

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

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KA 05-00837

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

EARL J. REED, DEFENDANT-APPELLANT.

KRISTIN F. SPLAIN, CONFLICT DEFENDER, ROCHESTER (KIMBERLY J. CZAPRANSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (LESLIE E. SWIFT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Dennis M. Kehoe, A.J.), rendered March 17, 2005. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him, following a jury trial, of criminal possession of a weapon in the third degree (Penal Law § 265.02 [former (4)]), defendant contends that County Court erred in denying his motion to sever his trial from that of his codefendant. We reject that contention for the same reasons as those set forth in our decision in *People v Wilburn* (50 AD3d 1617, 1618, lv denied 11 NY3d 742), the appeal by defendant's codefendant. We reject defendant's further contention that the court erred in denying his request for an adverse inference charge with respect to the People's failure to present certain items of physical evidence. Those items were not obtained by the police, "and there [was] no indication that the People . . . had those items 'within their possession and control' " (*People v Tutt*, 305 AD2d 987, lv denied 100 NY2d 588). Finally, we reject defendant's contention that he was deprived of effective assistance of counsel (see generally *People v Baldi*, 54 NY2d 137, 147).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court