

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

769

KA 19-01734

PRESENT: SMITH, J.P., LINDLEY, MONTOUR, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL SHEPPARD, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL),
FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered June 28, 2019. The judgment convicted defendant upon a plea of guilty of aggravated sexual abuse 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 aggravated sexual abuse in the second degree (Penal Law § 130.67 [1] [a]). As defendant contends and the People correctly concede, defendant did not validly waive his right to appeal because County Court's oral colloquy and the written waiver of the right to appeal provided defendant with erroneous information about the scope of that waiver and failed to identify that certain rights would survive the waiver (*see People v Jackson*, 207 AD3d 1077, 1077 [4th Dept 2022], *lv denied* 38 NY3d 1151 [2022]; *People v Pace*, 201 AD3d 1296, 1296 [4th Dept 2022], *lv denied* 38 NY3d 953 [2022]; *see generally People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]).

Contrary to defendant's contention, however, the court properly denied his motion seeking, *inter alia*, to dismiss the indictment on the ground that the grand jury proceeding was defective. Defendant contends that "the integrity [of the grand jury proceeding was] impaired" when the prosecutor failed to correct a police investigator's allegedly false testimony (CPL 210.35 [5]). Although that contention is not forfeited by the plea (*see People v Taylor*, 65 NY2d 1, 5 [1985]), dismissal of the indictment on that ground is an "exceptional remedy" that is not warranted in this case (*People v Darby*, 75 NY2d 449, 455 [1990]; *see People v Bean*, 66 AD3d 1386, 1386 [4th Dept 2009], *lv denied* 14 NY3d 769 [2010]). Upon our review of

the grand jury minutes, we conclude that "[t]here is no indication that the People knowingly or deliberately presented false testimony before the [g]rand [j]ury, and thus there is no basis for finding that the integrity of the [g]rand [j]ury proceeding was impaired . . . by the alleged false testimony" (*Bean*, 66 AD3d at 1386 [internal quotation marks omitted]; see *People v Klosin*, 281 AD2d 951, 951 [4th Dept 2001], *lv denied* 96 NY2d 864 [2001]; *People v Bennett*, 244 AD2d 923, 925 [4th Dept 1997], *lv denied* 91 NY2d 889 [1998], *reconsideration denied* 92 NY2d 847 [1998]).

We further conclude that the bargained-for sentence is not unduly harsh or severe.