

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

836

KA 05-02382

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROCKEL BYRON FRANCIS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NANCY A. GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas M. Van Strydonck, J.), rendered June 21, 2005. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a controlled substance in the second degree (two counts) and criminal possession of a controlled substance in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of, inter alia, two counts of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]). We reject the contention of defendant that he was denied effective assistance of counsel based on the failure of defense counsel to challenge the search warrant for his residence. According to defendant, the issuance of the search warrant was not supported by probable cause. "There can be no denial of effective assistance of . . . counsel arising from [defense] counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). Here, the information in the search warrant application demonstrated an ongoing drug operation at defendant's residence, and the application thus "established probable cause to believe that a search of defendant's residence would result in evidence of drug activity" (*People v McLaughlin*, 269 AD2d 858, 858, *lv denied* 95 NY2d 800; see *People v Casolari*, 9 AD3d 894, 895, *lv denied* 3 NY3d 672). Defendant failed to preserve for our review his challenge to Supreme Court's *Molineux* ruling (see CPL 470.05 [2]), and we decline to exercise our power to review that challenge as a matter

of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court