

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

820.2/11

KA 10-00823

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

AMBER MARACLE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered September 25, 2009. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the second degree and forgery in the second degree (four counts). The judgment was dismissed in part and affirmed by order of this Court entered June 10, 2011 in a memorandum decision (85 AD3d 1652), and defendant on September 23, 2011 was granted leave to appeal to the Court of Appeals from the order of this Court (17 NY3d 860), and the Court of Appeals on June 27, 2012 reversed the order and remitted the case to this Court for further proceedings consistent with the memorandum (___ NY3d ___ [June 27, 2012]).

Now, upon remittitur from the Court of Appeals,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the appeal from the judgment insofar as it imposed sentence on the conviction of four counts of forgery in the second degree is unanimously dismissed and the judgment is modified as a matter of discretion in the interest of justice by reducing the sentence to an indeterminate term of incarceration of 2a to 7 years and as modified the judgment is affirmed.

Memorandum: In *People v Maracle* (85 AD3d 1652, revd ___ NY3d ___ [June 27, 2012]), this Court previously dismissed defendant's appeal from the judgment in appeal No. 1 to the extent that it imposed sentence on the conviction of four counts of forgery in the second degree, and we otherwise affirmed the judgment convicting her upon her plea of guilty of grand larceny in the second degree (Penal Law § 155.40 [1]) and four counts of forgery in the second degree (§ 170.10 [1]). With respect to defendant's appeal from the resentence in appeal No. 2, we affirmed the resentence on the forgery counts

(*Maracle*, 85 AD3d at 1653). We concluded that defendant's waiver of the right to appeal encompassed her challenge to the severity of the sentence. In reversing our orders, the Court of Appeals concluded that the "plea colloquy fails to establish that defendant knowingly and intelligently waived her right to appeal the severity of her sentence" (*id.* at ____). The Court therefore remitted the matter to this Court "so that it may, should it so choose, exercise its interest of justice jurisdiction" (*id.* at ____).

Upon remittal, we agree with defendant with respect to the judgment in appeal No. 1 that the sentence imposed for grand larceny in the second degree is unduly harsh and severe. Thus, as a matter of discretion in the interest of justice (see CPL 470.15 [6] [b]), we modify the judgment by reducing the sentence to an indeterminate term of incarceration of 2a to 7 years. With respect to the resentencing in appeal No. 2, we conclude that the sentence is not unduly harsh or severe.

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court