

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

D32149
Y/prt

_____AD3d_____

Argued - June 21, 2011

WILLIAM F. MASTRO, J.P.
CHERYL E. CHAMBERS
LEONARD B. AUSTIN
JEFFREY A. COHEN, JJ.

2007-05151

DECISION & ORDER

The People, etc., appellant,
v Raymond Brun, respondent.

(Ind. No. 1780/06)

Kathleen M. Rice, District Attorney, Mineola, N.Y. (Judith R. Sternberg and Andrea M. DiGregorio of counsel), for appellant.

Martin Geoffrey Goldberg, Franklin Square, N.Y., for respondent.

Appeal by the People from an order of the County Court, Nassau County (Kase, J.), dated May 11, 2007, which was modified by decision and order of this Court dated January 27, 2009 (*People v Brun*, 58 AD3d 862). By decision and order dated July 7, 2009 (*People v Brun*, 64 AD3d 611), this Court denied the defendant's application for a writ of error coram nobis to vacate, on the ground of ineffective assistance of appellate counsel, the decision and order of this Court dated January 27, 2009. In an order dated October 26, 2010, the Court of Appeals reversed the decision and order of this Court dated July 7, 2009, granted the defendant's application for a writ of error coram nobis, vacated the decision and order of this Court dated January 27, 2009, and remitted the matter to this Court for a new determination of the People's appeal (*People v Brun*, 15 NY3d 875).

ORDERED that the order of the County Court, Nassau County, dated May 11, 2007, is modified, on the law and the facts, by deleting the provisions thereof granting those branches of the defendant's application which were to set aside the jury verdict convicting him of robbery in the first degree under counts 1, 2, and 3, robbery in the second degree under counts 7, 8, and 9, criminal use of a firearm in the first degree under count 10, and criminal facilitation in the fourth degree under count 12, and substituting therefor provisions denying those branches of the application; as so

August 2, 2011

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modified, the order dated May 11, 2007, is affirmed, counts 1, 2, 3, 7, 8, 9, 10, and 12 of the indictment and the verdicts of guilt thereon are reinstated, and the matter is remitted to the County Court, Nassau County, for the imposition of sentence on those counts.

Upon a de novo consideration of the People's appeal, and upon consideration of the arguments presented by assigned appellate counsel, we find that the County Court erred in granting those branches of the defendant's motion pursuant to CPL 290.10 which were to set aside the jury verdict convicting him of robbery in the first degree under counts 1, 2, and 3, robbery in the second degree under counts 7, 8, and 9, criminal use of a firearm in the first degree under count 10, and criminal facilitation in the fourth degree under count 12 for the reasons set forth in *People v Brun* (58 AD3d 862). Likewise, for the reasons set forth in *People v Brun* (58 AD3d 862), we find that the evidence was legally insufficient to establish the defendant's guilt as an accessory pursuant to count 11 of the indictment, which charged criminal use of a firearm in the first degree under Penal Law § 265.09(1)(a).

The defendant's contention that he was denied his right to effective assistance of trial counsel is based upon matter dehors the record, and is not properly before this Court (*see People v Brown*, 45 NY2d 852, 853-854; *People v Oliviera*, 168 AD2d 691).

MASTRO, J.P., CHAMBERS, AUSTIN and COHEN, 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