

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

1338

**KA 09-00822**

PRESENT: SMITH, J.P., FAHEY, LINDLEY, SCONIERS, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES W. MADILL, DEFENDANT-APPELLANT.

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DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (KRISTYNA S. MILLS OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Jefferson County Court (Kim H. Martusewicz, J.), entered April 24, 2004 pursuant to the 2005 Drug Law Reform Act. The order, among other things, granted defendant's application for resentencing upon defendant's 2004 conviction of criminal possession of a controlled substance in the second degree and imposed a new sentence.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by deleting those parts vacating the original sentence and imposing a new sentence and as modified the order is affirmed, the new sentence is vacated, and the matter is remitted to Jefferson County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from an order pursuant to the 2005 Drug Law Reform Act ([DLRA-2] L 2005, ch 643, § 1) granting his application for resentencing upon his conviction of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [2]) and imposing a determinate term of imprisonment of nine years plus a five-year period of postrelease supervision. We reject defendant's contention that the new sentence imposed is harsh and excessive. The People correctly concede, however, that County Court erred in imposing the new sentence without first affording defendant the opportunity to appeal from the order specifying the new sentence that the court would impose and to withdraw his application for resentencing following our determination of that appeal (*see People v James*, 67 AD3d 1357, *lv denied* 13 NY3d 939; *People v Graves*, 66 AD3d 1513, 1514-1515, *lv denied* 13 NY3d 907). We therefore modify the order by deleting those parts vacating the original sentence and imposing a new sentence, vacate the new sentence imposed, and remit the matter to County Court to afford defendant an opportunity to withdraw his application for resentencing before the proposed new sentence is imposed, as required by DLRA-2 (*see James*, 67

AD3d 1357; *Graves*, 66 AD3d at 1515).

Entered: November 12, 2010

Patricia L. Morgan  
Clerk of the Court