

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

D35600
O/kmb

_____AD3d_____

Submitted - June 12, 2012

DANIEL D. ANGIOLILLO, J.P.
THOMAS A. DICKERSON
JOHN M. LEVENTHAL
CHERYL E. CHAMBERS, JJ.

2010-06858

DECISION & ORDER

The People, etc., respondent,
v William Rivera, appellant.

(Ind. No. 1471/08)

Lynn W. L. Fahey, New York, N.Y., for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano, Sharon Y. Brodt, and Naomi K. Schneidmill of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Kron, J.), rendered January 8, 2010, convicting him of attempted burglary in the second degree, upon his plea of guilty, and sentencing him, as a persistent violent felony offender, to an indeterminate term of imprisonment of 12 years to life.

ORDERED that the judgment is modified, on the law, by vacating the sentence imposed; as so modified, the judgment is affirmed, and the matter is remitted to the Supreme Court, Queens County, for resentencing in accordance herewith.

As correctly conceded by the People, the defendant was improperly adjudicated a persistent violent felony offender based on the convictions enumerated in the statement filed by the People pursuant to CPL 400.16, since the defendant had committed all three of those offenses before he was sentenced for any one of them (*see* Penal Law §§ 70.04[1][b][ii], 70.08[1][a], [b]; *People v Morse*, 62 NY2d 205, 225; *People v Davis*, 43 AD3d 448, 449; *People v Cooper*, 245 AD2d 569). Accordingly, the sentence must be vacated and the matter remitted to the Supreme Court, Queens

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County, for the resentencing of the defendant.

ANGIOLILLO, J.P., DICKERSON, LEVENTHAL and CHAMBERS, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court