

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

736

KA 18-02274

PRESENT: SMITH, J.P., CARNI, CURRAN, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JASON CIPOLLA, DEFENDANT-APPELLANT.

DAVID J. PAJAK, ALDEN, FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (James A.W. McLeod, A.J.), rendered September 26, 2018. The judgment convicted defendant upon a plea of guilty of burglary 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 burglary in the third degree (Penal Law § 140.20), defendant contends that the waiver of the right to appeal is not valid. We agree. We conclude that the colloquy was insufficient to ensure that the waiver was voluntary, knowing, and intelligent, because County Court provided defendant with erroneous information about the scope of the waiver of the right to appeal, including characterizing the waiver as an absolute bar to the taking of an appeal (see *People v Thomas*, 34 NY3d 545, 560-564 [2019], *cert denied* – US – [Mar. 30, 2020]). The better practice is for the court to use the Model Colloquy, “which ‘neatly synthesizes . . . the governing principles’ ” (*People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020], quoting *Thomas*, 34 NY3d at 567; see NY Model Colloquies, Waiver of Right to Appeal). Furthermore, although there was also a written waiver of the right to appeal, “the court failed to confirm that [defendant] understood the contents of the written waiver[]” (*Thomas*, 34 NY3d at 566; see *People v Cooper*, 85 AD3d 1594, 1594 [4th Dept 2011], *affd* 19 NY3d 501 [2012]; *People v Testerman*, 149 AD3d 1559, 1559 [4th Dept 2017]). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court