

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

969

KA 15-01684

PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KEITH A. TONEY, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered August 17, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third 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 criminal sale of a controlled substance in the third degree (Penal Law §§ 110.00, 220.39 [1]). We reject defendant's contention that he did not knowingly waive his right to appeal. County Court "expressly ascertained from defendant that, as a condition of the plea, he was agreeing to waive his right to appeal" (*People v McCrea*, 140 AD3d 1655, 1655, *lv denied* 28 NY3d 933 [internal quotation marks omitted]) and, contrary to defendant's contention, the record establishes that the court did not conflate the waiver of the right to appeal with those rights automatically forfeited by a guilty plea (*see id.*). The court also specifically explained that the waiver included any challenge to the severity of the sentence, thereby foreclosing any such challenge on appeal (*see People v Lopez*, 6 NY3d 248, 255-256).

Defendant further contends that his plea was not knowingly, intelligently, and voluntarily entered. Although a challenge to the voluntariness of the plea survives a valid waiver of the right to appeal (*see People v Shaw*, 133 AD3d 1312, 1313, *lv denied* 26 NY3d 1150), defendant failed to preserve his contention for our review because he did not move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Garcia-Cruz*, 138 AD3d 1414, 1414-1415, *lv denied* 28 NY3d 929; *see generally People v Wisniewski*, 128 AD3d 1481, 1481, *lv denied* 26 NY3d 937). In any event,

defendant's " 'yes' and 'no' answers during the plea colloqu[y] do not invalidate his guilty plea[]" (*People v Russell*, 133 AD3d 1199, 1199, *lv denied* 26 NY3d 1149; see *People v Alicea*, 148 AD3d 1662, 1663, *lv denied* ___ NY3d ___ [Aug. 3, 2017]; *People v Dunham*, 83 AD3d 1423, 1424, *lv denied* 17 NY3d 794).

Entered: September 29, 2017

Mark W. Bennett
Clerk of the Court