

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FOURTH JUDICIAL DEPARTMENT

People v. Session

2026 NY Slip Op 02749 · No. 199 KA 24-01666 · Decided May 1, 2026

SUMMARY

The New York Appellate Division, Fourth Department, unanimously affirmed a judgment convicting Kyle Session, upon his guilty plea, of criminal sale of a controlled substance in the third degree. The court rejected his ineffective-assistance claim based on counsel's failure to seek judicial diversion, concluding that counsel cannot be ineffective for failing to make an application or argument with little or no chance of success.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department
WRITING FOR THE COURT	Lindley, J.P.; Bannister, J.; Greenwood, J.; Nowak, J.; Hannah, J.
JURISDICTION	Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department
DECIDED	May 1, 2026
DOCKET	199 KA 24-01666
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendant appealed from a judgment of the Cayuga County Court convicting him, upon his guilty plea, of criminal sale of a controlled substance in the third degree.
PRECEDENTIAL VALUE	Published opinion; precedential status indicated as published, although the decision states that it is uncorrected and subject to revision before publication in the Official Reports.
PARTIES	Kyle Session v. The People of the State of New York

TOPICS

- ineffective assistance
- criminal procedure
- appellate procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether defendant's ineffective-assistance claim based on counsel's failure to seek judicial diversion survived his guilty plea.
2. Whether counsel provided ineffective assistance by failing to file an application for judicial diversion under CPL 216.05.

HOLDINGS

1. The court assumed, without deciding, that defendant's ineffective-assistance contention survived his guilty plea.
2. Defendant was not denied effective assistance of trial counsel because counsel cannot be ineffective for failing to make a motion or argument that has little or no chance of success.

KEY QUOTATIONS

*“There can be no denial of effective assistance of trial counsel arising from counsel's failure to ‘make a motion or argument that has little or no chance of success’” (*1)*

FACTUAL BACKGROUND

Defendant pleaded guilty to criminal sale of a controlled substance in the third degree under Penal Law § 220.39. On appeal, he alleged that trial counsel was ineffective for failing to file an application for judicial diversion to a substance-abuse treatment program under CPL 216.05. The court rejected the claim because counsel is not ineffective for failing to make a motion or argument with little or no chance of success.

PROCEDURAL HISTORY

The Cayuga County Court entered judgment on January 26, 2023, after defendant pleaded guilty to criminal sale of a controlled substance in the third degree. Defendant appealed, arguing that counsel was ineffective for failing to apply for judicial diversion to a substance-abuse treatment program. The Appellate Division unanimously affirmed.

DISPOSITION

affirmed

CASES CITED

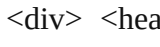
- People v. Clark, 191 AD3d 1485, 1486 (4th Dept 2021), lv denied 37 NY3d 954 (2021)
- People v. Glowacki, 159 AD3d 1585, 1586 (4th Dept 2018), lv denied 31 NY3d 1117 (2018)
- People v. Caban, 5 NY3d 143, 152 (2005)

OPINION

PER CURIAM.

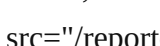
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Appellate Division, Fourth Department

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

v

KYLE SESSION, DEFENDANT-APPELLANT.

Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department

Decided on May 1, 2026

199 KA 24-01666

Present: Lindley, J.P., Bannister, Greenwood, Nowak, And Hannah, JJ.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered January 26, 2023.

The judgment convicted defendant, upon a plea of guilty, of criminal sale of a controlled substance in the third degree.

[*1] It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (Penal Law § 220.39), defendant contends that he was denied effective assistance of counsel based on his attorney's failure to file an application requesting judicial diversion to a substance abuse treatment program pursuant to CPL 216.05.

Even assuming, arguendo, that defendant's contention survives his guilty plea (*see People v Clark*, 191 AD3d 1485, 1486 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]; *People v Glowacki*, 159 AD3d 1585, 1586 [4th Dept 2018], *lv denied* 31 NY3d 1117 [2018]), we reject that contention inasmuch as "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005]).

Entered: May 1, 2026

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PER CURIAM.

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This decision is uncorrected and subject to revision before publication in the Official Reports. THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, v KYLE SESSION, DEFENDANT-APPELLANT. Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department Decided on May 1, 2026 199 KA 24-01666 Present: Lindley, J.P., Bannister, Greenwood, Nowak, And Hannah, JJ. DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT. Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered January 26, 2023. The judgment convicted defendant, upon a plea of guilty, of criminal sale of a controlled substance in the third degree. [*1] It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

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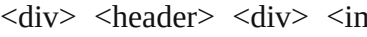
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