

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

D32578
N/kmb

_____AD3d_____

Submitted - September 27, 2011

REINALDO E. RIVERA, J.P.
ANITA R. FLORIO
LEONARD B. AUSTIN
SANDRA L. SGROI, JJ.

2009-07529

DECISION & ORDER

The People, etc., respondent,
v Keith Johnson, appellant.

(Ind. No. 2563/04)

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

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano and Sharon Y. Brodt of counsel; Lorrie A. Zinno on the brief), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Aloise, J.), rendered March 30, 2009, convicting him of criminal possession of a weapon in the third degree, upon his plea of guilty, and imposing sentence upon his adjudication as a second felony offender.

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, Queens County, for a hearing to determine whether the defendant's conviction in the State of California is sufficient to qualify as a predicate felony in New York and for resentencing thereafter.

The defendant's contention that his conviction of unlawful possession of a firearm in the State of California (*see* Cal Penal Code § 12021[a]) 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 the issue in the exercise of our interest of justice jurisdiction (*see People v Casey*, 82 AD3d 1005; *People v Horvath*, 81 AD3d 850; *People v Boston*, 79 AD3d 1140).

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As the People correctly concede on appeal, the California penal statute under which the defendant was convicted renders criminal not one act but several acts, only some of which, if committed in New York, would constitute a felony (*see People v Gonzalez*, 61 NY2d 586, 590-591; *People v Boston*, 79 AD3d 1140; *People v Grigg*, 73 AD3d 806). Accordingly, it would be proper to consider, inter alia, the California accusatory instrument to determine whether the particular act or acts underlying the defendant's prior conviction would constitute a felony in New York (*see People v Boston*, 79 AD3d at 1141; *People v Grigg*, 73 AD3d at 807). Therefore, we remit the matter to the Supreme Court, Queens County, for a hearing to determine whether the defendant's conviction in the State of California is sufficient to qualify as a predicate felony in New York, and for resentencing thereafter.

In light of our determination, we need not reach the defendant's remaining contention.

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

ENTER:


Matthew G. Kiernan
Clerk of the Court