

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

1214

KA 06-00788

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

PRINCE R. CLARK, JR., DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered February 22, 2006. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree (two counts), criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree (two counts) and criminally using drug paraphernalia in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury trial of, inter alia, two counts each of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [12]) and criminally using drug paraphernalia in the second degree (§ 220.50 [2], [3]). We reject the contention of defendant that County Court abused its discretion in denying his motion to sever his trial from that of his codefendant. "The 'core of each defense [was not] in irreconcilable conflict with the other and . . . there [was no] significant danger, as both defenses [were] portrayed to the trial court, that the conflict alone would lead the jury to infer defendant's guilt' " (*People v Bolling*, 49 AD3d 1330, 1332, quoting *People v Mahboubian*, 74 NY2d 174, 184; see *People v Cardwell*, 78 NY2d 996, 997-998). Although at least one comment made by the codefendant's attorney on summation was unfavorable to defendant, that single display of hostility did not warrant severance (see *People v Watkins*, 10 AD3d 665, 665-666, lv denied 3 NY3d 761). Also contrary to the contention of defendant, he did not establish his entitlement to severance on the ground that he would have been subjected to prejudicial cross-examination by the attorney for his codefendant had defendant testified (see generally *People v McGee*, 68 NY2d 328, 333). "At no stage of the proceedings [did] defendant

establish[] that his potential testimony would have given the codefendant an incentive to impeach his credibility" (*People v Frazier*, 309 AD2d 534, 534, lv denied 1 NY3d 571).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court