

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

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**KA 15-01697**

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LELAND JIRDON, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

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Appeal from a resentence of the Supreme Court, Erie County (Sheila A. DiTullio, A.J.), rendered July 9, 2015. Defendant was resentenced to a determinate term of incarceration of five years followed by five years' postrelease supervision.

It is hereby ORDERED that the resentence so appealed from is unanimously affirmed.

Memorandum: Defendant was convicted, upon his plea of guilty, of robbery in the second degree (Penal Law § 160.10 [1]), and he now appeals from a resentence with respect to that conviction. Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see People v Porterfield*, 107 AD3d 1478, 1478 [4th Dept 2013], *lv denied* 21 NY3d 1076 [2013]; *see generally People v Lopez*, 6 NY3d 248, 256 [2006]).

Although defendant validly waived his right to appeal during the plea proceeding, the waiver does not preclude his challenge to the resentence under the circumstances of this case. As a condition of his plea, defendant agreed to waive his right to appeal the conviction and sentence in exchange for the minimum lawful sentence for a second violent felony offender (*see* Penal Law §§ 70.04 [3] [b]; 70.45 [2]). After it was determined that defendant did not qualify as a predicate felon, Supreme Court—contrary to the sentencing commitment to defendant at the time of the plea and waiver of the right to appeal—resentenced defendant to a sentence greater than the minimum lawful sentence (*see* §§ 70.02 [3] [b]; 70.45 [2] [f]). Where, as here, the sentencing conditions under which a defendant agrees to waive the right to appeal change following the waiver, the defendant is not precluded by that waiver from challenging the severity of a subsequent resentence (*see People v Gray*, 32 AD3d 1052, 1053 [3d Dept 2006], *lv denied* 7 NY3d 902 [2006]; *People v Tausinger*, 21 AD3d 1181,

1183 [3d Dept 2005]; see also *People v Allen*, 97 AD3d 1164, 1164 [4th Dept 2012], *lv denied* 19 NY3d 994 [2012]). Moreover, inasmuch as "defendant was not asked [during resentencing] if he further agreed to waive his right to pursue an appeal regarding the modified terms of his sentence, he is not foreclosed from requesting appellate review of . . . the severity of the imposed sentence" (*People v Johnson*, 14 NY3d 483, 487 [2010]). We also note that "defendant's release to parole supervision does not render his challenge moot because he 'remains under the control of the Parole Board until his sentence has terminated' " (*People v Sebring*, 111 AD3d 1346, 1347 [4th Dept 2013], *lv denied* 22 NY3d 1159 [2014]; see *People v Rowell*, 5 AD3d 1073, 1074 [4th Dept 2004], *lv denied* 2 NY3d 806 [2004]). We nevertheless conclude that defendant's sentence is not unduly harsh or severe.

Entered: March 23, 2018

Mark W. Bennett  
Clerk of the Court