

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

541

KA 07-02654

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSEPH GRAY, DEFENDANT-APPELLANT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO
(TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH GRAY, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County
(Christopher J. Burns, J.), rendered December 10, 2007. The judgment
convicted defendant, upon his plea of guilty, of attempted criminal
possession of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is
unanimously reversed on the law, the motion is granted, the plea is
vacated, and the matter is remitted to Supreme Court, Erie County, for
further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him
upon his plea of guilty of attempted criminal possession of a
controlled substance in the third degree (Penal Law §§ 110.00, 220.16
[1]). Defendant moved to withdraw his plea on the ground that it was
not knowingly, voluntarily, and intelligently entered. According to
defendant, he pleaded guilty based on a mutual mistake. Indeed, the
record establishes that Supreme Court erroneously assured defendant
that he would retain the right to appeal with respect to the propriety
of the court's refusal to dismiss the indictment based on the denial
of defendant's right to testify before the grand jury pursuant to CPL
190.50 (5), and defendant relied on that erroneous assertion. We thus
agree with defendant that the court abused its discretion in denying
his motion because, in fact, the contention of defendant that he was
denied his right to testify before the grand jury was forfeited by the
plea (*see People v Winchester*, 38 AD3d 1336, 1337, *lv denied* 9 NY3d
853; *see generally People v Kyser*, 56 AD3d 1216, *lv denied* 11 NY3d
926; *People v Robertson*, 255 AD2d 968, *lv denied* 92 NY2d 1053). We
therefore reverse the judgment, grant defendant's motion, vacate the
plea, and remit the matter to Supreme Court for further proceedings on
the indictment (*see generally People v Di Raffaele*, 55 NY2d 234, 241).

In light of our determination, we do not reach the remaining contentions of defendant in his main and pro se supplemental briefs.

Entered: May 1, 2009

Patricia L. Morgan
Clerk of the Court