

State of New York

Court of Appeals

***Decided and Entered on the
eleventh day of June, 2019***

Present, Hon. Janet DiFiore, *Chief Judge, presiding.*

Mo. No. 2019-283
The People &c.,
Respondent,

v.

Howard Griffith,
Appellant.

Appellant having moved for reconsideration of this Court's February 21, 2019
dismissal order;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion is denied.



John P. Asiello
Clerk of the Court

State of New York

Court of Appeals

***Decided and Entered on the
twenty-first day of February, 2019***

Present, Hon. Janet DiFiore, *Chief Judge, presiding.*

Mo. No. 2018-1188

The People &c.,
Respondent,

v.

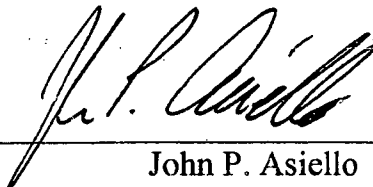
Howard Griffith,
Appellant.

Appellant having appealed to the Court of Appeals and moved for poor person relief in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, on the Court's own motion, that the appeal is dismissed, without costs, upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the Constitution; and it is further

ORDERED, that the motion for poor person relief is dismissed as academic.



John P. Asiello
Clerk of the Court

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

1074

KA 17-01664

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, DEJOSEPH, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HOWARD GRIFFITH, DEFENDANT-APPELLANT.

WILLIAM CLAUSS, ROCHESTER, FOR DEFENDANT-APPELLANT.

HOWARD GRIFFITH, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Onondaga County Court (Thomas J. Miller, J.), entered July 21, 2017. The order denied defendant's petition seeking a downward modification of his previously-imposed classification as a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated, and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following memorandum: Defendant appeals from an order that denied his petition pursuant to Correction Law § 168-o (2) seeking a downward modification of his previously-imposed classification as a level three risk under the Sex Offender Registration Act ([SORA] § 168 et seq.). As a preliminary matter, we note that defendant's pro se notice of appeal states that he is appealing pursuant to CPL 450.10 (1) "as it applies" to Correction Law § 168-n. CPL 450.10 (1), however, does not grant defendant the right to appeal from an order denying his petition for a downward modification of his risk level; instead, that right is conferred by CPLR 5701 (see generally *People v Charles*, 162 AD3d 125, 126, 137-140 [2d Dept 2018], lv denied 32 NY3d 904 [2018]). Nevertheless, we deem the appeal to have been taken pursuant to the proper statute, and we therefore reach the merits of the issues raised on appeal (see CPLR 2001).

We agree with defendant that he was denied effective assistance of counsel, and we therefore reverse the order, reinstate the petition, and remit the matter to County Court for a new hearing on the petition. Defendant contended in the petition, among other things, that he was entitled to a downward modification of his risk level classification. His assigned counsel, however, wrote a letter

to the court indicating that the petition lacked merit, counsel would not support the petition, and he had advised defendant to withdraw the petition so that defendant would not needlessly delay his right to file a new modification petition in two years. We conclude that defense counsel "essentially[] became a witness against [defendant] and took a position adverse to him," which denied defendant effective assistance of counsel (*People v Caccavale*, 305 AD2d 695, 695 [2d Dept 2003]; see *People v Freire*, 157 AD3d 963, 964 [2d Dept 2018]; *People v Brown*, 152 AD3d 1209, 1212 [4th Dept 2017], *lv denied* 30 NY3d 978 [2017]). In addition, a defendant may commence a Correction Law § 168-o (2) proceeding no more than once annually (see *People v Lashway*, 25 NY3d 478, 483 [2015]), thus defense counsel's advice was incorrect as well as adverse to defendant's position.

Contrary to defendant's contentions in his pro se supplemental brief, the court did not err in refusing to allow him to challenge his plea or other aspects of his underlying conviction. It is well settled that a SORA proceeding may not be used to challenge the underlying conviction (see generally *People v Buniek*, 121 AD3d 659, 659 [2d Dept 2014], *lv denied* 24 NY3d 914 [2015]; *People v Clavette*, 96 AD3d 1178, 1179 [3d Dept 2012], *lv denied* 20 NY3d 851 [2012]; *People v Ayala*, 72 AD3d 1577, 1578 [4th Dept 2010], *lv denied* 15 NY3d 816 [2010]).

In light of our determination, we do not address the remaining contentions in defendant's main brief.

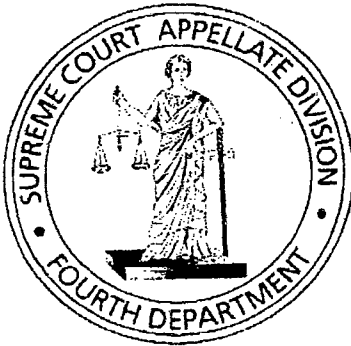
Entered: November 9, 2018

Mark W. Bennett
Clerk of the Court

Supreme Court
APPELLATE DIVISION
Fourth Judicial Department
Clerk's Office, Rochester, N.Y.



I, Mark W. Bennett, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.



IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this November 9, 2018

Clerk

COUNTY COURT
COUNTY OF ONONDAGA : STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

ORDER

-vs-

Indict No. 2001-0883-1

HOWARD GRIFFITH,

Defendant.

The defendant having been convicted of Rape in the First Degree on January 10, 2002, and having been sentenced to a term of 5 years in state prison to be followed by 5 years of post-release supervision, and the Hon. William D. Walsh having subsequently determined the defendant to be a risk level 3 sex offender pursuant to Article 6-c of the New York State Corrections Law; and the defendant having filed a pro se petition, dated January 27, 2017, seeking a downward modification of that assessment pursuant to the provisions of Correction Law § 168-0, and the Court having received an updated recommendation of the New York State Board of Examiners of Sex Offenders suggesting that the petition be denied, and the Court having assigned attorney Theodore Stenuf to assist the defendant at taxpayer expense, and the court having scheduled a hearing on the matter for June 9, 2017, and the Court having concluded that the defendant has failed to establish sufficient pertinent facts supporting the requested modification by clear and convincing evidence,

NOW, it is

ORDERED, that the defendant's petition for a downward modification of his sex offender rating level be denied.

Date: July 21, 2017


Thomas J. Miller
Onondaga County Court Judge

To: Howard Griffith
Board of Examiners of Sex Offenders
Onondaga County District Attorney's Office
Theodore Stenuf, Esq.

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FILED & ENTERED