

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

Decided and Entered: June 29, 2023

113600

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

TYLER L. WHITE,

Appellant.

Calendar Date: June 1, 2023

Before: Egan Jr., J.P., Lynch, Aarons, Fisher and McShan, JJ.

Cambareri & Brenneck, Syracuse (*Melissa K. Swartz* of counsel), for appellant.

Kristy L. Sprague, District Attorney, Elizabethtown (*Kevin P. Mallery* of counsel),
for respondent.

McShan, J.

Appeal from a judgment of the County Court of Essex County (Richard B. Meyer, J.), rendered April 25, 2022, which resentenced defendant following his conviction of the crime of assault in the second degree.

Defendant waived indictment and agreed to be prosecuted by a superior court information charging him with assault in the second degree pursuant to a plea agreement that also satisfied a related weapons charge. The People, in turn, promised to recommend a sentence of four months in jail to be followed by five years of probation, with sentencing left to the discretion of County Court, which advised defendant that a prison

sentence of up to seven years could be imposed on the charge but made no sentencing commitment. Defendant then pleaded guilty to assault in the second degree and waived his right to appeal both orally and in writing. Thereafter, in June 2021, the court sentenced defendant to a prison term of six years to be followed by five years of postrelease supervision (hereinafter PRS). Roughly 10 months later, upon discovering that the period of PRS imposed was illegal, the court resentenced defendant to six years in prison followed by two years of PRS, and we dismissed defendant's appeal from the June 2021 judgment as moot (208 AD3d 1391, 1392 [3d Dept 2022]). Defendant appeals from the judgment resentencing him.

We affirm. Defendant's challenge to the voluntariness of his plea based upon his assertion that he was not informed at the time of his plea that a term of PRS could be imposed, although surviving his appeal waiver, is unpreserved for our review absent evidence that he made an appropriate postallocution motion, despite having ample opportunity to do so (*see People v Crossley*, 191 AD3d 1046, 1047 [3d Dept 2021], *lv denied* 37 NY3d 991 [2021]; *People v Miller*, 190 AD3d 1029, 1030 [3d Dept 2021]). In this regard, after an illegal term of PRS was initially imposed in 2021, defendant proceeded with resentencing in 2022 without raising any objection to the new term of PRS or seeking to withdraw his guilty plea, notwithstanding being expressly questioned about whether he desired to do so at that time (*see People v Conceicao*, 26 NY3d 375, 381-382 [2015]; *People v Gamble*, 190 AD3d 1022, 1025 [3d Dept 2021], *lv denied* 36 NY3d 1097 [2021]; *compare People v Louree*, 8 NY3d 541, 546 [2007]), and the narrow exception to the preservation requirement was not triggered (*see People v Kimball*, 213 AD3d 1028, 1030 [3d Dept 2023]; *People v Ramos*, 179 AD3d 1395, 1397 [3d Dept 2020], *lv denied* 35 NY3d 973 [2020]). Defendant's remaining contention that the six-year prison term imposed is unduly harsh and severe is foreclosed by his waiver of appeal (*see People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Curry*, 158 AD3d 898, 899 [3d Dept 2018], *lv denied* 31 NY3d 1012 [2018]; *People v White*, 141 AD3d 463, 464 [1st Dept 2016], *lv denied* 28 NY3d 975 [2016]; *People v Hare*, 110 AD3d 1117, 1118 [3d Dept 2013]; *People v Sofia*, 62 AD3d 1159, 1159-1160 [3d Dept 2009]).¹

Egan Jr, J.P., Lynch, Aarons and Fisher, JJ., concur.

¹ Defendant's challenge to the validity of the appeal waiver was raised for the first time in his reply brief and, thus, is not properly before this Court (*see People v Guzman-Moore*, 144 AD3d 1267, 1268 n [3d Dept 2016], *lv denied* 29 NY3d 949 [2017]).

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 style with a large, prominent "R" at the beginning.

Robert D. Mayberger
Clerk of the Court