

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

589

**KA 10-00727**

PRESENT: SCUDDER, P.J., FAHEY, CARNI, GREEN, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TONY L. SPENCER, DEFENDANT-APPELLANT.

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TIMOTHY J. BRENNAN, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered October 8, 2009. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree (four counts) and criminal possession of a controlled substance in the third degree (four counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of four counts each of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). Contrary to defendant's contention, County Court properly granted the People's request to amend the indictment to delete language identifying the buyer as an undercover police officer. That amendment "did not change the theory of the prosecution, nor did it 'otherwise tend to prejudice the defendant on the merits' " (*People v Brink*, 31 AD3d 1139, 1140, *lv denied* 7 NY3d 865, quoting CPL 200.70 [1]; *see People v Waxter*, 268 AD2d 899, 900; *People v Brown*, 196 AD2d 428, 429-430, *lv denied* 82 NY2d 804). We further conclude that the court's imposition of consecutive sentences is not unduly harsh or severe.

Entered: April 29, 2011

Patricia L. Morgan  
Clerk of the Court