

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

424

KA 07-01773

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAREES JOHNSON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN M. PREVE 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 Erie County Court (Sheila A. DiTullio, J.), rendered August 22, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Erie County Court for resentencing.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the third degree (Penal Law § 265.02 [3]) and sentencing him to an indeterminate term of incarceration of two to four years. As defendant contends, and the People correctly concede, the sentence is illegal. Defendant was convicted of a class D nonviolent felony offense and thus the minimum term should have been no more than one third of the maximum term imposed, i.e., 12 months (see § 70.00 [3] [b]). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing (see *People v Adams*, 45 AD3d 1346; *People v Finland*, 273 AD2d 925). Because the illegal sentence requires that the case be remitted, we need not address defendant's further contention concerning the sentence.

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court