

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

422

**KA 08-01043**

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, PERADOTTO, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MARTIN NAGEL, DEFENDANT-APPELLANT.

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DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, J.), rendered April 8, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the amended order of restitution dated June 30, 2008 and reinstating the order of restitution dated April 21, 2008 and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal sale of a controlled substance in the third degree (Penal Law §§ 110.00, 220.39 [1]). Defendant failed to move to withdraw his plea or to vacate the judgment of conviction and thus failed to preserve for our review his contention that the plea was involuntary because County Court failed to make a sufficient inquiry into the effect of his medication on his mental state (*see People v Lear*, 19 AD3d 1002, *lv denied* 5 NY3d 807; *People v Ames*, 184 AD2d 1083, *lv denied* 80 NY2d 1025). Defendant further contends that the court erred in ordering restitution in the amount of \$189 at sentencing and further erred when it later amended its restitution order to \$283.50. Defendant failed to preserve for our review his contention with respect to the original order of restitution by failing to request a hearing or to object to the amount of restitution ordered at the time of sentencing (*see People v Peck*, 31 AD3d 1216, 1216-1217, *lv denied* 9 NY3d 992; *People v Lovett*, 8 AD3d 1007, 1008, *lv denied* 3 NY3d 673, 677). The People correctly concede, however, that there is no basis in the record for the restitution amount contained in the amended order of restitution, which was signed by the court more than two months after sentencing (*cf. Peck*, 31 AD3d at 1216-1217). We therefore modify the judgment by vacating the amended order of restitution and reinstating the original order of

restitution.

Entered: March 27, 2009

JoAnn M. Wahl  
Clerk of the Court