

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

Decided and Entered: May 23, 2024

112836

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

MATTHEW J. WERNER,

Appellant.

Calendar Date: April 29, 2024

Before: Garry, P.J., Egan Jr., Clark, Lynch and Mackey, JJ.

Theresa M. Suozzi, Saratoga Springs, for appellant.

Karen A. Heggen, District Attorney, Ballston Spa (*Jesse L. Ashdown* of counsel),
for respondent.

Mackey, J.

Appeal from a judgment of the County Court of Saratoga County (James A. Murphy III, J.), rendered January 7, 2021, convicting defendant upon his plea of guilty of the crime of criminal contempt in the first degree.

In satisfaction of various charges pending within Saratoga County, defendant waived indictment, pleaded guilty to a superior court information charging him with criminal contempt in the first degree and agreed to waive his right to appeal. Consistent with the plea agreement, County Court sentenced defendant, as a second felony offender, to a prison term of 1½ to 3 years. Defendant appeals.

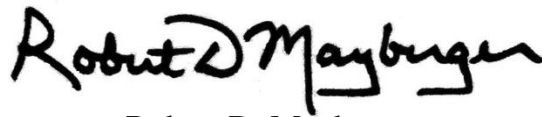
Initially, we agree with defendant that his waiver of the right to appeal is invalid as the written waiver of his right to appeal is overly broad in that it purports to encompass all potential appellate issues, and County Court's brief oral colloquy was not sufficient to cure the deficiencies in the written waiver or otherwise establish that defendant understood that some appellate rights survive (*see People v Vazquez*, 222 AD3d 1104, 1105 [3d Dept 2023], *lv denied* 41 NY3d 944 [2024]; *People v Elstone*, 217 AD3d 1274, 1274-1275 [3d Dept 2023]; *People v Loya*, 215 AD3d 1181, 1182 [3d Dept 2023], *lv denied* 40 NY3d 929 [2023]). In light of the invalid appeal waiver, defendant's challenge to the severity of the sentence imposed is not precluded. Although defendant contends that alleged mitigating factors warrant an alternative sentence of probation, we disagree and find that the agreed-upon sentence, which is the statutory minimum prison term for a second felony offender (*see* Penal Law § 70.06 [3] [e]; [4] [b]), is not unduly harsh or severe under the circumstances (*see* CPL 470.15 [6] [b]).

Regardless of the validity of the appeal waiver, defendant's contentions that his plea was not knowing, voluntary and intelligent and his claim of ineffective assistance of counsel – to the extent that it implicates the voluntariness of his plea – are unpreserved for our review as the record does not reflect that defendant made an appropriate postallocation motion despite having an opportunity to do so, and a review of the record does not disclose any basis to warrant the application of the narrow exception to the preservation requirement (*see People v Tucker*, 222 AD3d 1038, 1041-1042 [3d Dept 2023]; *People v Atkins*, 222 AD3d 1043, 1043-1044 [3d Dept 2023], *lv denied* ___ NY3d ___ [Apr. 26, 2024]). Were we to address the issues, we would find them to be without merit as the record reflects that defendant was sufficiently apprised of the rights he was forfeiting by pleading guilty and he assured County Court that he had sufficient time to speak with and was satisfied with counsel, that he understood the consequences of pleading guilty and that he was pleading guilty voluntarily (*see People v Dye*, 210 AD3d 1192, 1193 [3d Dept 2022], *lv denied* 39 NY3d 1072 [2023]; *People v Hawkins*, 207 AD3d 814, 815-816 [3d Dept 2022]). To the extent that defendant asserts that counsel did not properly meet with him, explore potential defenses or meet with prospective witnesses, such contentions involve matters outside the record that are more appropriately addressed in the context of a CPL article 440 motion (*see People v Finn*, 215 AD3d 1179, 1181 [3d Dept 2023], *lv denied* 40 NY3d 928 [2023]; *People v Devane*, 212 AD3d 894, 896 [3d Dept 2023], *lv denied* 39 NY3d 1110 [2023]; *People v Ramey*, 123 AD3d 1290, 1291 [3d Dept 2014], *lv denied* 25 NY3d 953 [2015]).

Garry, P.J., Egan Jr., Clark 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 style with a large, stylized 'R' and 'M'.

Robert D. Mayberger
Clerk of the Court