

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: May 2, 2019

109025

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

DIMETRI MOSELEY, Also Known
as PONCHO,

Appellant.

Calendar Date: March 27, 2019

Before: Egan Jr., J.P., Devine, Aarons and Rumsey, JJ.

Mitchell S. Kessler, Cohoes, for appellant.

D. Holley Carnright, District Attorney, Kingston (Lisa M. Bondarenka of counsel), for respondent.

Rumsey, J.

Appeal from a judgment of the County Court of Ulster County (Williams, J.), rendered November 21, 2016, upon a verdict convicting defendant of the crime of criminal possession of a weapon in the second degree.

In March 2014, defendant was charged by indictment with criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree for his alleged involvement in a shooting that occurred outside of a nightclub in January 2014. Before trial commenced, the People obtained a superseding indictment (No. 164-14) that, in relevant

part, charged defendant with only criminal possession of a weapon in the third degree. A jury trial on the superseding indictment ensued; however, after the jury was impaneled and sworn, defendant's motion for a mistrial was granted. The People subsequently obtained a second superseding indictment (No. 126-15) charging defendant with criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree. At defendant's subsequent trial, County Court dismissed the criminal possession of a weapon in the third degree count before submitting the case to the jury, and defendant was convicted on the remaining count, criminal possession of a weapon in the second degree. Defendant was thereafter sentenced, as a second felony offender, to a prison term of 13 years, followed by five years of postrelease supervision, and he now appeals.

The People concede, and we agree, that the second superseding indictment is a nullity and assert, therefore, that defendant's conviction must be reversed and the matter remitted for further proceedings on the first superseding indictment. In declaring a mistrial, County Court did not dismiss the superseding indictment or authorize the People to re-present new charges to a grand jury. Accordingly, the People were limited to retrying defendant upon the superseding indictment, and the second superseding indictment was a nullity (see People v Clarke, 55 AD3d 1447, 1448 [2008], lv denied 11 NY3d 923 [2009]; Matter of Jadoo v Griffin, 267 AD2d 311, 311 [1999]; People v Rodriguez, 150 AD2d 265, 266 [1989], lv denied 74 NY2d 818 [1989]). Where, as here, an indictment is a nullity, "any action or consequence that flowed from its filing . . . was necessarily a nullity as well" (People v Frederick, 14 NY3d 913, 916 [2010]). Accordingly, the judgment must be reversed. Defendant's remaining arguments have been rendered academic by our determination.

Egan Jr., J.P., Devine and Aarons, JJ., concur.

ORDERED that the judgment is reversed, on the law, and matter remitted to the County Court of Ulster County for further proceedings not inconsistent with this Court's decision.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court