

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

1003

KA 14-00087

PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RONALD THOMAS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ROMANA A. LAVALAS OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Onondaga County Court (Joseph E. Fahey, J.), entered December 18, 2013. The order denied the motion of defendant pursuant to CPL article 440.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Onondaga County Court for a hearing pursuant to CPL 440.30 (5).

Memorandum: We agree with defendant that County Court erred in denying without a hearing his motion pursuant to CPL 440.10 to vacate his judgment of conviction on the ground that he did not receive effective assistance of counsel. Defendant averred that defense counsel failed to advise him that he would be sentenced as a persistent violent felony offender if convicted after a trial, rather than as a second violent felony offender. Defendant further averred that he was prejudiced thereby because he would have accepted a plea offer had he known his actual predicate status. The record indicates that defense counsel, the court, and the People all failed to realize until after the trial started, when there were no further plea negotiations, that defendant would be a persistent violent felony offender if convicted. We conclude that defendant's submissions raise factual issues that require a hearing (*see* CPL 440.30 [5]; *People v Hill*, 114 AD3d 1169, 1170; *People v Wimberly*, 86 AD3d 651, 652-653; *People v Howard*, 12 AD3d 1127, 1127-1128). We therefore reverse the order and remit the matter to County Court to conduct a hearing on defendant's motion.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court