

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

1131

KA 19-00340

PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SALAUDEEN ROOTS, DEFENDANT-APPELLANT.

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

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered August 15, 2018. The judgment convicted defendant, upon a plea of guilty, of attempted promoting prison contraband in the first 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 promoting prison contraband in the first degree (Penal Law §§ 110.00, 205.25 [2]). Contrary to defendant's contention, we conclude that the plea colloquy establishes that defendant knowingly, voluntarily, and intelligently waived the right to appeal (*see People v Mess*, 186 AD3d 1069, 1069 [4th Dept 2020]; *see generally People v Thomas*, 34 NY3d 545, 559-560 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]).

Although defendant's challenge to the voluntariness of his plea survives his valid waiver of the right to appeal (*see Thomas*, 34 NY3d at 558; *People v Seaberg*, 74 NY2d 1, 10 [1989]), by failing to move to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve for our review his contention that the plea was not voluntarily entered (*see People v Garcia-Cruz*, 138 AD3d 1414, 1414-1415 [4th Dept 2016], *lv denied* 28 NY3d 929 [2016]; *see also People v Lopez*, 71 NY2d 662, 665 [1988]). This case does not fall within the rare exception to the preservation requirement (*see generally Lopez*, 71 NY2d at 666). In any event, we conclude that defendant's contention lacks merit (*see People v Hunt*, 188 AD3d 1648, 1649 [4th Dept 2020], *lv denied* 36 NY3d 1097 [2021]; *People v Green*, 132 AD3d 1268, 1269 [4th Dept 2015], *lv denied* 27 NY3d 1069 [2016], *reconsideration denied* 28 NY3d 930 [2016]).

To the extent that defendant contends that County Court erred in

accepting his plea because the record lacked the " 'strong evidence of actual guilt' " that would be required for an *Alford* plea (*People v Elliott*, 107 AD3d 1466, 1466 [4th Dept 2013], *lv denied* 22 NY3d 996 [2013]), we conclude that defendant's contention is misplaced inasmuch as he did not enter an *Alford* plea (see *People v Gale*, 130 AD2d 588, 588 [2d Dept 1987]). Insofar as defendant challenges the factual sufficiency of the plea allocution, that challenge is encompassed by his valid waiver of the right to appeal (see *People v Oliver*, 178 AD3d 1463, 1464 [4th Dept 2019]; *People v Steinbrecher*, 169 AD3d 1462, 1463 [4th Dept 2019], *lv denied* 33 NY3d 1108 [2019]).

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court