

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

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KAH 12-00565

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JAMES SMITH, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

THE STRODS LAW FIRM, AUBURN (LISA A. BLAIR OF COUNSEL), FOR
PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF
COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered December 21, 2011 in a proceeding pursuant to CPLR article 70. The judgment denied the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus. In support thereof, he contended, inter alia, that he was improperly sentenced as a persistent violent felony offender, the evidence is legally insufficient to support the conviction of sodomy in the first degree (Penal Law former § 130.50 [1]), and he was denied his right to effective assistance of counsel. We conclude that Supreme Court properly denied the petition. Those contentions could have been raised on direct appeal or by a motion pursuant to CPL article 440, and thus habeas corpus relief is unavailable (*see People ex rel. Donato v Kirkpatrick*, 73 AD3d 1450, 1451, lv denied 15 NY3d 707; *People ex rel. Mills v Poole*, 55 AD3d 1289, 1290, lv denied 11 NY3d 712).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court