

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

1682

KA 07-00396

PRESENT: SMITH, J.P., FAHEY, CARNI, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RODNEY FRAZIER, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (GERALD T. BARTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered July 20, 2006. The judgment convicted defendant, upon a jury verdict, of assault in the second degree, criminal possession of a weapon in the third degree and aggravated criminal contempt.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed for assault in the second degree and as modified the judgment is affirmed, and the matter is remitted to Onondaga County Court for resentencing on the conviction of assault in the second degree.

Memorandum: Defendant appeals from a judgment convicting him of, inter alia, assault in the second degree (Penal Law § 120.05). Defendant failed to preserve for our review his contention that the conviction with respect to the assault count is not supported by legally sufficient evidence because his motions for trial orders of dismissal were not specifically directed toward the ground raised on appeal (see *People v Gray*, 86 NY2d 10, 19). In any event, we reject defendant's contention (see generally *People v Bleakley*, 69 NY2d 490, 495). Furthermore, viewing the evidence in light of the elements of that count as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495).

Finally, as the People correctly concede, County Court erred in failing to include a period of postrelease supervision when it imposed the sentence for assault in the second degree. " 'Although this issue was not raised [by defendant] before the [sentencing] court or on appeal, we cannot allow an [illegal] sentence to stand' " (*People v Davis*, 37 AD3d 1179, 1180, lv denied 8 NY3d 983). "Because [the sentencing court] failed to pronounce the term of defendant's

mandatory postrelease supervision in his presence, this matter must be remitted . . . for a resentencing proceeding" (*People v Collado*, 11 NY3d 888, 889). We therefore modify the judgment by vacating the sentence imposed for assault in the second degree, and we remit the matter to County Court for resentencing on the conviction of assault in the second degree.

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court