

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

D36550  
O/kmb

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

Submitted - October 22, 2012

PETER B. SKELOS, J.P.  
DANIEL D. ANGIOLILLO  
THOMAS A. DICKERSON  
L. PRISCILLA HALL, JJ.

---

2011-04193

DECISION & ORDER

The People, etc., respondent,  
v Anthony Francis, appellant.

(Ind. No. 10-00238)

---

John F. Ryan, White Plains, N.Y. (Salvatore A. Gaetani of counsel), for appellant.

Janet DiFiore, District Attorney, White Plains, N.Y. (Laurie Sapakoff and Steven Bender of counsel), for respondent.

Appeal by the defendant from a judgment of the County Court, Westchester County (Hubert, J.), rendered March 24, 2011, convicting him of robbery in the first degree (two counts), criminal possession of a weapon in the second degree, and criminal possession of a weapon in the third 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 County Court, Westchester County, for resentencing before a different Judge in accordance herewith.

The defendant contends that the County Court improperly considered materially untrue assumptions and charges of which he was acquitted as a basis for sentencing. We reach that issue in the interest of justice.

The remarks of the County Court demonstrate that, in imposing sentence, it improperly speculated that the defendant attempted to kidnap the complainant and intended to burglarize his residence. Since the court sentenced the defendant, in part, “on the basis of materially untrue assumptions or misinformation,” the defendant was denied due process, and must be

November 28, 2012

Page 1.

PEOPLE v FRANCIS, ANTHONY

resentenced (*People v Metellus*, 46 AD3d 578, 579; see *People v Naranjo*, 89 NY2d 1047; *People v Wilson*, 303 AD2d 773). Accordingly, we vacate the sentence and remit the matter to the County Court, Westchester County, for resentencing before a different Judge.

The defendant's contention that the County Court improperly considered charges of which he was acquitted as a basis for sentencing is without merit.

SKELOS, J.P., ANGIOLILLO, DICKERSON and HALL, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court