

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

**1252**

**KA 12-01625**

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSHUA L. MACK, DEFENDANT-APPELLANT.

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ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (ANDREW M. MOLITOR OF  
COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered April 23, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree (two counts).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Chautauqua County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of two counts of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]). Contrary to defendant's contention, the sentence is not unduly harsh or severe. We agree with defendant, however, that County Court failed to rule on his oral motion to withdraw his guilty plea. Contrary to the People's contention, we cannot "deem the court's failure to rule on the . . . motion as a denial thereof" (*People v Spratley*, 96 AD3d 1420, 1421; see *People v Concepcion*, 17 NY3d 192, 197-198). We therefore hold the case, reserve decision and remit the matter to County Court to determine defendant's motion.

Entered: November 21, 2014

Frances E. Cafarell  
Clerk of the Court