

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

775

KA 18-00695

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL LABADEE, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

TODD J. CASELLA, DISTRICT ATTORNEY, PENN YAN (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (Jason L. Cook, J.), rendered December 19, 2017. The judgment convicted defendant, upon his plea of guilty, of 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 criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). We reject defendant's contention that he did not knowingly, voluntarily, and intelligently waive his right to appeal (*see People v Garrett*, 167 AD3d 1586, 1586 [4th Dept 2018]; *see generally People v Lopez*, 6 NY3d 248, 256-257 [2006]). Contrary to defendant's contentions, the record establishes that County Court " 'did not improperly conflate the waiver of the right to appeal with those rights automatically forfeited by a guilty plea' " (*People v Bray*, 170 AD3d 1538, 1538 [4th Dept 2019], *lv denied* 33 NY3d 1066 [2019]; *see People v Alfano*, 172 AD3d 1920, 1921 [4th Dept 2019], *lv denied* 33 NY3d 1101 [2019]), and "the court 'was not required to specify during the colloquy which specific claims survive the waiver of the right to appeal' " (*People v Livermore*, 161 AD3d 1569, 1569 [4th Dept 2018], *lv denied* 32 NY3d 939 [2018]). The valid waiver of the right to appeal encompasses defendant's challenge to the severity of the sentence (*see People v McArthur*, 149 AD3d 1568, 1568-1569 [4th Dept 2017]; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Defendant contends that his plea was not knowing, intelligent, and voluntary because he simply responded "yes" and "no" to many of the court's questions. That contention is actually a challenge to the factual sufficiency of the plea allocution, which is encompassed by

the valid waiver of the right to appeal (see *People v Pryce*, 148 AD3d 1625, 1625-1626 [4th Dept 2017], lv denied 29 NY3d 1085 [2017]; *People v Simcoe*, 74 AD3d 1858, 1859 [4th Dept 2010], lv denied 15 NY3d 778 [2010]). In any event, defendant did not preserve that contention for our review because he did not move to withdraw the plea or to vacate the judgment of conviction (see *Livermore*, 161 AD3d at 1570), and this case does not fall within the narrow exception to the preservation rule (see *People v Lopez*, 71 NY2d 662, 666 [1988]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court