

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

Decided and Entered: May 23, 2024

112849

112850

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

RYAN P. RABINE,

Appellant.

Calendar Date: April 19, 2024

Before: Garry, P.J., Egan Jr., Pritzker, Powers and Mackey, JJ.

Rural Law Center of New York, Inc., Plattsburgh (*Lora J. Tryon* of counsel), for appellant.

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

Appeals (1) from a judgment of the County Court of Warren County (Robert A. Smith, J.), rendered February 10, 2021, convicting defendant upon his plea of guilty of the crime of attempted criminal possession of a weapon in the second degree, and (2) from a judgment of said court, rendered February 10, 2021, convicting defendant upon his plea of guilty of the crime of criminal possession of a controlled substance in the fourth degree.

Defendant waived indictment and agreed to be prosecuted pursuant to two superior court informations charging him, respectively, with attempted criminal possession of a weapon in the second degree and criminal possession of a controlled

substance in the fourth degree. Pursuant to a negotiated plea agreement, which encompassed the superior court informations and other pending and/or uncharged offenses, defendant agreed to plead guilty to the charged crimes with the understanding that he would be released under supervision subject to various terms and conditions. If successful, defendant would receive concurrent split sentences of six months in jail followed by five years of probation; if unsuccessful, defendant could receive consecutive prison terms totaling 12½ years followed by periods of postrelease supervision. The plea agreement also required defendant to waive his right to appeal. Defendant pleaded guilty in conformity with the agreement and was released. After defendant violated certain conditions of his release, County Court – consistent with its discussions with counsel – sentenced defendant to a prison term of 4½ years followed by three years of postrelease supervision with respect to the weapon conviction and to a concurrent prison term of 4½ years followed by two years of postrelease supervision with respect to the drug conviction. These appeals ensued.

We agree with defendant that the written waivers of appeal are invalid – in part because they contain overbroad language suggesting a complete bar to an appeal (*see e.g. People v Knowlton*, 207 AD3d 1002, 1002 [3d Dept 2022]; *People v Ellithorpe*, 207 AD3d 1001, 1001 [3d Dept 2022]) and in part because County Court failed to ascertain whether defendant had read the waivers, discussed them with counsel or understood their contents (*see e.g. People v Devins*, 206 AD3d 1365, 1366 [3d Dept 2022]; *People v Burke*, 199 AD3d 1170, 1171 [3d Dept 2021]). That said, "the lack of a valid written waiver is not fatal where, as here, the oral waiver colloquy is sufficient to demonstrate that the defendant knowingly, intelligently and voluntarily waived his or her right to appeal" (*People v Burke*, 199 AD3d at 1171 [internal quotation marks and citation omitted]; *accord People v Devins*, 206 AD3d at 1366; *see People v Washington*, 206 AD3d 1278, 1280 [3d Dept 2022], *lv denied* 39 NY3d 942 [2022]). In this regard, County Court explained the separate and distinct nature of the right to appeal, as well as the appellate process, and expressly delineated certain of the issues that would survive the waiver. In return, defendant indicated that he had discussed the waiver with counsel and expressed his willingness to waive his right to appeal. Under these circumstances, we are satisfied that the court's oral colloquy was sufficient to convey that some appellate review survived (*see People v Wheeler*, 216 AD3d 1314, 1314-1315 [3d Dept 2023], *lv denied* 40 NY3d 1082 [2023]; *People v Devins*, 206 AD3d at 1366; *People v Brunson*, 185 AD3d 1300, 1300 & n [3d Dept 2020], *lv denied* 36 NY3d 928 [2020]; *compare People v Gamble*, 190 AD3d 1022, 1024 [3d Dept 2021], *lv denied* 36 NY3d 1097 [2021]) and that defendant, in turn, knowingly, intelligently and voluntarily waived his right to appeal. In

light of the valid appeal waiver, defendant's challenge to the severity of his sentence is precluded (*see People v Robinson*, 213 AD3d 1002, 1003 [3d Dept 2023]).

Garry, P.J., Egan Jr., Pritzker, Powers and Mackey, JJ., concur.

ORDERED that the judgments are 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