

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

884

KA 16-00558

PRESENT: WHALEN, P.J., PERADOTTO, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KENNETH SMITH, DEFENDANT-APPELLANT.

KATHRYN FRIEDMAN, BUFFALO, FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered March 2, 2016. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first 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 manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that his brief responses to County Court's questions during the plea colloquy were insufficient to establish that the plea was knowingly, voluntarily, and intelligently entered. Even assuming, arguendo, that defendant's contention is not merely a challenge to the factual sufficiency of the plea allocution and thus survives his valid waiver of the right to appeal (*see People v Wisniewski*, 128 AD3d 1481, 1481, *lv denied* 26 NY3d 967), we conclude that it is not preserved for our review because defendant did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Russell*, 133 AD3d 1199, 1199, *lv denied* 26 NY3d 1149; *People v Lewis*, 114 AD3d 1310, 1311, *lv denied* 22 NY3d 1200). In any event, we conclude that defendant's contention is without merit (*see Russell*, 133 AD3d at 1199; *People v Dunham*, 83 AD3d 1423, 1424, *lv denied* 17 NY3d 794).

Defendant's valid waiver of the right to appeal with respect to both the conviction and sentence encompasses his challenge to the severity of the sentence (*see People v Jones*, 144 AD3d 1590, 1590, *lv denied* 28 NY3d 1147; *see generally People v Lopez*, 6 NY3d 248, 255-256), and there is no merit to his contention that his sentence is illegal (*see Penal Law* §§ 70.02 [1] [a]; 70.06 [6] [a]; *People v Parker*, 133 AD3d 1300, 1302, *lv denied* 27 NY3d 1154, *reconsideration denied* 28 NY3d 1030; *People v Solano*, 49 AD3d 671, 671, *lv denied* 10

NY3d 964).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court