

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

850

KA 12-00899

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BILLIE EPPS, DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered July 23, 2010. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree (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 two counts of sexual abuse in the first degree (Penal Law § 130.65 [3]). Defendant contends that Supreme Court erred in enhancing his sentence without affording him the opportunity to withdraw his plea (*see People v Selikoff*, 35 NY2d 227, 241, *cert denied* 419 US 1122) and that his waiver of the right to appeal does not foreclose him from raising that contention. We agree with defendant that the waiver of the right to appeal does not encompass his contention regarding the alleged enhanced sentence (*see People v Joyner*, 19 AD3d 1129, 1129; *People v Lighthall*, 6 AD3d 1170, 1171, *lv denied* 3 NY3d 643). Defendant, however, failed to preserve that contention for our review because he failed to object to the alleged enhanced sentence and did not move to withdraw his plea or to vacate the judgment of conviction on that ground (*see Joyner*, 19 AD3d at 1129; *People v Webb*, 299 AD2d 955, 955, *lv denied* 99 NY2d 565), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]*).

Entered: September 27, 2013

Frances E. Cafarell
Clerk of the Court