

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

765

KA 10-00659

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RODNEY L. SCALES, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered March 19, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted robbery 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 robbery in the first degree (Penal Law §§ 110.00, 160.15 [4]). Defendant failed to preserve for our review his challenge to the factual sufficiency of the plea allocution because he did not move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Lopez*, 71 NY2d 662, 665). In any event, "no factual colloquy was required inasmuch as defendant pleaded guilty to a lesser included offense" (*People v Theibert*, 17 AD3d 1049, 1049; *see People v Thousand*, 96 AD3d 1439, 1440, *lv denied* 19 NY3d 1002).

Defendant further contends that County Court should have afforded him the opportunity to withdraw his guilty plea because his postplea assertions of innocence cast doubt on whether the plea was knowingly, intelligently, and voluntarily entered. Defendant did not move to withdraw the plea or vacate the judgment on that ground and, thus, that contention is not preserved for our review (*see People v Eagle*, 105 AD3d 1453, 1453-1454, *lv denied* 21 NY3d 1073; *cf. People v Nelson*, 66 AD3d 1430, 1430, *lv denied* 14 NY3d 772). In any event, that contention lacks merit. " '[A] defendant is not entitled to withdraw his guilty plea based on a subsequent unsupported claim of innocence, where the guilty plea was voluntarily made with the advice of counsel following an appraisal of all the relevant factors' " (*People v Alexander*, 97 NY2d 482, 485; *see People v Gleen*, 73 AD3d 1443, 1444,

lv denied 15 NY3d 773).

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court