

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

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KA 22-00405

PRESENT: SMITH, J.P., BANNISTER, GREENWOOD, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

PAUL B. BOVEE, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN, FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered October 28, 2021. The judgment convicted defendant upon his plea of guilty of menacing a police officer or peace officer and possession of an imitation controlled substance with intent to sell it.

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 menacing a police officer or peace officer (Penal Law § 120.18) and possession of an imitation controlled substance with intent to sell it (Public Health Law § 3383 [2]). We affirm.

Defendant did not move to withdraw the plea or to vacate the judgment of conviction, and thus he failed to preserve for our review his challenge to the voluntariness of his plea (*see People v Szymanski*, 217 AD3d 1415, 1415 [4th Dept 2023], *lv denied* 40 NY3d 952 [2023]; *People v Roots*, 201 AD3d 1364, 1365 [4th Dept 2022]; *People v Caldero*, 195 AD3d 1450, 1451 [4th Dept 2021], *lv denied* 37 NY3d 1145 [2021]). Defendant's contention that he was denied effective assistance of counsel based on defense counsel's failure to file a motion to dismiss the indictment on speedy trial grounds survives his guilty plea "only insofar as he demonstrates that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [his] attorney[']s allegedly poor performance" (*People v Cunningham*, 213 AD3d 1270, 1271 [4th Dept 2023], *lv denied* 39 NY3d 1110 [2023] [internal quotation marks omitted]; *see People v Henry*, 207 AD3d 1062, 1064 [4th Dept 2022], *lv denied* 39 NY3d 940 [2022]; *see generally People v Parson*, 27 NY3d 1107, 1108 [2016]).

To the extent that defendant's contention survives his plea, we

conclude that it lacks merit. It is well settled that even a single error or failure to make an argument may amount to ineffective assistance of counsel, despite otherwise competent representation, where that error is sufficiently egregious and prejudicial (see generally *People v McGee*, 20 NY3d 513, 518 [2013]; *People v Turner*, 5 NY3d 476, 480 [2005]). "To rise to that level, the [failure to make a particular argument] must typically involve an issue that is so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it," and it must be evident that the failure to advance that argument could not be grounded in legitimate strategy (*McGee*, 20 NY3d at 518; see generally *People v Caban*, 5 NY3d 143, 152 [2005]). Here, we conclude that "defendant's speedy trial argument is not 'clear cut,' " and, thus, defense counsel was not ineffective in failing to move to dismiss the indictment on that ground (*People v Valentin*, 183 AD3d 1271, 1272 [4th Dept 2020], *lv denied* 35 NY3d 1049 [2020]; see *People v Brunner*, 16 NY3d 820, 821 [2011]).

Finally, contrary to defendant's further contention, we conclude that the sentence is not unduly harsh or severe.