

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

D28752
O/prt

_____AD3d_____

Submitted - October 6, 2010

WILLIAM F. MASTRO, J.P.
ANITA R. FLORIO
THOMAS A. DICKERSON
ARIEL E. BELEN
PLUMMER E. LOTT, JJ.

2009-05091

DECISION & ORDER

The People, etc., respondent,
v Anthony Favale, appellant.

(Ind. No. 695/05)

Robert C. Mitchell, Riverhead, N.Y. (Alfred J. Cicale of counsel), for appellant.

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Grazia DiVincenzo of counsel),
for respondent.

Appeal by the defendant, as limited by his brief, from an amended sentence of the County Court, Suffolk County (Braslow, J.), rendered April 28, 2009, upon his conviction of attempted criminal possession of a controlled substance in the third degree and criminal possession of a weapon in the third degree, after his plea of guilty.

ORDERED that the amended sentence is reversed, on the law, and the matter is remitted to the County Court, Suffolk County, for resentencing in accordance herewith.

While the defendant's contention that he was improperly adjudicated a second felony offender is unreserved for appellate review (*see* CPL 470.05[2]), we consider the matter in the exercise of our interest of justice jurisdiction (*see People v Fusillo*, 94 AD2d 802). The sentencing court adjudicated the defendant a second felony offender (*see* Penal Law § 70.06) absent any indication of compliance with the procedural requirements of CPL 400.21, or any showing that the defendant was given notice and an opportunity to be heard (*see People v Bouyea*, 64 NY2d 1140; *People v Alston*, 289 AD2d 339). Accordingly, the matter must be remitted to the County Court,

October 26, 2010

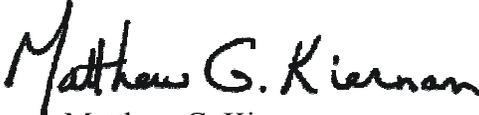
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Suffolk County, for resentencing (*see People v Hamdam*, 58 AD3d 752).

MASTRO, J.P., FLORIO, DICKERSON, BELEN and LOTT, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court