Court, Westchester County, for further proceedings on the felony complaint.

The defendant was charged, by felony complaint, with one count of attempted assault in the first degree under Penal Law § 120.10(3), one count of criminal use of a firearm in the second degree, and one count of reckless endangerment in the first degree. He waived indictment by a grand jury and pleaded guilty under a superior court information to one count of attempted assault in the second degree under Penal Law §§ 110.00 and 120.05(4).

As the People correctly concede, the judgment of conviction must be reversed because the superior court information was jurisdictionally defective, since the single count contained therein charged the defendant with a nonexistent crime (*see People v Roe*, 191 AD2d 844, 845). An attempt

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requires an intent to commit a specific crime (*see* Penal Law § 110.00; *People v Terry*, 104 AD2d 572, 573; *People v Williams*, 40 AD2d 1023, 1024). “One cannot attempt to commit an act which one does not intend to commit” (*People v Terry*, 104 AD2d at 573). Assault in the second degree as defined in subdivision 4 of section 120.05 of the Penal Law involves no intent, only a culpable mental state of recklessness. Accordingly, one cannot legally be found guilty of attempted assault in the second degree by reckless conduct (*see People v Williams*, 40 AD2d at 1024; *see also People v Terry*, 104 AD2d at 573). Thus, the superior court information was jurisdictionally defective (*see People v Roe*, 191 AD2d at 845), and this defect survives the defendant’s failure to raise this claim in the County Court, his plea of guilty, and his waiver of the right to appeal (*see People v Zanghi*, 79 NY2d 815, 817; *People v Edwards*, 39 AD3d 875, 876).

COVELLO, J.P., DICKERSON, ENG and AUSTIN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court