

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

**409**

**KA 18-02048**

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND BANNISTER, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DASHAWN SMITH, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (HELEN SYME OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered December 13, 2016. The judgment convicted defendant, upon a plea of guilty, of attempted criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), defendant contends that Supreme Court erred in accepting his plea without further inquiry into whether defendant was aware of a possible defense based on the operability of the gun. Although that contention survives defendant's purported waiver of the right to appeal (*see People v DeJesus*, 144 AD3d 1564, 1565 [4th Dept 2016]), defendant failed to preserve it for our review inasmuch as he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]). Contrary to defendant's contention, this case does not fall within the narrow exception to the preservation requirement stated in *People v Lopez* (71 NY2d 662, 666 [1988]).

Entered: May 7, 2021

Mark W. Bennett  
Clerk of the Court