

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

995

KA 18-00609

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RONALD JONES, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered September 20, 2017. The judgment convicted defendant upon a plea of guilty of criminal sexual act in the third degree and endangering the welfare of a child (two counts).

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, inter alia, criminal sexual act in the third degree (Penal Law § 130.40 [2]). Preliminarily, we agree with defendant that his waiver of the right to appeal is invalid (*see People v Raghna*, 185 AD3d 1411, 1411 [4th Dept 2020]; *People v Brown*, 180 AD3d 1341, 1341 [4th Dept 2020], *lv denied* 35 NY3d 968 [2020]; *see also People v Thomas*, 34 NY3d 545, 561-563 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]).

Contrary to defendant's contention, County Court properly refused to suppress statements made by defendant during an interview with a police detective. After the detective read defendant his *Miranda* rights, defendant said, "I would feel more comfortable if I had a lawyer." We conclude that, taking into account the surrounding circumstances, including defendant's demeanor and manner of expression, defendant did not make an unequivocal invocation of his right to counsel (*see People v Glover*, 87 NY2d 838, 839 [1995]; *cf. People v Porter*, 9 NY3d 966, 967 [2007]; *People v Kennard*, 134 AD3d 1519, 1521 [4th Dept 2015]), that "a reasonable officer . . . would have understood only that [defendant] *might* be invoking the right to counsel," and that further communication and questioning by the detective was appropriate to clarify defendant's intention (*Davis v United States*, 512 US 452, 459 [1994]). The detective offered to read the *Miranda* rights to defendant again, but defendant stated that it

was not necessary, then acknowledged that he was comfortable with his understanding of the rights and that he wanted to speak with the detective. Before beginning to ask defendant questions about the underlying criminal incident, the detective reminded defendant that he could have a lawyer if he asked for one and that he could stop talking to the detective at any time. During the rest of the interview, defendant did not ask for an attorney or indicate a desire to stop talking to the detective.

Defendant's challenge to the court's order compelling him to provide a buccal swab for DNA analysis is forfeited by his guilty plea (see *People v Graham*, 175 AD3d 1823, 1824 [4th Dept 2019], *lv denied* 34 NY3d 1159 [2020]; *People v King*, 155 AD3d 1574, 1574 [4th Dept 2017], *lv denied* 30 NY3d 1106 [2018]; *People v Smith*, 138 AD3d 1415, 1416 [4th Dept 2016]). Finally, the sentence is not unduly harsh or severe.