

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

736

KA 08-01588

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

OTIS L. SIMMONS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered July 10, 2008. The order denied the motion of defendant pursuant to CPL 440.30 (1-a) for DNA testing.

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

Memorandum: County Court properly denied defendant's postjudgment motion pursuant to CPL 440.30 (1-a) for DNA testing. We note that defendant has abandoned any request for DNA testing on blood found in the basement where the alleged rape occurred inasmuch as his contention in his brief on appeal is limited to DNA testing of pubic hair (*see generally People v Jansen*, 145 AD2d 870, 871, *lv denied* 73 NY2d 923). We conclude that, even if the mitochondrial DNA testing sought by defendant had been performed on the pubic hair, there is no reasonable probability that the verdict would have been more favorable to defendant (*see generally People v Pitts*, 4 NY3d 303, 310, *rearg denied* 5 NY3d 783).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court