

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

883

**KA 07-02578**

PRESENT: MARTOCHE, J.P., SMITH, FAHEY, CARNI, AND GREEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RAYMOND E. JOSEPH, III, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (ROBERT R. ZICKL OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), entered October 26, 2007. The order directed defendant to pay restitution.

It is hereby ORDERED that the order so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the amount of restitution ordered and as modified the order is affirmed, and the matter is remitted to Genesee County Court for a new hearing in accordance with the following Memorandum: On appeal from an order directing him to pay restitution in the amount of \$551.82 plus a 5% surcharge, defendant contends that County Court erred in delegating its responsibility to conduct the restitution hearing to its court attorney, who prepared a preliminary fact-finding report that was adopted by the court. We agree, for the same reason as that set forth in our decision in *People v Bunnell* (59 AD3d 942, amended on rearg \_\_\_ AD3d \_\_\_ [June 5, 2009]). We note that, although defendant failed to preserve his contention for our review (see CPL 470.05 [2]), we exercise our power to review his contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). We therefore modify the order by vacating the amount of restitution ordered, and we remit the matter to County Court for a new hearing to determine the amount of restitution in compliance with Penal Law § 60.27.

Entered: June 5, 2009

Patricia L. Morgan  
Clerk of the Court