

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

737

KA 22-01669

PRESENT: BANNISTER, J.P., MONTOUR, NOWAK, DELCONTE, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SAMUEL MCCULLOUGH, DEFENDANT-APPELLANT.

JULIA CIANCA, PUBLIC DEFENDER, ROCHESTER (PAUL SKIP LAISURE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (RYAN P. ASHE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered September 27, 2022. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of criminal possession of a controlled substance in the third degree and dismissing count 1 of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]).

Defendant—a passenger in a vehicle stopped by the police—was found in possession of two bags of crack cocaine, weighing 6.512 grams in the aggregate. As defendant contends, and the People correctly concede, the evidence adduced at trial is legally insufficient to establish that the defendant intended to sell the narcotics (see *People v Nellons*, 133 AD3d 1258, 1259 [4th Dept 2015]). However, contrary to the parties' contentions, the top count cannot be reduced to criminal possession of a controlled substance in the seventh degree, inasmuch as criminal possession of a controlled substance in the seventh degree is an inclusory concurrent count of criminal possession of a controlled substance in the fourth degree, of which defendant was also convicted (see CPL 300.30 [4]; 300.40 [3] [b]; *People v Luciano*, 152 AD3d 989, 991 [3d Dept 2017], *lv denied* 30 NY3d 1020 [2017]; *People v Mann*, 231 AD2d 914, 914-915 [4th Dept 1996], *lv denied* 89 NY2d 866 [1996]). The top count must therefore be dismissed

altogether (see CPL 300.40 [3] [b]; *Luciano*, 152 AD3d at 991). We thus modify the judgment by reversing that part convicting defendant of criminal possession of a controlled substance in the third degree and dismissing that count of the indictment.

Finally, contrary to defendant's contention, the sentence imposed upon his conviction of criminal possession of a controlled substance in the fourth degree is not unduly harsh or severe.