

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

Decided and Entered: May 23, 2024

113112

113113

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

JAMES DELOSH,

Appellant.

Calendar Date: April 24, 2024

Before: Egan Jr., J.P., Aarons, Lynch, Reynolds Fitzgerald and Powers, JJ.

Rural Law Center of New York, Inc., Plattsburgh (Keith F. Schockmel of counsel),
for appellant, and appellant pro se.

Gary M. Pasqua, District Attorney, Canton (*Matthew L. Peabody* of counsel), for
respondent.

Aarons, J.

Appeals (1) from a judgment of the County Court of St. Lawrence County (John F. Richey, J.), rendered September 16, 2021, convicting defendant upon his plea of guilty of the crime of attempted criminal possession of a controlled substance in the third degree, and (2) from a judgment of said court, rendered September 16, 2021, convicting defendant upon his plea of guilty of the crime of attempted criminal possession of a controlled substance in the third degree.

Defendant was charged in two indictments, handed up in September 2020 and December 2020, with various drug-related crimes. Pursuant to a plea agreement, defendant pleaded guilty to attempted criminal possession of a controlled substance in the third degree in satisfaction of the first indictment and pleaded guilty to attempted criminal possession of a controlled substance in the third degree in satisfaction of the second indictment, and he agreed to waive the right to appeal. Defendant also signed a stipulation forfeiting \$3,076 that was allegedly seized in relation to the charged crimes. County Court sentenced defendant, as a second felony offender, to two concurrent prison terms of 3½ years, to be followed by three years of postrelease supervision. Defendant appeals.

We affirm. Contrary to defendant's contention, his appeal waiver is valid. County Court advised defendant that an appeal waiver was a condition of his plea agreement, explained the separate and distinct nature of the appeal waiver and enumerated certain rights that survive the waiver, and defendant affirmed his understanding thereof (*see People v Foote*, 210 AD3d 1311, 1312 [3d Dept 2022]; *People v Burnham*, 206 AD3d 1368, 1368-1369 [3d Dept 2022], *lv denied* 38 NY3d 1187 [2022]). Additionally, defendant executed a detailed written waiver that expressly indicated that he was waiving any challenge to the severity of his sentence and also delineated various appellate rights that he retained (*see People v Rayder*, 214 AD3d 1124, 1124 [3d Dept 2023]; *People v Bass*, 189 AD3d 1977, 1978 [3d Dept 2020], *lv denied* 36 NY3d 1095 [2021]). In response to County Court's inquiries, defendant confirmed that he had read and discussed the written waiver with counsel, understood its contents and had no questions relative thereto (*see People v Robinson*, 213 AD3d 1002, 1003 [3d Dept 2023]; *People v Grimshaw*, 207 AD3d 959, 959 [3d Dept 2022]). Under these circumstances, we conclude that defendant knowingly, intelligently and voluntarily waived the right to appeal (*see People v Dobbs*, 217 AD3d 1276, 1277 [3d Dept 2023]; *People v Rayder*, 214 AD3d at 1124; *People v Grimshaw*, 207 AD3d at 959). Given defendant's valid appeal waiver, his challenge to the severity of his sentence is foreclosed (*see People v Gayle*, 221 AD3d 1061, 1062 [3d Dept 2023]; *People v Williams*, 208 AD3d 1499, 1500 [3d Dept 2022]).

Defendant's challenge to County Court's imposition of mandatory surcharges and fees for each of the two convictions is precluded by his valid appeal waiver (*see People v Archer*, 171 AD3d 1404, 1405 [3d Dept 2019], *lv denied* 33 NY3d 1066 [2019]; *People v Frazier*, 57 AD3d 1460, 1461 [4th Dept 2008], *lv denied* 12 NY3d 783 [2009]; *see also People v Morales*, 119 AD3d 1082, 1084 [3d Dept 2014], *lv denied* 24 NY3d 1086

[2014]), and is otherwise unpreserved by his failure to raise an objection to the imposition of the surcharges and fees at the time they were imposed or move for resentencing (*see People v Stebbins*, 171 AD3d 1395, 1397 [3d Dept 2019], *lv denied* 33 NY3d 1108 [2019]; *People v Dunn*, 254 AD2d 511, 512 [3d Dept 1998], *lv denied* 92 NY2d 1031 [1998], *cert denied* 527 US 1024 [1999]; *People v Burt*, 142 AD2d 794, 794 [3d Dept 1988]). Defendant's contention in his supplemental pro se brief that the forfeiture of \$3,076 was unauthorized is waived both by his written forfeiture stipulation and his valid appeal waiver (*see People v Vellon*, 128 AD3d 1274, 1275 [3d Dept 2015], *lv denied* 26 NY3d 1043 [2015]; *People v Carbone*, 101 AD3d 1232, 1233 [3d Dept 2012]).

Finally, although County Court purportedly sentenced defendant as a second felony offender, there is a disparity between the sentences imposed – concurrent determinate sentences of 3½ years – and Penal Law § 70.06 (2), which requires that "when the court has found . . . that a person is a second felony offender[,] the court must impose an indeterminate sentence of imprisonment." The determinate sentences imposed would, however, be proper if the court sentenced defendant as a second felony drug offender (*see* Penal Law § 70.70 [3] [b] [ii]). Inasmuch as the People concede, and the record reflects, that defendant is, in fact, a second felony drug offender, and the sentence is otherwise proper, the uniform sentence and commitment form must be amended to correctly reflect defendant's status as such (*see People v Graham*, 214 AD3d 1256, 1258 [3d Dept 2023], *lv denied* 40 NY3d 934 [2023]; *People v Carrington*, 194 AD3d 1253, 1255 [3d Dept 2021]).¹

Egan Jr., J.P., Lynch, Reynolds Fitzgerald and Powers, JJ., concur.

¹ The record does not contain a certificate of conviction, which may contain the same error. County Court should determine whether the certificate is erroneous and amend it if necessary.

ORDERED that the judgments are affirmed, and matter remitted for entry of an amended uniform sentence and commitment form.

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