

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

629

**KA 18-02442**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

NATHANIEL D. WILSON, ALSO KNOWN AS NATHANIEL D. WILSON, JR., ALSO KNOWN AS NATHANIEL WILSON, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JAMES M. SPECYAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered September 25, 2018. The judgment convicted defendant, upon a plea of guilty, of murder 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 *Alford* plea, of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that his waiver of the right to appeal is invalid and does not encompass his challenges to his plea and to the severity of the sentence. With respect to defendant's contention that County Court erred in accepting his *Alford* plea because the record does not contain the requisite strong evidence of guilt or establish that the plea was the product of a voluntary and rational choice, we note that defendant's contention would survive even a valid waiver of the right to appeal to the extent that it implicates the voluntariness of the plea (see *People v Dash*, 74 AD3d 1859, 1860 [4th Dept 2010], *lv denied* 15 NY3d 892 [2010]; *People v Dille*, 21 AD3d 1298, 1298 [4th Dept 2005], *lv denied* 5 NY3d 882 [2005]). Defendant failed to move to withdraw his plea or to vacate the judgment of conviction, however, and thus he failed to preserve that contention for our review (see *People v Dixon*, 147 AD3d 1518, 1518-1519 [4th Dept 2017], *lv denied* 29 NY3d 1078 [2017]; *People v Elliott*, 107 AD3d 1466, 1466 [4th Dept 2013], *lv denied* 22 NY3d 996 [2013]). Defendant further contends that preservation is not required because the plea was not knowingly, voluntarily and intelligently entered inasmuch as he made statements during sentencing that were inconsistent with guilt and the court failed to conduct the requisite "further inquiry" (*People v Lopez*, 71 NY2d 662, 666 [1988]). We conclude that preservation is required

because the "record indicated strong evidence of guilt and the court was not required to do more than it did to ensure that defendant voluntarily entered the plea" (*People v Couser*, 28 NY3d 368, 379 [2016]). Furthermore, defendant raised the issue of intoxication for the first time in the presentence interview, and therefore the court had no duty to make further inquiry at the time of the plea based on such information (see generally *People v Espinal*, 99 AD3d 435, 435 [1st Dept 2012], *lv denied* 20 NY3d 986 [2012]). In any event, " '[i]n New York, [an Alford] plea is allowed only when, as in *Alford* itself, it is the product of a voluntary and rational choice, and the record before the court contains strong evidence of actual guilt' " (*People v Richardson*, 72 AD3d 1578, 1579 [4th Dept 2010]; see *People v Hill*, 16 NY3d 811, 814 [2011]). Here, we conclude that both of those conditions were met (see *People v Cruz*, 89 AD3d 1464, 1465 [4th Dept 2011], *lv denied* 18 NY3d 993 [2012]). Furthermore, we note that, "unlike an ordinary guilty plea, an *Alford* plea does not involve a recitation of guilt . . . Inasmuch as defendant tendered his plea without admitting guilt, his claims of innocence are not incompatible with his *Alford* plea . . . As such, they form no basis to attack the plea" (*People v Alexander*, 97 NY2d 482, 487 [2002]).

Finally, even assuming, arguendo, that defendant's waiver of the right to appeal was invalid (see *People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* - US -, 140 S Ct 2634 [2020]; see also *People v Bisoño*, 36 NY3d 1013, 1017-1018 [2020]), and thus does not preclude our review of his challenge to the severity of his sentence (see *People v Baker*, 158 AD3d 1296, 1296 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]), we conclude that the sentence is not unduly harsh or severe.