

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

1471

**KA 08-02635**

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, GREEN, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRYON K. RUSS, DEFENDANT-APPELLANT.

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ROBERT TUCKER, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

BRYON K. RUSS, DEFENDANT-APPELLANT PRO SE.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

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Appeal from a resentencing of the Ontario County Court (William F. Kocher, J.), rendered November 13, 2008. Defendant was resentenced upon his conviction of robbery in the first degree (two counts), assault in the first degree, and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the resentencing so appealed from is unanimously modified on the law by vacating the directive that the sentences shall run consecutively to the sentence imposed by Wayne County Court and as modified the resentencing is affirmed.

Memorandum: Defendant was convicted upon a jury verdict of, inter alia, robbery in the first degree (Penal Law § 160.15 [2]), and he appeals from the resentencing on that conviction. Ontario County Court (Harvey, J.) sentenced defendant to concurrent determinate terms of imprisonment on each count (*People v Russ*, 292 AD2d 862, lv denied 98 NY2d 713, 99 NY2d 539), but failed to state that it was imposing an additional period of postrelease supervision with respect to each count, as required by Penal Law § 70.45 (1). Defendant thereafter moved to set aside the sentence as illegal pursuant to CPL 440.20 (1) and, with the consent of the People, County Court (Kocher, J.) resentenced defendant to the originally imposed determinate sentences of imprisonment with no postrelease supervision, pursuant to Penal Law § 70.85. We agree with defendant that the court at resentencing erred in directing that the sentences shall run consecutively to a sentence imposed by Wayne County Court subsequent to the conviction in Ontario County. "The power of a court of original jurisdiction to review a sentence is narrowly limited by case law and statute" (*People v Tavano*, 67 AD2d 1090, 1091; see generally CPL 430.10). In resentencing defendant pursuant to Penal Law § 70.85, the court had no authority to direct that the sentences run either concurrently with or consecutively to the sentence imposed by Wayne County Court. We

therefore modify the resentence accordingly. We have considered the contentions of defendant in his pro se supplemental brief and conclude that they are lacking in merit.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court