

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

Decided and Entered: June 20, 2019

108786

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

AHMAD MORTON,

Appellant.

Calendar Date: April 30, 2019

Before: Garry, P.J., Clark, Mulvey, Devine and Pritzker, JJ.

Erin C. Morigerato, Albany, for appellant.

P. David Soares, District Attorney, Albany (Jonathan P. Catania of counsel), for respondent.

Mulvey, J.

Appeal from a judgment of the County Court of Albany County (Lynch, J.), rendered July 29, 2016, which revoked defendant's probation and imposed a sentence of imprisonment.

Defendant waived indictment and agreed to be prosecuted by a superior court information charging him with attempted criminal possession of a controlled substance in the third degree. He pleaded guilty to that crime and waived his right to appeal. In accordance with the terms of the plea agreement, he was sentenced to time served and five years of probation. However, defendant was subsequently charged with violating various conditions of his probation. At the conclusion of a

hearing on the probation violations, County Court determined that defendant had violated his probation by possessing a firearm.¹ Consequently, the court revoked his probation and resented him to 5½ years in prison, followed by two years of postrelease supervision. Defendant appeals.

Defendant's challenges related to his underlying judgment of conviction – arguments concerning the voluntariness of his plea and alleged ineffectiveness of counsel prior to and during the plea proceeding – cannot be raised on the appeal from the judgment resentencing him following the revocation of his probation (see People v Pozzi, 117 AD3d 1325, 1325 [2014]; People v Daniels, 106 AD3d 1189, 1189 [2013], lv denied 21 NY3d 1014 [2013]; People v Pittman, 17 AD3d 930, 931 n [2005], lv denied 5 NY3d 767 [2005]).² The record does not support defendant's arguments that he was deprived of meaningful representation at the probation violation hearing. Any other arguments concerning the ineffectiveness of counsel rely on information outside the record and would be more appropriately addressed in a CPL article 440 motion (see People v Perkins, 140 AD3d 1401, 1403 [2016], lv denied 28 NY3d 1126 [2016]).

Defendant's "current challenge to the severity of the sentence imposed upon the revocation of his probation is not precluded by his waiver of appeal entered in connection with his original guilty plea and sentence" (People v Middlemiss, 149 AD3d 1419, 1420 [2017]). Nevertheless, defendant possessed a loaded weapon within months of being placed on probation, resulting in his conviction of another felony. Although the sentence he received was the maximum that could be imposed for the crime of attempted criminal possession of a controlled substance in the third degree (see Penal Law §§ 70.70 [2] [a] [ii]; 110.05 [4]; 220.16), we find no extraordinary

¹ In connection therewith, defendant pleaded guilty to attempted criminal possession of a weapon in the second degree and that conviction is the subject of a separate appeal (People v Morton, ___ AD3d ___ [appeal No. 109132, decided herewith]).

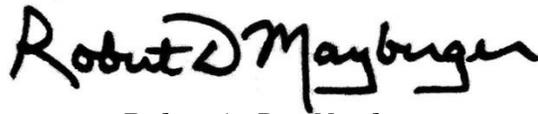
² There is no indication that defendant appealed from his underlying judgment of conviction.

circumstances or abuse of discretion warranting a reduction of the resentence in the interest of justice (see People v Regan, 162 AD3d 1414, 1415 [2018]).

Garry, P.J., Clark, Devine and Pritzker, 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