

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

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KA 18-00520

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRIAN E. SCHMIEGE, DEFENDANT-APPELLANT.

ROBERT M. GRAFF, LOCKPORT, FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered November 16, 2017. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted burglary in the third degree (Penal Law §§ 110.00, 140.20). Defendant validly waived his right to appeal (see *People v Johnson*, 169 AD3d 1480, 1481 [4th Dept 2019], *lv denied* – NY3d – [Mar. 27, 2019]; *People v Link*, 166 AD3d 1581, 1581 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]), and that waiver forecloses his challenge to the severity of both the incarceration and restitution components of his sentence (see *Johnson*, 169 AD3d at 1481; *People v Kesick*, 119 AD3d 1371, 1372 [4th Dept 2014]; see generally *People v Allen*, 82 NY2d 761, 763 [1993]).

Defendant's further contention that Supreme Court violated CPL 430.10 by imposing restitution after the conclusion of the sentencing hearing implicates the legality of his sentence and thus survives his valid appeal waiver (see *People v Moore*, 124 AD3d 1386, 1387 [4th Dept 2015]; *People v Carpenter*, 19 AD3d 730, 731 [3d Dept 2005], *lv denied* 5 NY3d 804 [2005]; see generally *People v Campbell*, 97 NY2d 532, 535 [2002]). Nevertheless, that contention lacks merit because CPL 430.10 applies only to the incarceration component of a sentence, not to the restitution component (see *Matter of Pirro v Angiolillo*, 89 NY2d 351, 356 [1996]; *People v Johnson*, 208 AD2d 1175, 1175-1176 [3d Dept 1994], *lv denied* 85 NY2d 910 [1995]). Indeed, it is well established that a court may impose restitution within a reasonable time after the sentencing hearing if, as here, the People announce their intent to seek restitution during that hearing (see *People v Swiatowy*, 280 AD2d

71, 73 [4th Dept 2001], *lv denied* 96 NY2d 868 [2001]).

Finally, defendant argues that the court violated the plea bargain by imposing \$3,700 in restitution instead of the \$1,850 mentioned during the plea colloquy. Although that argument survives defendant's valid appeal waiver (see *People v Copes*, 145 AD3d 1639, 1639 [4th Dept 2016], *lv denied* 28 NY3d 1182 [2017]), it is nevertheless unpreserved for appellate review (see *People v Wilson*, 289 AD2d 1088, 1088 [4th Dept 2001], *lv denied* 98 NY2d 656 [2002]; see generally *People v Williams*, 27 NY3d 212, 219-225 [2016]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (see *People v Hoke*, 167 AD3d 1549, 1550 [4th Dept 2018], *lv denied* - NY3d - [Mar. 26, 2019]; *Wilson*, 289 AD2d at 1088).

Entered: May 3, 2019

Mark W. Bennett
Clerk of the Court