

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

414

**KA 07-00239**

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, PERADOTTO, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT A. HORTON, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered October 4, 2006. The judgment convicted defendant, upon his plea of guilty, of absconding from temporary release in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the DNA databank fee and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of absconding from temporary release in the first degree (Penal Law § 205.17), defendant contends that Supreme Court erred in imposing a DNA databank fee pursuant to Penal Law § 60.35 (former [1] [e]). We agree. That fee may be imposed only "where the offender has been convicted within the previous five years of one of the other felonies specified in this subdivision," i.e., Executive Law § 995 (7) (§ 995 [7] [a]; see Penal Law § 60.35 [former (1) (e)]), and defendant's prior conviction of forgery in the second degree is not one of those specified felonies. Although defendant failed to preserve his contention for our review (see CPL 470.05 [2]; *People v King*, 57 AD3d 1495), we exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]), and we therefore modify the judgment accordingly.

Entered: March 20, 2009

JoAnn M. Wahl  
Clerk of the Court