

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

745

KA 17-01377

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

THOMAS B. NEWSOME, DEFENDANT-APPELLANT.

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

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered May 1, 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 guilty plea, of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). Defendant contends that his guilty plea was not knowing, voluntary, and intelligent. Defendant, however, failed to preserve that contention for our review because he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Tapia*, 158 AD3d 1079, 1080 [4th Dept 2018], *lv denied* 31 NY3d 1088 [2018]; *People v VanDeViver*, 56 AD3d 1118, 1118 [4th Dept 2008], *lv denied* 11 NY3d 931 [2009], *reconsideration denied* 12 NY3d 788 [2009]). This case does not fall within the rare exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666 [1988]). We decline to exercise our power to review the issue as a matter of discretion in the interest of justice (*see CPL 470.15 [3] [c]*).

Defendant further contends that County Court erred in failing to order a competency hearing sua sponte. Although that contention need not be preserved for our review (*see People v Chapman*, 179 AD3d 1526, 1527 [4th Dept 2020], *lv denied* 35 NY3d 968 [2020]; *People v Henderson*, 162 AD3d 1507, 1508 [4th Dept 2018], *lv denied* 32 NY3d 1004 [2018]), we nevertheless reject it. We conclude that there is "no indication in the record that defendant was unable to understand the proceedings. . . . Rather, the record establishes that the court conducted a thorough plea colloquy and that [d]efendant's answers were

in all respects appropriate, showing no indication of mental impairment requiring a competency hearing" (*People v Roosevelt*, 43 AD3d 1300, 1301 [4th Dept 2007], *lv denied* 9 NY3d 1038 [2008] [internal quotation marks omitted]; see *People v Shannon*, 189 AD3d 2165, 2166 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]; *People v Wilcox*, 45 AD3d 1320, 1320 [4th Dept 2007], *lv denied* 10 NY3d 772 [2008]). Although defendant advised the court of his mental health issues, it is well established that "a history of psychiatric illness does not in itself call into question defendant's competence to proceed" (*Henderson*, 162 AD3d at 1508 [internal quotation marks omitted]; see *People v Carpenter*, 13 AD3d 1193, 1194 [4th Dept 2004], *lv denied* 4 NY3d 797 [2005]).

To the extent that defendant's further contention that he was denied effective assistance of counsel survives his guilty plea (see *People v Barnes*, 32 AD3d 1250, 1251 [4th Dept 2006]), we reject that contention. On the record before us, we conclude that defendant "received an advantageous plea, and 'nothing in the record casts doubt on the apparent effectiveness of' " the attorneys who represented him (*People v Shaw*, 133 AD3d 1312, 1313 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016], quoting *People v Ford*, 86 NY2d 397, 404 [1995]; see *People v Spencer*, 170 AD3d 1614, 1615 [4th Dept 2019], *lv denied* 37 NY3d 974 [2021]).

Finally, we note that defendant was sentenced to the minimum term of incarceration authorized by law. Thus, contrary to defendant's contention, "that part of his . . . sentence cannot be considered unduly harsh or severe" (*People v Griffith*, 181 AD3d 1170, 1172 [4th Dept 2020], *lv denied* 35 NY3d 1045 [2020] [internal quotation marks omitted]; see *People v Leggett*, 101 AD3d 1694, 1695 [4th Dept 2012], *lv denied* 20 NY3d 1101 [2013]). Also, the period of postrelease supervision imposed by the court is not unduly harsh or severe.