

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

419

KA 13-01871

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RASHEEN P. TOWNSEND, DEFENDANT-APPELLANT.

ROSEMARIE RICHARDS, SOUTH NEW BERLIN, FOR DEFENDANT-APPELLANT.

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (JOHN C. TUNNEY OF COUNSEL),
FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Peter C. Bradstreet, J.), rendered January 15, 2013. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree and criminal sale of a controlled substance in the third degree.

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 criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal sale of a controlled substance in the third degree (§ 220.39 [1]). We reject the contention that the verdict is against the weight of the evidence on the issue of defendant's identity as the seller of the drugs, or on the issue of the identity and narcotic nature of the substance sold by defendant (*see People v Bleakley*, 69 NY2d 490, 495). We further conclude that County Court did not err in admitting in evidence the drugs and the audiotape recording of the sale (*see People v Hawkins*, 11 NY3d 484, 494; *People v Newman*, 87 AD3d 1348, 1350, lv denied 18 NY3d 926; *People v Cleveland*, 273 AD2d 787, 788, lv denied 95 NY2d 864; *People v Adams*, 185 AD2d 680, 681, lv denied 80 NY2d 926).

Finally, we conclude that the court did not err in refusing to charge criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03) as a lesser included offense under both counts of the indictment. Criminal possession of a controlled substance in the seventh degree is not a lesser included offense of criminal sale of a controlled substance in the third degree (*see People v Davis*, 14 NY3d 20, 23; *People v Yon*, 300 AD2d 1127, 1128, lv denied 99 NY2d 621; *People v Young*, 249 AD2d 576, 578-579, lv denied 92 NY2d 908). "One need not have dominion or control over a drug in order to offer to sell it to someone else" (*Davis*, 14 NY3d at 23).

Criminal possession of a controlled substance in the seventh degree is a lesser included offense of criminal possession of a controlled substance in the third degree (see *People v Palmer*, 216 AD2d 883, 884, lv denied 86 NY2d 799; see generally *People v Glover*, 57 NY2d 61, 63-64), but here there is no reasonable view of the evidence from which the jury could have concluded that defendant possessed the cocaine but did not intend to sell it (see *People v Fairley*, 63 AD3d 1288, 1289-1290, lv denied 13 NY3d 743; *People v Shannon*, 254 AD2d 116, 116, lv denied 92 NY2d 1054).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court