

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

Decided and Entered: April 1, 2021

109752

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

AFREKA S. SMITH,

Appellant.

Calendar Date: March 5, 2021

Before: Egan Jr., J.P., Clark, Aarons, Reynolds Fitzgerald and
Colangelo, JJ.

Rural Law Center of New York, Castleton (Kelly L. Egan of
counsel), for appellant.

Karen A. Heggen, District Attorney, Ballston Spa (Gordon
W. Eddy of counsel), for respondent.

Appeal from a judgment of the County Court of Saratoga
County (Murphy III, J.), rendered September 11, 2017, convicting
defendant upon her plea of guilty of the crime of possessing an
obscene sexual performance by a child.

Defendant waived indictment and agreed to be prosecuted
pursuant to a superior court information charging her with one
count of possessing an obscene sexual performance by a child.
The plea agreement, which required defendant to waive her right
to appeal, contemplated that defendant would plead guilty to the
charged crime with the understanding that she would be sentenced
to a 10-year term of probation. Defendant pleaded guilty in

conformity with the agreement, and the agreed-upon probationary period was imposed. This appeal ensued.

The People, citing People v Thomas (34 NY3d 545 [2019]), concede that defendant's waiver of the right to appeal is invalid, and County Court's brief oral colloquy with defendant fails to demonstrate that defendant "understood the distinction that some appellate review survived" (id. at 561; see People v Deming, 190 AD3d 1193, 1194 [2021]; People v Brunson, 185 AD3d 1300, 1300 n [2020], lv denied 36 NY3d 928 [2020]). Accordingly, defendant's challenge to the sentence imposed by County Court is not precluded (see People v Gonzalez, 186 AD3d 1832, 1832 [2020]). That said, although defendant expressed remorse for her actions and has no prior criminal history, given the disturbing nature of the underlying crime, we find no extraordinary circumstances or abuse of discretion warranting a reduction of the agreed-upon probationary sentence in the interest of justice (see generally People v Hatch, 165 AD3d 1321, 1322 [2018], lv denied 32 NY3d 1125 [2018]; People v Matthew NN., 156 AD3d 1119, 1120 [2017]; People v McCann, 100 AD3d 1150, 1151 [2012]).

Egan Jr., J.P., Clark, Aarons, Reynolds Fitzgerald and Colangelo, JJ., concur.

ORDERED that the judgment is affirmed.

ENTER:



Robert D. Mayberger
Clerk of the Court