

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

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KA 17-00741

PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RAYMOND CAMPAGNA, JR., DEFENDANT-APPELLANT.

HEIDI S. CONNOLLY, SKANEATELES, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (DIANE M. ADSIT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered January 24, 2017. The judgment convicted defendant, upon his plea of guilty, of aggravated vehicular homicide, aggravated vehicular assault, driving while intoxicated, a misdemeanor, and reckless driving.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the term of probation imposed on counts one and five of the amended indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, aggravated vehicular homicide (Penal Law § 125.14 [5]), aggravated vehicular assault (§ 120.04-a [4]), and driving while intoxicated as a misdemeanor (Vehicle and Traffic Law §§ 1192 [2]; 1193 [1] [b] [i]).

Preliminarily, we conclude that "the imposition of a five-year term of probation with an ignition interlock device with respect to the [aggravated] vehicular [homicide and aggravated vehicular] assault counts is illegal pursuant to Penal Law § 60.21" (*People v Giacona*, 130 AD3d 1565, 1566 [4th Dept 2015]; see *People v Flagg*, 107 AD3d 1613, 1614 [2013], *lv denied* 22 NY3d 1138 [2014]). As relevant here, the mandatory term of probation with an ignition interlock device pursuant to section 60.21 applies only to a defendant convicted of a violation of Vehicle and Traffic Law § 1192 (2), (2-a) or (3) (see *Giacona*, 130 AD3d at 1566; *Flagg*, 107 AD3d at 1614). " 'Although this issue was not raised before the [sentencing] court or on appeal, we cannot allow an [illegal] sentence to stand' " (*People v Davis*, 37 AD3d 1179, 1180 [4th Dept 2007], *lv denied* 8 NY3d 983 [2007]). The proper remedy is to vacate the term of probation imposed on the aggravated vehicular homicide and aggravated vehicular assault counts (see *Giacona*, 130 AD3d at 1566; *Flagg*, 107 AD3d at 1614), and we

therefore modify the judgment accordingly. We note, however, that County Court properly included the ignition interlock condition as a component of the three-year term of probation imposed as part of the sentence on the conviction of misdemeanor driving while intoxicated under Vehicle and Traffic Law § 1192 (2) (see *Giacona*, 130 AD3d at 1566).

We further conclude that the sentence, as modified, is not unduly harsh or severe.

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court