

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

Decided and Entered: November 27, 2024

CR-23-2052

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

JAMES QQ.,

Appellant.

Calendar Date: November 18, 2024

Before: Garry, P.J., Egan Jr., Clark, Pritzker and Mackey, JJ.

Todd G. Monahan, Schenectady, for appellant.

Joseph Stanzione, District Attorney, Catskill (*Danielle D. McIntosh* of counsel),
for respondent.

Clark, J.

Appeal from an order of the County Court of Greene County (Ryan T. McAllister, J.) entered August 2, 2023, which dismissed defendant's application for resentencing pursuant to CPL 440.47, without a hearing.

Defendant is serving two concurrent prison terms of 25 years, to be followed by five years of postrelease supervision, for his convictions of manslaughter in the first degree and assault in the first degree. The convictions stem from defendant's conduct, acting in concert with a codefendant, in beating the victim with a metal pipe and stomping on his head, causing fatal head injuries. On appeal, we affirmed defendant's convictions, with a modification to correct the sentence. In 2022, defendant sought

permission to apply for resentencing pursuant to the provisions of the Domestic Violence Survivors Justice Act (hereinafter DVSJA) (*see* CPL 440.47 [1] [c]; Penal Law § 60.12, as amended by L 2019, ch 31, § 1; L 2019, ch 55, part WW, § 1). County Court granted such permission, finding that defendant had satisfied the step one eligibility criteria for alternative sentencing (*see* CPL 440.47 [1] [a]). Thereafter, represented by counsel, defendant applied for resentencing. Upon reviewing the application, County Court dismissed it without prejudice, finding that defendant failed to support his application with the type of evidence required under step two to corroborate his claim that he was a victim of domestic violence at the time of the offenses (*see* CPL 440.47 [2] [c]). Defendant appeals.

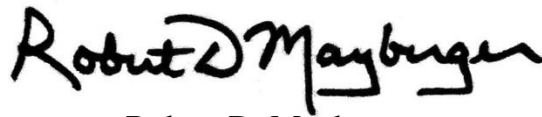
Although not initially raised by the parties,¹ for the reasons stated in *People v Melissa OO.* (___ AD3d ___, ___ [3d Dept 2024] [decided herewith]), we are constrained to find that where, as here, a defendant's application for resentencing pursuant to the DVSJA is dismissed without prejudice due to a failure to satisfy the evidentiary requirements under step two (*see* CPL 440.47 [2] [c]), such an order of dismissal is not appealable (*see* CPL 440.47 [3]). Therefore, the instant appeal must be dismissed.

Garry, P.J., Egan Jr., Pritzker and Mackey, JJ., concur.

¹ The Court requested that the parties address the appealability of an order dismissing a DVSJA application without prejudice before a hearing, and we have reviewed the parties' submissions.

ORDERED that the appeal is dismissed.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive style with a large, stylized 'R' and 'M'.

Robert D. Mayberger
Clerk of the Court