

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

D27460  
Y/prt

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - April 20, 2010

MARK C. DILLON, J.P.  
HOWARD MILLER  
THOMAS A. DICKERSON  
CHERYL E. CHAMBERS, JJ.

---

2008-05919

DECISION & ORDER

The People, etc., respondent,  
v Derrick Smiley, appellant.

(Ind. No. 2834/07)

---

Robert C. Mitchell, Riverhead, N.Y. (John M. Dowden of counsel), for appellant.

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Ronnie Jane Lamm of counsel),  
for respondent.

Appeal by the defendant from a judgment of the County Court, Suffolk County (Gazzillo, J.), rendered June 5, 2008, convicting him of criminal sale of a controlled substance in the third degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant's contention that the arresting detective should not have been allowed to testify as an expert is unpreserved for appellate review (*see* CPL 470.05[2]), and we decline to review that contention in the exercise of our interest of justice jurisdiction.

Contrary to the defendant's contention, the jury verdict was not inconsistent. Inasmuch as possession is not a necessary element of criminal sale of a controlled substance in the third degree (*see* Penal Law § 220.39[1]), the jury's acquittal of the defendant of the charge of criminal possession of a controlled substance in the third degree (*see* Penal Law § 220.16[1]) does not render infirm his conviction of criminal sale of a controlled substance in the third degree (*see* CPL 300.30[5]; *People v Trappier*, 87 NY2d 55, 58; *People v Carrion*, 282 AD2d 543).

May 18, 2010

PEOPLE v SMILEY, DERRICK

Page 1.

The defendant's contention that his conviction of criminal sale of a controlled substance in the third degree was not supported by legally sufficient evidence is unpreserved for appellate review, as defense counsel merely made a general motion for a trial order of dismissal at the close of the People's case (*see* CPL 470.05[2]; *People v Hawkins*, 11 NY3d 484, 492). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621), we find that the evidence was legally sufficient to establish the defendant's guilt beyond a reasonable doubt.

Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see* CPL 470.15[5]; *People v Romero*, 7 NY3d 633, 644-645).

The sentence imposed was not excessive (*see* Penal Law § 70.02; *People v Adams*, 55 AD3d 616).

The defendant's remaining contentions are without merit.

DILLON, J.P., MILLER, DICKERSON and CHAMBERS, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court