

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

D32070
W/kmb

_____AD3d_____

Submitted - June 14, 2011

REINALDO E. RIVERA, J.P.
ANITA R. FLORIO
LEONARD B. AUSTIN
JEFFREY A. COHEN, JJ.

2008-02115

DECISION & ORDER

The People, etc., respondent,
v Daryl Holley, appellant.

(Ind. No. 2276/07)

Arza Feldman, Uniondale, N.Y. (Steven A. Feldman of counsel), for appellant, and appellant pro se.

Kathleen M. Rice, District Attorney, Mineola, N.Y. (Ilisa T. Fleischer, Andrew Fukuda, and Douglas Noll of counsel), for respondent.

Appeal by the defendant from a judgment of the County Court, Nassau County (Ayles, J.), rendered February 26, 2008, convicting him of criminal sale of a controlled substance in the third degree (three counts), criminal possession of a controlled substance in the third degree (three counts), and criminally using drug paraphernalia in the second degree (two counts), upon a jury verdict, and imposing sentence.

ORDERED that the judgment is modified, as a matter of discretion in the interest of justice, (1) by reducing the determinate term of imprisonment imposed on the conviction of criminal sale of a controlled substance in the third degree under count seven of the indictment to six years of imprisonment and (2) by reducing the determinate term of imprisonment imposed on the conviction of criminal possession of a controlled substance in the third degree under count eight of the indictment to six years of imprisonment; as so modified, the judgment is affirmed.

The defendant argues that certain videotaped statements made by confidential informants and detectives should have been redacted before admission of the subject videotapes into evidence. However, any error in failing to redact the challenged statements was harmless, as there

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was overwhelming evidence of the defendant's guilt, and no significant probability that the error contributed to his convictions (*see People v Crimmins*, 36 NY2d 230, 241-242).

Moreover, contrary to the defendant's contention, the fact that the sentence imposed after trial was greater than the sentence offered during plea negotiations is no indication that the defendant was punished for asserting his right to proceed to trial (*see People v Pena*, 50 NY2d 400, 411-412, *cert denied* 449 US 1087; *People v Rodriguez*, 73 AD3d 815, 816-817; *People v Brock*, 69 AD3d 644; *People v Garcia*, 66 AD3d 699, 701). It is "to be anticipated that sentences handed out after trial may be more severe than those proposed in connection with a plea" (*People v Pena*, 50 NY2d at 412; *see People v Lopez*, 67 AD3d 929, 930; *People v DeHaney*, 66 AD3d 1040, 1041), and there is no indication that vindictiveness or retaliation played a role in the County Court's determination (*see People v Lopez*, 67 AD3d at 930; *People v Santiago*, 4 AD3d 545).

However, under the particular circumstances of this case, we deem it appropriate to reduce the sentences imposed to the extent indicated herein.

The defendant's remaining contentions, raised in his pro se supplemental brief, are without merit.

RIVERA, J.P., FLORIO, AUSTIN and COHEN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court