

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

81

KA 20-00764

PRESENT: SMITH, J.P., CURRAN, MONTOUR, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DHAN B. KHADKA, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (TONYA PLANK OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Sam L. Valleriani, J.), rendered October 7, 2020. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated as a class D felony, and refusal to submit to a breath test.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of count 3 of the indictment and dismissing that count, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of driving while intoxicated as a class D felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]) and refusal to submit to a breath test (§ 1194 [1] [b]). As defendant contends and the People correctly concede, refusal to submit to a breath test mandated by Vehicle and Traffic Law § 1194 (1) (b) "is not a cognizable offense for which a person may be charged or convicted in a criminal court" (*People v Adams*, 201 AD3d 1311, 1312 [4th Dept 2022], *lv denied* 38 NY3d 1007 [2022]; *see People v Alim*, 204 AD3d 1418, 1419-1420 [4th Dept 2022], *lv denied* 38 NY3d 1068 [2022]; *People v Harris*, 201 AD3d 1327, 1327-1328 [4th Dept 2022], *lv denied* 38 NY3d 951 [2022]; *People v Bemby*, 199 AD3d 1340, 1342 [4th Dept 2021], *lv denied* 37 NY3d 1159 [2022]). Inasmuch as defendant was convicted by the jury of the nonexistent offense of refusal to submit to a breath test, we modify the judgment by reversing that part convicting him of count 3 of the indictment and dismissing that count (*see Alim*, 204 AD3d at 1419-1420; *Harris*, 201 AD3d at 1327-1328). Finally, we note that the certificate of conviction must be corrected to reflect that Sam L. Valleriani, J., presided at trial and sentencing (*see People v*

McKay, 197 AD3d 992, 993 [4th Dept 2021], *lv denied* 37 NY3d 1060 [2021]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court