

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

D31374  
C/kmb

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

Submitted - January 4, 2011

ANITA R. FLORIO, J.P.  
RANDALL T. ENG  
ARIEL E. BELEN  
LEONARD B. AUSTIN, JJ.

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2010-01972

DECISION & ORDER

The People, etc., respondent,  
v Timothy Browning, appellant.

(Ind. No. 624/95)

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

Daniel M. Donovan, Jr., District Attorney, Staten Island, N.Y. (Morrie I. Kleinbart and Anne Grady of counsel), for respondent.

Appeal by the defendant from an order of the Supreme Court, Richmond County (Rooney, J.), dated February 22, 2010, which denied his motion to be resentenced pursuant to CPL 440.46.

ORDERED that the order is affirmed.

Contrary to the People's contention, the defendant's release from imprisonment while his motion for resentencing pursuant to CPL 440.46 was pending does not render this appeal academic (*see People v Overton*, \_\_\_\_\_AD3d\_\_\_\_\_, 2011 NY Slip Op 04278 [2d Dept 2011]).

However, the Supreme Court providently exercised its discretion in denying the defendant's motion for resentencing on substantial justice grounds. The defendant was convicted of two violent felonies prior to the commission of the instant drug offenses, and during his incarceration on the instant offenses, he received disciplinary tickets for 10 Tier III and 20 Tier II infractions, including tickets for possession of drugs and possession of a weapon. In addition, the defendant's parole was revoked on multiple occasions for parole violations. Under these circumstances,

May 24, 2011

PEOPLE v BROWNING, TIMOTHY

Page 1.

substantial justice dictated that the motion be denied (*see People v Colon*, 77 AD3d 849; *People v Pipkin*, 77 AD3d 770; *People v Winfield*, 59 AD3d 747, 747-748; *People v Perez*, 57 AD3d 921, 922; *People v Flores*, 50 AD3d 1156, 1156-1157; *People v Stamps*, 50 AD3d 827, 828).

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

ENTER:

  
Matthew G. Kiernan  
Clerk of the Court