

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

**1173**

**KA 19-02152**

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CLIFTON A. MCBEAN, DEFENDANT-APPELLANT.

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CAITLIN M. CONNELLY, BUFFALO, FOR DEFENDANT-APPELLANT.

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (JOHN C. TUNNEY OF COUNSEL),  
FOR RESPONDENT.

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Appeal from a judgment of the Steuben County Court (Philip J. Roche, J.), rendered April 30, 2019. The judgment convicted defendant upon a plea of guilty of attempted burglary in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating that part of the sentence ordering restitution and by amending the order of protection to expire on May 22, 2033, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the first degree (Penal Law §§ 110.00, 140.30 [2]). Contrary to defendant's contention, the waiver of the right to appeal is valid. "[A]ll the relevant circumstances reveal a knowing and voluntary waiver" (*People v Thomas*, 34 NY3d 545, 563 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]). Defendant contends that the waiver of the right to appeal is invalid because he did not have an opportunity to discuss it with defense counsel. Defendant has waived that particular contention, however, inasmuch as County Court afforded defendant an opportunity to discuss the waiver of the right to appeal with defense counsel, but defendant declined that opportunity (*see generally People v Forshey*, 298 AD2d 962, 963 [4th Dept 2002], *lv denied* 99 NY2d 558 [2002], *reconsideration denied* 100 NY2d 561 [2003]). Defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence and also "includes waiver of the right to invoke [this Court's] interest-of-justice jurisdiction to reduce the sentence" (*People v Lopez*, 6 NY3d 248, 255 [2006]; *see People v Vickers*, 186 AD3d 1070, 1071 [4th Dept 2020], *lv denied* 36 NY3d 977 [2020]).

Defendant's contention regarding the restitution component of his sentence survives his valid waiver of the right to appeal (*see People v Rodriguez*, 173 AD3d 1840, 1841 [4th Dept 2019], *lv denied* 34 NY3d

953 [2019]; *People v Thomas*, 71 AD3d 1231, 1232 [3d Dept 2010], *lv denied* 14 NY3d 893 [2010]). The People correctly concede that the court erred in ordering restitution to a person who was not a "victim of the offense" (Penal Law § 60.27 [4] [b]), and we therefore modify the judgment by vacating that part of the sentence ordering restitution (*see People v Meyers*, 182 AD3d 1037, 1042 [4th Dept 2020], *lv denied* 35 NY3d 1028 [2020]).

Finally, defendant's contention that the court erred in calculating the expiration date of the order of protection also survives his waiver of the right to appeal (*see People v Lopez*, 151 AD3d 1649, 1650 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]) and, although defendant failed to preserve that contention for our review, we exercise our power to review it as a matter of discretion in the interest of justice (*see CPL 470.15 [3] [c]; Lopez*, 151 AD3d at 1650; *People v Richardson*, 143 AD3d 1252, 1255 [4th Dept 2016], *lv denied* 28 NY3d 1150 [2017]). Here, the expiration date of the maximum term of defendant's determinate sentence of imprisonment is May 22, 2025. Pursuant to CPL 530.13 (4) (A) (ii), the duration of the order of protection may not exceed, as it does here, eight years from that date. We therefore further modify the judgment by amending the order of protection to expire on May 22, 2033 (*see People v Griswold*, 186 AD3d 1104, 1105 [4th Dept 2020], *lv denied* 35 NY3d 1113 [2020]; *People v Chattley*, 49 AD3d 1307, 1307 [4th Dept 2008], *lv denied* 10 NY3d 933 [2008]).

Entered: March 26, 2021

Mark W. Bennett  
Clerk of the Court