

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

Decided and Entered: May 25, 2017

106703

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

MILTON WOOD,

Appellant.

Calendar Date: May 1, 2017

Before: McCarthy, J.P., Rose, Devine, Clark and Mulvey, JJ.

Todd G. Monahan, Schenectady, for appellant.

P. David Soares, District Attorney, Albany (Vincent Stark of counsel), for respondent.

Rose, J.

Appeal from a judgment of the Supreme Court (McDonough, J.), rendered March 8, 2014 in Albany County, convicting defendant upon his plea of guilty of the crime of criminal sale of a controlled substance in the third degree.

Defendant was charged in a 10-count indictment with various drug offenses stemming from, among other things, his alleged sale of cocaine on four occasions and the subsequent seizure by law enforcement of drug-related paraphernalia and proceeds, including \$1,753.33 in United States currency and a Mercedes-Benz E320 automobile. Thereafter, pursuant to a negotiated plea agreement, defendant pleaded guilty to attempted criminal sale of a controlled substance in the third degree and executed a written waiver of appeal in open court. Consistent with the terms of the

plea agreement, Supreme Court sentenced defendant as a second felony offender to a prison term of 12 years, to be followed by three years of postrelease supervision. Defendant now appeals.

We affirm. Initially, defendant's contentions that Supreme Court should have had him evaluated for inclusion in the judicial diversion program (see CPL art 216) and that the sentence imposed was harsh and excessive are foreclosed by the unchallenged appeal waiver, which – in any event – the record reflects was knowing, voluntary and intelligent (see People v Smith, 112 AD3d 1232, 1232 [2013], lv denied 22 NY3d 1203 [2014]; People v Roche, 106 AD3d 1328, 1329 [2013]; People v Ivey, 79 AD3d 1531, 1531 [2010], lvs denied 16 NY3d 856, 859 [2011]; see generally People v Lopez, 6 NY3d 248, 255-256 [2006]). Similarly, to the extent that defendant claims that his counsel was ineffective for failing to advocate for his inclusion in a judicial diversion program, his valid appeal waiver precludes this claim as well (cf. People v Ivey, 79 AD3d at 1532).

To the extent that defendant contends that his counsel promised him that he would receive a sentence of less than 12 years in prison, his claim implicates the voluntariness of his plea and survives his valid appeal waiver (see e.g. People v Dolberry, 147 AD3d 1149, 1150 [2017]). Our review of the record before us, however, does not establish or substantiate defendant's allegation. In addition, to the extent that defendant's claim is based upon off-the-record communications between defendant and counsel regarding the sentence that he was going to receive, such a claim is not properly addressed in this appeal (People v Fairweather, 147 AD3d 1153, 1154 [2017]; People v Lewis, 143 AD3d 1183, 1185 [2016]).

McCarthy, J.P., Devine, Clark and Mulvey, 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 with a prominent initial "R".

Robert D. Mayberger
Clerk of the Court