

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

Decided and Entered: April 26, 2007

16668

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

DAVID G. CLARK,

Appellant.

Calendar Date: March 26, 2007

Before: Mercure, J.P., Peters, Spain, Rose and Lahtinen, JJ.

Matthew C. Hug, Wynantskill, for appellant.

Beth G. Cozzolino, District Attorney, Hudson (H. Neal Conolly of counsel), for respondent.

Peters, J.

Appeal from a judgment of the County Court of Columbia County (Czajka, J.), rendered December 7, 2005, convicting defendant upon his plea of guilty of the crimes of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree, criminal possession of stolen property in the fourth degree (two counts) and resisting arrest (two counts).

Defendant pleaded guilty to criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree, criminal possession of stolen property in the fourth degree (two counts) and resisting arrest (two counts). Although the People and defendant agreed to a joint recommendation that defendant be sentenced to eight years in

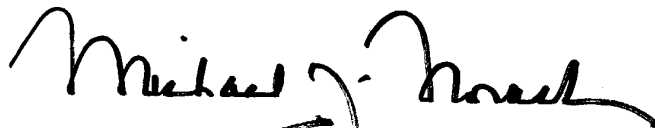
prison, County Court sentenced him to an aggregate prison term of 12 years. Defendant now appeals, arguing that his sentence was improperly exacerbated based upon a factual misstatement made by County Court during sentencing.

While County Court was under no obligation to accept the prison term jointly recommended by the People and defendant (see People v Mills, 17 AD3d 712, 713 [2005], lv denied 5 NY3d 766 [2005]; People v Rawdon, 296 AD2d 599, 599 [2002], lv denied 98 NY2d 771 [2002]), we must nevertheless vacate defendant's sentence. During his plea allocution, defendant stated that he pointed his weapon in the air in order to scare away pursuing police officers. County Court, however, in imposing its sentence, indicated that it was taking into account the circumstances in which the offenses occurred, including defendant's pointing of a loaded weapon at a police officer. While a police officer had described such conduct, defendant disavowed it upon his plea. Thus, this matter must be remitted for resentencing.

Mercure, J.P., Spain, Rose and Lahtinen, JJ., concur.

ORDERED that the judgment is modified, on the law, by vacating the sentence imposed; matter remitted to the County Court of Columbia County for resentencing; and, as so modified, affirmed.

ENTER:

A handwritten signature in black ink, appearing to read "Michael J. Novack". The signature is written in a cursive style with a large, looping initial "M".

Michael J. Novack
Clerk of the Court