

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

709

KA 12-00383

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SHAWN WHALEN, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered November 23, 2011. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Erie County, for resentencing in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [3]). As the People correctly concede, Supreme Court erred in failing to set forth on the record its determination denying defendant's request for youthful offender treatment (see CPL 720.20 [1]; *People v Beasley*, 86 AD3d 932, 932; *People v Lee*, 79 AD3d 1641, 1641). We thus modify the judgment by vacating the sentence, and we remit the matter to Supreme Court for resentencing following a determination whether defendant should be sentenced as a youthful offender (see *Beasley*, 86 AD3d at 932). In view of our determination, we do not address defendant's remaining contentions, which concern the waiver of the right to appeal and the severity of the sentence.

Entered: June 7, 2013

Frances E. Cafarell
Clerk of the Court