

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

1470

KA 15-00039

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ADAM L. RICHARDSON, DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL),
FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered August 7, 2014. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree, burglary in the first degree (two counts) and assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating that part of the sentence awarding restitution and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, robbery in the first degree (Penal Law § 160.15 [3]), defendant contends that he was deprived of his state constitutional right to counsel in connection with his decision to testify before the grand jury. Although defendant's deprivation of counsel contention is not forfeited by his guilty plea (see *People v Griffin*, 20 NY3d 626, 630-632 [2013]; *People v Smith*, 143 AD3d 31, 34 [1st Dept 2016], *mod on other grounds* 30 NY3d 626 [2017]; *People v Chappelle*, 121 AD3d 1166, 1168 [3d Dept 2014], *lv denied* 24 NY3d 1118 [2015]), it is nevertheless encompassed by his general, unrestricted, and unchallenged waiver of his right to appeal (see *People v Vanvleet*, 126 AD3d 1359, 1360 [4th Dept 2015], *lv denied* 26 NY3d 1012 [2015]; see also *People v Triplett*, 149 AD3d 1592, 1592-1593 [4th Dept 2017], *lv denied* 29 NY3d 1095 [2017]; *People v Whitfield*, 52 AD3d 748, 748 [2d Dept 2008], *lv denied* 11 NY3d 858 [2008]; *People v Segrue*, 274 AD2d 671, 672 [3d Dept 2000], *lv denied* 95 NY2d 908 [2000]). Notably, unlike in *People v Robbins* (33 AD3d 1127, 1128 [3d Dept 2006]), defendant does not assert that the alleged deprivation of his right to counsel infected the plea bargaining process or otherwise tainted the voluntariness of his guilty plea (see *Whitfield*, 52 AD3d at 748; *People v Wolmart*, 5 AD3d 706, 707 [2d Dept 2004], *lv denied* 4 NY3d 750 [2004]).

We decline to follow the Third Department's determination in *People v Trapani* (162 AD3d 1121, 1122 [3d Dept 2018]) that a deprivation of counsel contention survives a valid waiver of the right to appeal irrespective of whether the alleged deprivation infected the defendant's guilty plea.

Defendant's further contention that County Court erred in ordering him to pay restitution because restitution was not part of the plea agreement survives both his guilty plea and his unchallenged waiver of the right to appeal (see *People v Spencer*, 134 AD3d 1553, 1554 [4th Dept 2015]). Moreover, contrary to the People's contention, defendant preserved his contention for appellate review by objecting to the imposition of restitution on the same ground he now advances (see *People v Gilmore*, 12 AD3d 1155, 1156 [4th Dept 2004]). On the merits, it is undisputed that the plea bargain did not include restitution, and the court therefore erred in awarding restitution without affording defendant the opportunity to withdraw his plea (see *People v Pett*, 74 AD3d 1891, 1892 [4th Dept 2010]; *People v Hunter*, 72 AD3d 1536, 1536 [4th Dept 2010]; *Gilmore*, 12 AD3d at 1156). Therefore, as the People now request, we modify the judgment by vacating that part of the sentence awarding restitution (see *People v Annunziata*, 105 AD2d 709, 709 [2d Dept 1984]; see also *People v Feher*, 165 AD3d 1610, 1611 [4th Dept 2018], *lv denied* 32 NY3d 1171 [2019]).

Finally, we note that the uniform sentence and commitment form incorrectly indicates that defendant was sentenced to a definite term of incarceration, and it must be amended to reflect the court's imposition of a determinate term of imprisonment. The uniform sentence and commitment form must also be amended to clarify that the sentence imposed on count one of the indictment runs concurrently with the sentences imposed on the remaining counts thereof (see *People v Hoke*, 167 AD3d 1549, 1550 [4th Dept 2018], *lv denied* 33 NY3d 949 [2019]).