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

Decided and Entered: October 5, 2017 107179

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,
v MEMORANDUM AND ORDER

COREY DESTOUCHE,
Appellant.

Calendar Date: September 8, 2017

Before: McCarthy, J.P., Egan Jr., Lynch, Devine and Pritzker, JJ.

Adam W. Toraya, Albany, for appellant.

Robert M. Carney, District Attorney, Schenectady (Chandler Delamater of counsel), for respondent.

Lynch, J.

Appeal from a judgment of the County Court of Schenectady County (Giardino, J.), rendered August 5, 2014, convicting defendant upon his plea of guilty of the crime of robbery in the third degree.

Defendant waived indictment and pleaded guilty to a superior court information charging him with robbery in the third degree and waived his right to appeal. He was sentenced in accordance with the plea agreement to a prison term of 2⅓ to 7 years. Defendant appeals.

Initially, we agree with defendant that his waiver of the right to appeal was invalid. Although defendant, at some point,

executed a written waiver of appeal, he answered in the negative when County Court inquired as to whether he understood what it meant to give up his right to appeal. The court's ensuing explanation of the appeal waiver was insufficient and confusing, and did not explain the separate and distinct nature of the waiver of the right to appeal from the rights automatically forfeited by the guilty plea. Furthermore, there was no confirmation by defendant that any confusion regarding the appeal waiver was obviated by the court's explanation. In view of this, the record does not establish that the waiver was knowingly, voluntarily and intelligently made (see People v Bates, 146 AD3d 1075, 1075-1076 [2017]; People v Henry, 133 AD3d 1085, 1085-1086 [2015]).

Turning to the merits, defendant's contention that the plea was not knowing, voluntary and intelligent is unpreserved inasmuch as the record does not reflect that any appropriate postallocution motion was made by defendant (see People v Laflower, 145 AD3d 1341, 1342 [2016]). Defendant's contention that the sentence imposed is harsh and excessive, particularly given his lack of family support, is without merit. Our review of the record establishes no abuse of discretion or extraordinary circumstances warranting a reduction of the agreed-upon sentence in the interest of justice (see People v Wilson, 98 AD3d 1167, 1168 [2012]; People v Harrell, 92 AD3d 974, 975 [2012], lv denied 19 NY3d 864 [2012]).

McCarthy, J.P., Egan Jr., Devine and Pritzker, JJ., concur.

ORDERED that the judgment is affirmed.

ENTER:

Robert D. Mayberger
Clerk of the Court