

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

485

KA 23-01005

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, KEANE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WYATT S. PENFOLD, DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL),
FOR DEFENDANT-APPELLANT.

VINCENT A. HEMMING, ACTING DISTRICT ATTORNEY, WARSAW, FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered April 21, 2022. The judgment convicted defendant upon a guilty plea of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his guilty plea of assault in the second degree (Penal Law § 120.05 [3]), defendant contends that he was deprived of effective assistance of counsel because his attorney failed to file any motions, failed to request a hearing pursuant to *People v Outley* (80 NY2d 702 [1993]), and failed to move to withdraw his plea when it became apparent that County Court would impose an enhanced sentence. We reject defendant's contention. An attorney is not ineffective for failing to file motions that have " 'little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005]; see *People v Zona*, 225 AD3d 1296, 1297-1298 [4th Dept 2024]), and defendant has not identified any motions that he believes would have been meritorious if filed on his behalf. With respect to defendant's remaining complaints about defense counsel's performance, we note that defendant stated on the record at sentencing that he did not wish to have an *Outley* hearing, which the court offered to conduct, and defense counsel stated, without contradiction by defendant, that defendant did not wish to withdraw his plea. Considering that defense counsel negotiated a seemingly favorable plea agreement, which involved the dismissal of two unrelated felony charges, we conclude, after viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, that defendant was afforded meaningful representation (see generally *People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, defendant's challenge to the severity of his enhanced

sentence is precluded by his valid waiver of the right to appeal (see *People v May*, 169 AD3d 1365, 1365 [4th Dept 2019]; see generally *People v Garcia*, 155 AD3d 1570, 1571 [4th Dept 2017], lv denied 31 NY3d 983 [2018]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court