

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1606

KA 06-02121

PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LAMAR BROWN, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Erie County (Penny M. Wolfgang, J.), entered May 30, 2006. The order denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting defendant of criminal possession of a controlled substance in the second degree.

It is hereby ORDERED that the order so appealed from is unanimously affirmed.

Memorandum: Supreme Court properly denied defendant's motion pursuant to CPL 440.10 seeking to vacate the judgment convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]), as charged in a superior court information (SCI). Defendant had waived indictment of a count of criminal possession of a controlled substance in the first degree (§ 220.21 [1]) and instead pleaded guilty to the charge contained in the SCI. Defendant did not appeal from the judgment of conviction but moved to vacate it pursuant to CPL 440.10 on the grounds that the court lacked jurisdiction over the SCI and that he was denied effective assistance of counsel because defense counsel permitted him to plead guilty despite the court's lack of jurisdiction over the SCI. Although defendant is correct that the court lacked jurisdiction to permit him to waive indictment and "consent to be prosecuted by [SCI]" inasmuch as he was charged in the indictment with a class A felony (CPL 195.10 [1] [b]), we nevertheless conclude that he is barred from raising that error by way of a motion to vacate the judgment pursuant to CPL 440.10. Where, as here, "sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review" of the defendant's contentions, the court must deny a motion to vacate the judgment (CPL 440.10 [2] [c]; see *People v*

Cuadrado, 9 NY3d 362, 364-365).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court