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

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KA 19-02104

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MARINO PADILLA, DEFENDANT-APPELLANT.

LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL), FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (ERICH D. GROME OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered September 10, 2019. The judgment convicted defendant, upon a plea of guilty, of assault in the second 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 assault in the second degree (Penal Law § 120.05 [7]). Defendant's challenges to the voluntariness of his guilty plea are unpreserved, and the narrow exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666 [1988]) does not apply in this case (*see People v Padilla*, 151 AD3d 1700, 1700-1701 [4th Dept 2017], *lv denied* 31 NY3d 1016 [2018]; *see generally People v Peque*, 22 NY3d 168, 182 [2013], *cert denied* 574 US 840 [2014]). We note in that regard that, contrary to defendant's assertion, "serious physical injury" is not an element of the crime to which he pleaded guilty (*see* § 120.05 [7]). Moreover, defendant's "assertion that his allocution failed to affirmatively establish each element of the crime[to which he pleaded guilty] 'is not a recognized ground for vacating a guilty plea' " (*People v Rathburn*, 178 AD3d 1421, 1422 [4th Dept 2019], *lv denied* 35 NY3d 944 [2020]; *see People v Goldstein*, 12 NY3d 295, 300-301 [2009]; *People v Gulbin*, 165 AD3d 1611, 1612 [4th Dept 2018], *lv denied* 32 NY3d 1172 [2019]; *People v Madden*, 148 AD3d 1576, 1578 [4th Dept 2017], *lv denied* 29 NY3d 1034 [2017]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court