

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

895

KA 11-01667

PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ELBERT J. WELCH, DEFENDANT-APPELLANT.

ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

ELBERT J. WELCH, DEFENDANT-APPELLANT PRO SE.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Niagara County Court (Robert C. Noonan, A.J.), dated July 12, 2011. The order denied the application of defendant to be resentenced pursuant to CPL 440.46.

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

Memorandum: Defendant appeals from an order denying his application for resentencing pursuant to CPL 440.46. Contrary to defendant's contentions in his main and pro se supplemental briefs, we conclude that County Court properly considered the relevant facts and circumstances in determining that "[t]he evidence of the defendant's rehabilitation does not outweigh his criminal history, institutional record, and pattern of successive reoffenses while on parole" (*People v Cabrera*, 103 AD3d 748, 748-749). Thus, the court did not abuse its discretion in determining that "substantial justice dictate[d] that the application should be denied" (L 2004, ch 738, § 23; see e.g. *People v Milland*, 103 AD3d 669, 670, lv denied 21 NY3d 1017; *People v Benitez-Fernandez*, 96 AD3d 1665, 1666). We have considered defendant's remaining contentions in his pro se supplemental brief and conclude that none warrants reversal or modification of the order.

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court