

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: July 11, 2013

104492

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

KEITH GRUBER,

Appellant.

Calendar Date: May 29, 2013

Before: Lahtinen, J.P., Spain, McCarthy and Egan Jr., JJ.

Carl J. Silverstein, Monticello, for appellant, and
appellant pro se.

James R. Farrell, District Attorney, Monticello (Bonnie M.
Mitzner of counsel), for respondent.

Lahtinen, J.P.

Appeal from a judgment of the County Court of Sullivan
County (LaBuda, J.), rendered June 2, 2011, convicting defendant
upon his plea of guilty of the crime of driving while
intoxicated.

Following his December 2009 arrest resulting from a one-car
accident in which defendant crashed his car into a stone wall, he
pleaded guilty to driving while intoxicated and waived his right
to appeal. The comprehensive appeal waiver, among other things,
provided that defendant was waiving his right to "any other
matters which I may have an appeal as of right or otherwise in
any State or Federal Court." Thereafter, defendant was sentenced
to, as relevant here, the agreed-upon prison term of 1 $\frac{1}{3}$ to 4

years. Defendant now appeals.

We affirm. To the extent that defendant challenges the voluntariness of his plea, such challenge is not preserved for this Court's review inasmuch as the record does not indicate that he has moved to withdraw his plea or vacate the judgment of conviction (see People v Revette, 102 AD3d 1065, 1065 [2013]; People v Secore, 102 AD3d 1057, 1058 [2013]). Furthermore, as defendant made no statements that cast doubt upon his guilt or called into question the voluntariness of his plea, the narrow exception to the preservation requirement is not implicated (see People v Secore, 102 AD3d 1059, 1060 [2013]; People v Williams, 102 AD3d 1055, 1056 [2013]). Were we to consider defendant's argument that his plea was rendered involuntary because the appeal waiver purported to contain nonwaivable rights, we would find it to be unavailing. Where an appeal waiver encompasses nonwaivable issues, those issues are excluded from the scope of the waiver and it fails to render the rest of the waiver invalid, much less implicate the voluntariness of a defendant's plea (see People v Neal, 56 AD3d 1211, 1211 [2008], lv denied 12 NY3d 761 [2009]; People v Norton, 9 AD3d 741, 742 [2004]; People v Wagoner, 6 AD3d 985, 986 [2004]). Finally, defendant's contention that he received the ineffective assistance of counsel is similarly unpreserved due to his failure to move to withdraw his plea or vacate the judgment of conviction (see People v Williams, 101 AD3d 1174, 1174 [2012]).

Spain, McCarthy and Egan Jr., JJ., concur.

ORDERED that the judgment is affirmed.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive style with a large, prominent "R" and "M".

Robert D. Mayberger
Clerk of the Court