

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

**440**

**KA 07-02334**

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GEORGE SWAN, DEFENDANT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (ROBERT P. RICKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered October 30, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal mischief 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 his plea of guilty, of criminal mischief in the third degree (Penal Law § 145.05 [2]). We reject the contention of defendant that County Court failed to comply with the procedural requirements for adjudicating him a second felony offender pursuant to CPL 400.21. Even assuming, arguendo, that the People failed to file the predicate felony statement prior to sentencing (see CPL 400.21 [2]), we conclude that defendant was properly afforded notice of the predicate felony inasmuch as the record establishes that he received the predicate felony statement before he was sentenced (see *generally People v Sampson*, 30 AD3d 623, *lv denied* 7 NY3d 817). Furthermore, although the court failed to ask defendant at sentencing if he wished to controvert his second felony offender status pursuant to CPL 400.21 (3), defendant had contested his status at a prior hearing and raised the same contentions concerning his status in a written motion to vacate his plea. We conclude on the record before us that the court substantially complied with the requirements of CPL 400.21 (see *People v Mateo*, 53 AD3d 1111, 1112, *lv denied* 11 NY3d 791; *People v Beu*, 24 AD3d 1257, *lv denied* 6 NY3d 809; see also *Sampson*, 30 AD3d 623).

Entered: March 20, 2009

JoAnn M. Wahl  
Clerk of the Court