

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

D30441  
W/ct

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

Argued - February 3, 2011

DANIEL D. ANGIOLILLO, J.P.  
ANITA R. FLORIO  
ARIEL E. BELEN  
LEONARD B. AUSTIN, JJ.

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2009-03047

DECISION & ORDER

The People, etc., respondent,  
v Christopher Casey, appellant.

(Ind. No. 2948/05)

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Lynn W. L. Fahey, New York, N.Y., for appellant.

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

Appeal by the defendant from a judgment of the Supreme Court, Kings County (DiMango, J.), rendered December 12, 2008, convicting him of burglary in the third degree, upon his plea of guilty, and imposing sentence.

ORDERED that the judgment is modified, on the law and as a matter of discretion in the interest of justice, by vacating the defendant's adjudication as a second felony offender and the sentence imposed; 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's contention that his conviction of burglary in the third degree in the State of New Jersey did not qualify as a predicate New York felony pursuant to Penal Law § 70.06(1)(b)(i) is unpreserved for appellate review (*see People v Samms*, 95 NY2d 52, 57). However, we reach this issue in the exercise of our interest of justice jurisdiction (*see People v Boston*, 79 AD3d 1140; *People v Grigg*, 73 AD3d 806; *People v Burgos*, 97 AD2d 826). As the People correctly concede, the out-of-state crime of which the defendant was convicted would not constitute a felony in New York for the purposes of enhanced sentencing (*see People v Muniz*, 74 NY2d 464, 469; NJ Stat Ann § 2C:18-2).

March 15, 2011

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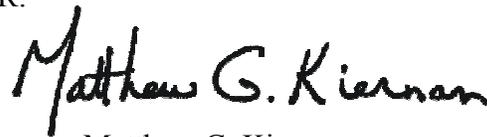
PEOPLE v CASEY, CHRISTOPHER

Accordingly, the defendant's adjudication as a second felony offender and the sentence imposed must be vacated, and the matter must be remitted to the Supreme Court, Kings County, so that the defendant may be resentenced as a first-time felony offender (*see* Penal Law §§ 140.20, 70.00[2][d], [3][b]; *People v Cochran*, 10 AD3d 563).

In light of our determination, we need not reach the defendant's remaining contention (*see People v Burgos*, 97 AD2d at 827-828).

ANGIOLILLO, J.P., FLORIO, BELEN and AUSTIN, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan  
Clerk of the Court