

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

796

KA 17-00489

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LEWIS SMITH, DEFENDANT-APPELLANT.

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

LEWIS SMITH, DEFENDANT-APPELLANT PRO SE.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered January 17, 2017. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third 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 criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), defendant contends that his plea was not knowing, voluntary and intelligent because the prosecutor, eight months before the plea, incorrectly stated that defendant could be sentenced as a persistent felony offender (*cf. People v Boykins*, – AD3d –, –, 2018 NY Slip Op 02919, *2-3 [Apr. 27, 2018] [4th Dept 2018]). Defendant's contention is not preserved for our review inasmuch as he "did not move to withdraw the plea or to vacate the judgment of conviction on [the] ground" now raised on appeal (*People v Brown*, 151 AD3d 1951, 1952 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]; *see People v Gast*, 114 AD3d 1270, 1270 [4th Dept 2014], *lv denied* 22 NY3d 1198 [2014]). In any event, that contention is without merit (*see People v Johnson*, 24 AD3d 1259, 1259 [4th Dept 2005], *lv denied* 6 NY3d 814 [2006]; *see also People v Morrison*, 78 AD3d 1615, 1616 [4th Dept 2010], *lv denied* 16 NY3d 834 [2011]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court