

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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KA 06-01046

PRESENT: SMITH, J.P., CENTRA, FAHEY, PERADOTTO, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KIM M. WILSON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NANCY A. GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered November 1, 2005. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]). "By failing to move to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve for our review his contention that he raised [a] possible . . . intoxication defense[] during his plea colloquy and thus that [Supreme] Court erred in failing to conduct a sufficient inquiry to ensure that the plea was knowingly, voluntarily and intelligently entered" (*People v Davis*, 37 AD3d 1179, 1179, lv denied 8 NY3d 983; see *People v Lopez*, 71 NY2d 662, 665). This is not one of those rare cases "where the defendant's recitation of the facts underlying the crime pleaded to clearly cast significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea" such that preservation is not required (*Lopez*, 71 NY2d at 666; see *People v Wimes*, 49 AD3d 1286, 1287, lv denied 11 NY3d 743). The sentence is not unduly harsh or severe.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court