

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

1537

KA 09-00188

PRESENT: SCUDDER, P.J., SMITH, GREEN, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JACK Z. SWEET, DEFENDANT-APPELLANT.

KATHLEEN E. CASEY, BARKER, FOR DEFENDANT-APPELLANT.

JACK Z. SWEET, DEFENDANT-APPELLANT PRO SE.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered October 31, 2008. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following Memorandum: Defendant appeals from an order denying his motion pursuant to CPL 440.10 to vacate the judgment convicting him after a jury trial of one count of robbery in the first degree (Penal Law § 160.15 [3]), and two counts each of burglary in the first degree (§ 140.30 [2], [3]) and robbery in the second degree (§ 160.10 [2] [a]). Defendant contends, inter alia, that Supreme Court erred in denying the motion without conducting a hearing on the issue whether trial counsel was ineffective in failing to move to dismiss the indictment based on the alleged violation of defendant's statutory right to a speedy trial (see CPL 30.30 [1] [a]). We agree. In support of the motion, defendant submitted evidence that the felony complaint was filed on December 5, 2001 and that the People announced their readiness for trial on the record on June 17, 2002. Because defendant made a prima facie showing that the People failed to comply with CPL 30.30 (1) (a), the burden shifted to the People to demonstrate "sufficient excludable time" (*People v Kendzia*, 64 NY2d 331, 338; see *People v Manning*, 52 AD3d 1295, 1295-1296). The court erred in relieving the People of that burden and in implicitly imposing the burden on defendant to show the absence of excludable time by failing to conduct a hearing at which the People would have had the burden of proof on the issue of "sufficient excludable time" (*Kendzia*, 64 NY2d at 338). Moreover, "[i]t is well settled that a failure of counsel to assert a

meritorious speedy trial claim is, by itself, a sufficiently egregious error to render a defendant's representation ineffective" (*People v St. Louis*, 41 AD3d 897, 898). We therefore hold the case, reserve decision and remit the matter to Supreme Court for a hearing on that issue.

We have examined the remaining contentions of defendant, including those raised in his pro se supplemental brief, and conclude that they are lacking in merit.