

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

836

KA 21-01423

PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES G. SCOTT, DEFENDANT-APPELLANT.

LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL),
FOR DEFENDANT-APPELLANT.

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T.
VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered September 30, 2021. The judgment convicted defendant upon his plea of guilty of assault in the second 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 Cayuga County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon his guilty plea of assault in the second degree (Penal Law § 120.05 [2]), defendant contends, and the People correctly concede, that County Court erred in sentencing him as a persistent violent felony offender without granting his request for a hearing.

As relevant here, a persistent violent felony offender is one "who stands convicted of a violent felony offense . . . , after having previously been subjected to two or more predicate violent felony convictions" (Penal Law § 70.08 [1] [a]). The sentences upon the predicate violent felony convictions "must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted" (§ 70.04 [1] [b] [iv]). "In calculating the ten year period . . . , any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration" (§ 70.04 [1] [b] [v]).

Although defendant admitted at sentencing that he had been convicted of the prior violent felony offenses alleged in the People's persistent violent felony offender statement, defendant did not concede that he had been sentenced on at least two of those violent

felonies within 10 years prior to the commission of the instant offense, and the People's statement did not set forth the commencement date, termination date, and place of imprisonment for each period of incarceration to be used for tolling of the ten-year limitation as required by CPL 400.15 (2). Moreover, as the People correctly concede, the record does not include a specific finding by the court regarding whether there was sufficient incarceration tolling for defendant's prior violent felony convictions to count as predicate convictions.

We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing following a hearing in which the People will have the burden of proof of establishing the appropriate time computations under Penal Law § 70.04 (1) (b) (v) and, consequently, whether defendant is a persistent violent felony offender (see *People v Vanhooser* [appeal No. 2], 126 AD3d 1531, 1532-1533 [4th Dept 2015]).