

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

Decided and Entered: September 22, 2016

107323

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

DAVID MAHONEY,

Appellant.

Calendar Date: August 8, 2016

Before: Peters, P.J., Garry, Egan Jr., Rose and Clark, JJ.

Marshall Nadan, Kingston, for appellant.

D. Holley Carnright, District Attorney, Kingston (Joan Gudesblatt Lamb of counsel), for respondent.

Appeal from a judgment of the County Court of Ulster County (Williams, J.), rendered July 2, 2014, convicting defendant upon his plea of guilty of the crime of burglary in the third degree (two counts).

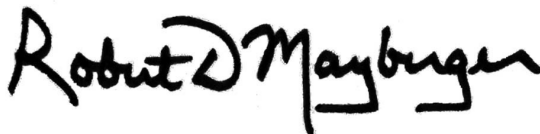
In satisfaction of an indictment charging seven counts of burglary in the third degree, defendant pleaded guilty to two of the counts with the understanding that he would be sentenced to concurrent prison terms of $2\frac{1}{3}$ to 7 years. Defendant waived his right to appeal as part of the plea bargain. After reviewing the presentence report, County Court informed defendant that it would not impose the agreed-upon sentence and stated that it would instead impose consecutive prison terms of $2\frac{1}{3}$ to 7 years and 2 to 6 years. Defendant declined the opportunity to withdraw his plea, and County Court sentenced him to the consecutive terms. Defendant now appeals.

Although defendant's challenge to the enhanced sentence "survives [his] waiver of appeal, the record does not reflect that [he] moved to withdraw his plea or vacate the judgment of conviction; accordingly, this issue is unpreserved for our review" (People v Johnson, 97 AD3d 990, 991 [2012] [internal citation omitted]; see People v Adams, 104 AD3d 1020, 1020 [2013]). In any event, "[w]here a court determines that the negotiated sentence is not appropriate, it may impose an enhanced sentence if it first offers the defendant the opportunity to withdraw his or her plea" (People v Sanchez, 87 AD3d 1226, 1226 [2011], lv denied 18 NY3d 928 [2012]; accord People v Mattucci, 92 AD3d 1029, 1029-1030 [2012], lv denied 19 NY3d 964 [2012]). Based upon its review of the presentence report, among other factors, County Court concluded that the negotiated sentence was no longer appropriate, explained such fact to defendant and provided him with an opportunity to withdraw his plea, which he declined to do. As such, were this issue before us, we would find that County Court did not abuse its discretion in imposing an enhanced sentence (see People v Adams, 104 AD3d at 1021; People v Mattucci, 92 AD3d at 1030).

Peters, P.J., Garry, Egan Jr., Rose and Clark, 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, slightly slanted style.

Robert D. Mayberger
Clerk of the Court