

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

Decided and Entered: June 20, 2019

109132

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.

Pritzker, J.

Appeal from a judgment of the County Court of Albany County (Lynch, J.), rendered December 14, 2016, convicting defendant upon his plea of guilty of the crime of attempted criminal possession of a weapon in the second degree.

In satisfaction of a one-count indictment and other pending charges, defendant pleaded guilty to attempted criminal possession of a weapon in the second degree and waived his right to appeal, both orally and in writing. In accordance with the terms of the plea agreement, he was sentenced as a second felony offender to seven years in prison, followed by five years of postrelease supervision, to run concurrently with a sentence

imposed in connection with his violation of probation (People v Morton, ___ AD3d ___ [appeal No. 108786, decided herewith]). Defendant appeals.

Initially, defendant's challenge to the validity of his appeal waiver is without merit. During the plea colloquy, County Court explained to defendant that, notwithstanding the automatic forfeiture of his trial-related rights resulting from his guilty plea, defendant ordinarily retained his right to appeal his case to a higher court (see People v Dickerson, 168 AD3d 1194, 1194 [2019]; People v Smith, 157 AD3d 1059, 1060 [2018], lv denied 31 NY3d 987 [2018]). This adequately conveyed to defendant the separate and distinct nature of his right to appeal (see People v Tucker, 164 AD3d 948, 949 [2018]). County Court went on to explain that the waiver of appeal was a condition of his plea agreement, which defendant indicated he understood, and then, after consulting with counsel, defendant executed a written waiver of appeal in open court, which he indicated he signed and understood (see People v McDonald, 165 AD3d 1327, 1327-1328 [2018], lv denied 32 NY3d 1175 [2019]; People v Venable, 161 AD3d 1315, 1315 [2018], lv denied 31 NY3d 1154 [2018]). In these circumstances, we find that defendant knowingly, intelligently and voluntarily waived his right to appeal (see People v Dickerson, 168 AD3d at 1194; People v McDonald, 165 AD3d at 1328). Accordingly, defendant's challenge to the severity of the promised sentence is precluded (see People v McDonald, 165 AD3d at 1328; People v Velez, 158 AD3d 952, 952-953 [2018]).

Although defendant's challenge to the voluntariness of his plea survives his appeal waiver, this claim has not been preserved for our review as the record does not disclose that he made an appropriate postallocution motion despite having an opportunity to do so before sentencing (see People v Dickerson, 168 AD3d at 1194-1195; People v Mais, 168 AD3d 1142, 1143 [2019]). Moreover, the exception to the preservation rule is inapplicable as defendant did not make any statements that negated his guilt or called into question the voluntariness of his guilty plea (see People v Lopez, 71 NY2d 662, 665-666 [1988]; People v Bonfante, 167 AD3d 1160, 1160 [2018], lv denied

32 NY3d 1202 [2019]). Defendant's generalized claim that he was denied the effective assistance of counsel – to the extent that it impacted the voluntariness of his guilty plea – is also unpreserved for the same reason (see People v Dickerson, 168 AD3d at 1195; People v Mais, 168 AD3d at 1143).

Lastly, defendant maintains that his conviction should be vacated because the certificate of conviction and the uniform sentence and commitment form erroneously state that he was convicted of criminal possession of a weapon in the second degree. The People concede and the record confirms that the subject documents contain this error. However, rather than vacating the conviction, the proper remedy is to remit the matter to County Court for correction of the error on both forms (see People v Payne, 148 AD3d 1226, 1227-1228 [2017], lv denied 29 NY3d 1084 [2017]; People v Butler, 134 AD3d 1349, 1350 [2015], lvs denied 27 NY3d 962, 963 [2016]).

Garry, P.J., Clark, Mulvey and Devine, JJ., concur.

ORDERED that the judgment is affirmed, and matter remitted for entry of an amended uniform sentence and commitment form and an amended certificate of conviction.

ENTER:



Robert D. Mayberger
Clerk of the Court