

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

Decided and Entered: November 9, 2017

106484

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

ROOSEVELT CLARK,

Appellant.

Calendar Date: April 4, 2017

Before: Peters, P.J., McCarthy, Garry, Egan Jr. and Lynch, JJ.

Gail B. Rubenfeld, Monticello, 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 September 13, 2013, convicting defendant upon his plea of guilty of the crime of aggravated criminal contempt.

In satisfaction of an eight-count indictment stemming from his violation of an order of protection on several occasions, defendant pleaded guilty to aggravated criminal contempt as charged in the first count. Pursuant to the plea agreement, defendant waived his right to appeal during the plea allocution and signed a written waiver of appeal. County Court thereafter imposed the agreed-upon sentence of five years of probation, the first six months to be served in jail, and issued a full stay-away order of protection in favor of the victim in effect until September 13, 2021. Defendant appeals.

Defendant argues that the eight-year duration of the permanent order of protection exceeds the maximum duration then permitted, and that County Court further incorrectly calculated the expiration date of the order by failing to take into consideration the jail time credit to which he is entitled (see Penal Law § 70.30 [3]). Because the duration of the order of protection was not disclosed prior to defendant executing the waiver of appeal, this claim survives the appeal waiver (see People v Belile, 137 AD3d 1460, 1462 [2016]; People v Loffler, 111 AD3d 1059, 1060 [2013]). Ordinarily, this claim, which does not implicate the legality of the sentence, must be preserved by an objection at or before sentencing (see People v Nieves, 2 NY3d 310, 316-317 [2004]; People v Belile, 137 AD3d at 1462). Here, however, the record does not reflect that the duration of the order was disclosed to defendant or to defense counsel at any point prior to or during sentencing. As such, defendant had no practical ability to register a timely objection to the duration of the order and, accordingly, preservation was not required (see generally People v Williams, 27 NY3d 212, 221 [2016]; People v Conceicao, 26 NY3d 375, 381-382 [2015]).

With regard to the duration of the order of protection, we disagree with defendant's assertion that eight years was not permitted under the Criminal Procedure Law at the time he was sentenced (see CPL former 530.13 [4] [A] [i]; L 2013, ch 55, part E, § 19; L 2011, ch 9, § 3). To the extent that defendant seeks a correction of the expiration date of the order of protection to factor in his jail time credit (see Penal Law § 70.30 [3]), this claim was not preserved due to his failure to request this relief at sentencing, despite an opportunity to do so and an awareness that he had been in jail prior to sentencing and would be entitled to receive jail time credit (see People v Belile, 137 AD3d at 1462; People v Gardner, 129 AD3d 1386, 1387-1388 [2015]). Given the failure to raise this issue in County Court, a record was not made of the precise jail time credit to which defendant is entitled (see People v Gardner, 129 AD3d at 1388) and, as defendant may address this issue before County Court, we decline to exercise our interest of justice jurisdiction to modify the order in this regard (see CPL 470.15 [6] [a]; People v Belile, 137 AD3d at 1462).

Peters, P.J., McCarthy, Garry, Egan Jr. and Lynch, 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