

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

D35595
C/kmb

_____AD3d_____

Argued - June 11, 2012

MARK C. DILLON, J.P.
ARIEL E. BELEN
LEONARD B. AUSTIN
SANDRA L. SGROI, JJ.

2009-11715

DECISION & ORDER

The People, etc., respondent,
v Immanuel Flowers, appellant.

(Ind. No. 6490/08)

Lynn W. L. Fahey, New York, N.Y. (Denise A. Corsi of counsel), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Sholom J. Twersky, and Kaye Scholer LLP [Gerald Derevyanny], of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Marrus, J.), rendered December 7, 2009, convicting him of criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is modified, as a matter of discretion in the interest of justice, by vacating the sentence imposed; as so modified, the judgment is affirmed, and the matter is remitted to the Supreme Court, Kings County, for resentencing.

Contrary to the defendant's contention, he was not deprived of his right to the effective assistance of counsel, since the record as a whole demonstrates that he received meaningful representation (*see People v Benevento*, 91 NY2d 708, 712-713; *People v Baldi*, 54 NY2d 137, 147; *cf. People v Cyrus*, 48 AD3d 150, 159-161).

However, the remarks of the sentencing court demonstrated that it improperly considered a crime that was dismissed at trial for lack of legally sufficient evidence as a basis for sentencing (*see People v Grant*, 94 AD3d 1139, 1141-1142; *People v Harvey*, 76 AD3d 605, 606; *People v Pacquette*, 73 AD3d 1088, *affd* 17 NY3d 87; *People v Romero*, 71 AD3d 795, 796; *People v Schrader*, 23 AD3d 585, 585-586). Accordingly, the sentence must be vacated and the matter must

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be remitted to the Supreme Court, Kings County, for resentencing.

DILLON, J.P., BELEN, AUSTIN and SGROI, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court