

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

D34434  
N/kmb

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

Submitted - March 9, 2012

ANITA R. FLORIO, J.P.  
RUTH C. BALKIN  
PLUMMER E. LOTT  
ROBERT J. MILLER, JJ.

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2011-00115

DECISION & ORDER

The People, etc., respondent,  
v Kelly Green, appellant.

(Ind. No. 129/88)

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Lynn W. L. Fahey, New York, N.Y. (Paul Skip Laisure 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 (Rienzi, J.), dated December 15, 2010, which denied his motion for resentencing pursuant to CPL 440.46 on his conviction of criminal sale of a controlled substance in the third degree, which sentence was originally imposed, upon a jury verdict, on June 1, 1989.

ORDERED that the order is affirmed.

Notwithstanding the defendant's positive achievements while incarcerated, the Supreme Court providently exercised its discretion in denying the defendant's motion for resentencing pursuant to CPL 440.46. The defendant had prior convictions for robbery in the second degree and assault in the second degree, and a prior juvenile delinquency adjudication for an act which, if committed by an adult, would have constituted the crime of murder in the second degree. In addition, the defendant received disciplinary tickets for 38 Tier II and 7 Tier III infractions during his incarceration, including multiple tickets for fighting, harassment, making threats, violent conduct, and lewd conduct. Under the circumstances, substantial justice dictated that the motion be denied (*see People v Myles*, 90 AD3d 952, 953-954; *People v Miller*, 88 AD3d 1015, 1016, *lv denied* 18

April 10, 2012

PEOPLE v GREEN, KELLY

Page 1.

NY3d 860; *People v Karim*, 85 AD3d 943, 944).

FLORIO, J.P., BALKIN, LOTT and MILLER, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino  
Clerk of the Court