

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D55182
O/htr

_____AD3d_____

Submitted - January 8, 2018

CHERYL E. CHAMBERS, J.P.
SYLVIA O. HINDS-RADIX
COLLEEN D. DUFFY
HECTOR D. LASALLE, JJ.

2016-04475

DECISION & ORDER

The People, etc., respondent,
v Joseph Rovinsky, appellant.

(Ind. No. 2389/11)

Laurette D. Mulry, Riverhead, NY (Alfred J. Cicale of counsel), for appellant.

Timothy D. Sini, District Attorney, Riverhead, NY (Michael J. Brennan of counsel),
for respondent.

Appeal by the defendant from a resentencing of the County Court, Suffolk County (John J. Toomey, J.), imposed March 28, 2016, upon his conviction of assault in the first degree and assault in the second degree, upon his plea of guilty, after remittitur from this Court for resentencing (*see People v Rovinsky*, 135 AD3d 969), the resentencing being a determinate term of imprisonment of 15 years to be followed by 5 years of postrelease supervision for the conviction of assault in the first degree, to be served concurrently with a determinate term of imprisonment of 5 years to be followed by 3 years of postrelease supervision for the conviction of assault in the second degree.

ORDERED that the matter is remitted to the County Court, Suffolk County, for further proceedings on the defendant's motion to withdraw his plea of guilty, for which the defendant shall be appointed new counsel, and thereafter a report to this Court limited to its findings with respect to the motion and whether the defendant established his entitlement to the withdrawal of his plea of guilty, and the appeal is held in abeyance pending receipt of the County Court's report, which shall be filed with all convenient speed.

The defendant contends, and the People agree, that the County Court erred in failing to consider the defendant's oral pro se application at the resentencing proceeding to withdraw his plea of guilty. There is no indication in the record that the court ruled on the defendant's motion. The

April 25, 2018


Page 1.

PEOPLE v ROVINSKY, JOSEPH

court neither granted nor denied it on the record before us. As CPL 470.15(1) serves as a legislative restriction on this Court's power to review issues not ruled upon by the trial court (*see People v Concepcion*, 17 NY3d 192, 195; *People v LaFontaine*, 92 NY2d 470, 474; *see also People v Ingram*, 18 NY3d 948, 949), the court's failure to rule on the motion precludes our review of the issue raised by the defendant's appeal (*see People v McDonald*, 125 AD3d 1280; *People v Hallmark*, 122 AD3d 1438). Accordingly, the matter must be remitted to the County Court, Suffolk County, for further proceedings on the defendant's motion to withdraw his plea of guilty, for which the defendant shall be appointed new counsel, and thereafter a report to this Court on the motion and whether the defendant established his entitlement to withdrawal of his plea of guilty. The appeal will be held in abeyance pending receipt of the County Court's report. We express no opinion as to the merits of the defendant's motion, and we decide no other issues at this time.

CHAMBERS, J.P., HINDS-RADIX, DUFFY and LASALLE, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court