

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

904

KA 16-01270

PRESENT: WHALEN, P.J., CARNI, LINDLEY, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ERIKA BROWN, DEFENDANT-APPELLANT.

KATHRYN FRIEDMAN, BUFFALO, FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered June 15, 2016. The judgment convicted defendant, upon her plea of guilty, of criminal sale of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and one count of criminal possession of a controlled substance in the third degree (§ 220.16 [1]). At the outset, we conclude that defendant knowingly, voluntarily and intelligently waived her right to appeal, and that waiver encompasses her challenge to the severity of the sentence (see *People v Lopez*, 6 NY3d 248, 255-256). The further contention of defendant that the sentence is illegal, however, survives her waiver of the right to appeal (see *People v Seaberg*, 74 NY2d 1, 9; *People v Bussom*, 125 AD3d 1331, 1331). Nevertheless, contrary to defendant's contention, we conclude that County Court imposed a legal sentence.

To the extent that defendant contends that the plea was not knowing, voluntary and intelligent because the court failed to conduct a sufficient inquiry to determine whether she understood the consequences of the plea, that contention also survives her valid waiver of the right to appeal (see *People v Green*, 122 AD3d 1342, 1343; *People v Povoski*, 78 AD3d 1533, 1533, *lv denied* 16 NY3d 799). Defendant's contention, however, is not preserved for our review because she did not move to withdraw the plea or to vacate the judgment of conviction on that ground (see *People v Hough*, 148 AD3d 1671, 1671; *People v Brinson*, 130 AD3d 1493, 1493, *lv denied* 26 NY3d 965). We conclude in any event that defendant's contention is "belied

by [her] statements during the plea colloquy" (*People v Rickard*, 262 AD2d 1073, 1073, *lv denied* 94 NY2d 828; see *People v Hampton*, 142 AD3d 1305, 1306-1307, *lv denied* 28 NY3d 1124; *People v Caldwell*, 78 AD3d 1562, 1563, *lv denied* 16 NY3d 796). The record reveals that an interpreter was present throughout the plea proceeding, and defendant "acknowledged, through the interpreter, that [she] understood the terms of the plea bargain and that [she] willingly accepted them" (*People v Mercedes*, 171 AD2d 1044, 1044, *lv denied* 77 NY2d 998; see *People v Martes*, 154 AD2d 946, 946, *lv denied* 75 NY2d 870; *People v Quezada*, 145 AD2d 950, 951).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court