

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

1321

**KA 11-00709**

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DWIGHT FOWLER, DEFENDANT-APPELLANT.

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DAVISON LAW OFFICE, PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF  
COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered March 9, 2010. The judgment convicted defendant, upon his plea of guilty, of kidnapping in the second degree, criminal sexual act in the first degree and robbery in the second degree.

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, inter alia, kidnapping in the second degree (Penal Law § 135.20), defendant contends that the waiver of the right to appeal is not valid and challenges the severity of the sentence. We agree with defendant that his waiver of the right to appeal does not encompass his challenge to the severity of the sentence because "no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal his conviction that he was also waiving his right to appeal the harshness of his sentence" (*People v Pimentel*, 108 AD3d 861, 862, lv denied 21 NY3d 1076, citing *People v Maracle*, 19 NY3d 925, 928). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: December 31, 2015

Frances E. Cafarell  
Clerk of the Court