

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

1495

KA 08-01046

PRESENT: HURLBUTT, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

PRESTON M. LAGASSE, DEFENDANT-APPELLANT.

STEVEN D. SESSLER, GENESEO, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES B. RITTS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered April 18, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the surcharge to 5% of the amount of restitution ordered and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a forged instrument in the second degree (Penal Law § 170.25). We reject the contention of defendant that he was not eligible for the initial period of interim probation supervision imposed by County Court (see CPL 390.30 [6]), inasmuch as he was a second felony offender. At the time of the entry of the plea, the court had not "found, pursuant to the provisions of the criminal procedure law," that defendant was a second felony offender (Penal Law § 70.06 [2]).

Contrary to defendant's further contention, the court did not err in calculating the amount of restitution. That amount was a condition of the plea bargain, and defendant specifically agreed to that amount during the plea allocution (see *People v Hannan*, 303 AD2d 765). As the People correctly concede, however, the court erred in imposing a 10% surcharge on the amount of restitution ordered and instead should have imposed a surcharge of 5% (see Penal Law § 60.27 [8]; *People v Viehdeffer*, 288 AD2d 860), and we therefore modify the judgment accordingly. Finally, we reject defendant's challenge to the severity of the sentence.

Entered: December 30, 2009

Patricia L. Morgan
Clerk of the Court