

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

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KA 05-02215

PRESENT: SCUDDER, P.J., MARTOCHE, CENTRA, FAHEY, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

EFRAIN COTTO, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (PATRICK H. FIERRO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered September 13, 2005. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by amending the order of protection and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). Although defendant failed to preserve for our review his contention that the order of protection is invalid (see *People v Nieves*, 2 NY3d 310, 315-317), we nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). We agree with defendant that Supreme Court erred in determining the maximum expiration date, which exceeds three years from the expiration of the maximum term of the determinate sentence of imprisonment that was imposed (see CPL 530.13 [former (4)]), and that the court also erred in failing to consider the jail time credit to which defendant is entitled (see *People v Goins*, 45 AD3d 1371, 1372). We therefore modify the judgment by amending the order of protection, and we remit the matter to Supreme Court to determine the jail time credit to which defendant is entitled, and to specify in the order of protection an expiration date in accordance with CPL 530.13 (former [4]), the version of the statute in effect when the judgment was rendered on September 13, 2005 (see *id.*).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court