

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

1653

KAH 07-02186

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
DENNIS WURTHMANN, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

ROBERT A. KIRKPATRICK, SUPERINTENDENT, WENDE
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

KEVIN J. BAUER, BUFFALO, FOR PETITIONER-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS OF
COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered July 12, 2007. The judgment converted the proceeding for a writ of habeas corpus to a proceeding pursuant to CPLR article 78 and dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the first three decretal paragraphs and as modified the judgment is affirmed without costs.

Memorandum: Supreme Court erred in converting this proceeding seeking a writ of habeas corpus to a proceeding pursuant to CPLR article 78, and we therefore modify the judgment accordingly (*see People ex rel. Smith v Mantello*, 167 AD2d 912). We further conclude on the merits, however, that the court properly dismissed the petition. Petitioner previously appealed from a judgment convicting him of murder in the second degree (Penal Law § 125.25 [2]) and criminal possession of a weapon in the third degree (§ 265.02 [former (1)]), and this Court modified the judgment by vacating the sentence and remitted the matter for resentencing (*People v Wurthmann*, 26 AD3d 830, 831, *lv denied* 7 NY3d 765). The certificate of conviction issued following petitioner's resentencing and the minutes of the resentencing proceeding establish that County Court properly corrected its previous errors in accordance with the express terms of our prior decision by modifying the sentence only to the extent that it was illegal and by otherwise allowing the valid terms of the sentence previously imposed to stand (*see generally People v Carpenter*, 19 AD3d 730, 731, *lv denied* 5 NY3d 804).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court