

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

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KA 19-02028

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DWAYNE NELSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered February 15, 2019. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (§ 220.16 [12]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). The two pleas were entered in a single plea proceeding.

Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (see *People v Lopez*, 196 AD3d 1157, 1157 [4th Dept 2021], *lv denied* 37 NY3d 1028 [2021]), we reject defendant's contention in appeal No. 2 that Supreme Court abused its discretion by directing that the sentence imposed in that appeal run consecutively to the sentence imposed in appeal No. 1 (see *People v Washington*, 124 AD3d 1388, 1388 [4th Dept 2015], *lv denied* 25 NY3d 954 [2015]; see also *People v Graham*, 171 AD3d 1559, 1561 [4th Dept 2019], *lv denied* 33 NY3d 1069 [2019]).

Defendant further contends in both appeals that he was denied effective assistance of counsel. To the extent that defendant contends that his attorney was ineffective for failing to address off-the-record discussions regarding defense strategy or the content

of off-the-record plea negotiations, those issues are based upon matters outside the record and must be raised by way of a motion pursuant to CPL article 440 (see *People v Tyes*, 160 AD3d 1447, 1448 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]). To the extent that defendant's contention is reviewable on direct appeal, we conclude that it lacks merit inasmuch as he "received . . . advantageous plea[s], and 'nothing in the record casts doubt on the apparent effectiveness of counsel' " (*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]).

Finally, contrary to defendant's contention in both appeals, we conclude that the sentences are not unduly harsh or severe, and we decline to exercise our power to reduce them as a matter of discretion in the interest of justice (see CPL 470.15 [6] [b]).