

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

1003

KA 19-02175

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

EZIEKIEL SMITH, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS OF COUNSEL),
FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II,
OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Stephen T. Miller, A.J.), rendered September 17, 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, in appeal No. 1, from a judgment convicting him, upon a plea of guilty, of assault in the second degree (Penal Law § 120.05 [3]) and, in appeal No. 2, from a judgment convicting him, upon a plea of guilty, of burglary in the second degree (§ 140.25 [2]). As defendant contends in both appeals and the People correctly concede, the respective waivers of defendant's right to appeal are invalid inasmuch as the written waivers and oral waiver colloquies " `mischaracterized the nature of the right[s] that defendant was being asked to cede, portraying the waiver[s] as [overly broad and] an absolute bar to defendant taking an appeal' " (*People v Johnson*, 192 AD3d 1494, 1495 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; *see People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]). Nonetheless, in both appeals we reject defendant's contention that his sentences are unduly harsh and severe.

We do not address defendant's remaining contentions in appeal Nos. 1 and 2 because they were withdrawn by defendant.

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court