

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

D30229
C/kmb

_____AD3d_____

Submitted - October 30, 2009

PETER B. SKELOS, J.P.
RANDALL T. ENG
LEONARD B. AUSTIN
SHERI S. ROMAN, JJ.

2007-09745

DECISION & ORDER

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

(Ind. No. 6666/05)

Lynn W. L. Fahey, New York, N.Y. (David P. Greenberg of counsel), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Ruth E. Ross of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Sullivan, J.), rendered September 12, 2007, convicting him of attempted rape in the first degree, upon his plea of guilty, and imposing sentence upon his adjudication as a predicate felon. By decision and order of this Court dated May 4, 2010, the appeal was held in abeyance and the matter was remitted to the Supreme Court, Kings County, for a hearing to determine whether the defendant's conviction in the State of Florida was sufficient to qualify as a predicate felony in New York pursuant to Penal Law § 70.04(1)(b)(i) or Penal Law § 70.06(1)(b)(i) (*see People v Grigg*, 73 AD3d 806). The Supreme Court has now filed its report.

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

The defendant was adjudicated and sentenced as a predicate felon based upon a prior conviction of armed robbery in the State of Florida. The Florida statute under which the defendant was convicted (*see Fla Stat Ann*, tit 46, § 812.13) criminalizes several different acts, some of which, if committed in New York, would constitute a felony pursuant to Penal Law § 160.05, or a violent

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felony pursuant to Penal Law § 160.15, and some of which would not constitute a felony in New York. Thus, by decision and order dated May 4, 2010, we held the defendant's appeal in abeyance and remitted the matter to the Supreme Court, Kings County, for a hearing to determine whether the defendant's conviction in the State of Florida was based upon acts which would constitute a felony or violent felony in New York (*see People v Grigg*, 73 AD3d 806).

On remittitur, the People conceded before the Supreme Court that the defendant's armed robbery conviction in the State of Florida cannot be used as a predicate felony in New York. The Supreme Court has now filed its report finding that the subject conviction cannot be used as a predicate felony "as it cannot be shown that it was based upon acts which constitute a felony, or a violent felony, in New York." Accordingly, we modify the judgment by vacating the sentence imposed, and remit the matter to the Supreme Court, Kings County, so that the defendant may be resentenced as a first-time violent felony offender (*see People v Fumai*, 34 AD3d 831, 832; *People v Maglione*, 305 AD2d 426, 427; *People v Lee*, 194 AD2d 559, 560).

SKELOS, J.P., ENG, AUSTIN and ROMAN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court