

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

Decided and Entered: July 28, 2022

111603

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

MICHAEL S. ELLITHORPE,
Appellant.

Calendar Date: June 17, 2022

Before: Egan Jr., J.P., Lynch, Reynolds Fitzgerald, Ceresia
and McShan, JJ.

Rural Law Center of New York, Castleton (Keith F.
Schockmel of counsel), for appellant.

Jason M. Carusone, District Attorney, Lake George (Morgan
Cosentino of counsel), for respondent.

Appeal from a judgment of the County Court of Warren
County (Hall Jr., J.), rendered March 20, 2019, convicting
defendant upon his plea of guilty of the crime of attempted rape
in the second degree.

Defendant waived indictment and agreed to plead guilty to
a superior court information charging him with attempted rape in
the second degree with the understanding that he would be
sentenced to a prison term of 1½ years followed by 10 years of
postrelease supervision. The charge stemmed from defendant's
alleged interaction with an individual who informed defendant
that she was a 14-year-old girl but, in reality, was an

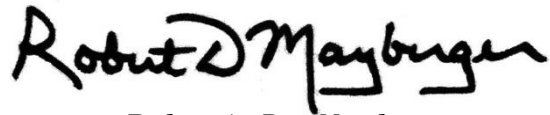
undercover police officer. The plea agreement also required defendant to waive his right to appeal. Defendant entered an Alford plea to the charged crime, and County Court imposed the agreed-upon sentence. This appeal ensued.

We affirm. Defendant executed a written waiver of appeal, after conferring with counsel, that expressly included any challenge to the sentence imposed, as well as "any other matters which [he] may have an appeal as of right or otherwise" – language suggesting a complete bar (emphasis added). County Court did not ask defendant if he had read the written waiver, nor did the court inquire as to whether defendant understood the appellate rights that he was relinquishing (compare People v Carter, 200 AD3d 1312, 1313 [2021]; People v Pizarro, 185 AD3d 1092, 1093 [2020]; People v King, 184 AD3d 909, 910 [2020]). Further, County Court's oral explanation of the waiver was insufficient to advise defendant that some appellate review nonetheless survived (compare People v Vittengl, 203 AD3d 1390, 1391 [2022]; People v Mirel, 194 AD3d 1198, 1199 [2021]). Under these circumstances, we agree that defendant's waiver of the right to appeal is invalid and, therefore, his challenge to the sentence imposed is not precluded (see People v Lenahan, 201 AD3d 1255, 1256 [2022], lv denied 38 NY3d 1008 [2022]). That said, and upon reviewing the record as a whole, we do not find the agreed-upon sentence to be unduly harsh or severe (see CPL 470.15 [6] [b]), and we reject defendant's assertion that modification thereof is warranted because "there was no actual victim" of the crime.

Egan Jr., J.P., Lynch, Reynolds Fitzgerald, Ceresia and McShan, 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