

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

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KA 07-02563

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TIMOTHY M. DOZIER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered August 8, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth 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 criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]). We reject the challenge by defendant to the validity of his waiver of the right to appeal. Supreme Court was not required to engage in a particular litany to ensure that defendant's waiver of the right to appeal was voluntary, knowing and intelligent (*see People v Callahan*, 80 NY2d 273, 283; *People v Pointer*, 43 AD3d 1413, *lv denied* 9 NY3d 1037), and thus the waiver of the right to appeal was not rendered invalid based on the court's failure to require defendant to articulate the waiver in his own words (*see People v Ludlow*, 42 AD3d 941). The valid waiver by defendant of the right to appeal includes the waiver of his right to invoke our "interest-of-justice jurisdiction to reduce the sentence" (*People v Lopez*, 6 NY3d 248, 255).

Although the further contention of defendant that his plea was coerced and thus was not voluntary survives his valid waiver of the right to appeal (*see People v Adams*, 57 AD3d 1385; *People v Thomas*, 56 AD3d 1240), defendant did not move to withdraw the plea or to vacate the judgment of conviction and thus failed to preserve his contention for our review (*see People v Russell*, 55 AD3d 1314; *People v Elardo*, 52 AD3d 1272, *lv denied* 11 NY3d 787, 788). In any event, that contention lacks merit. The court's statement informing defendant of the sentence that he could receive in the event that he went forward

with a suppression hearing and trial did not constitute a threat to impose a greater sentence unless defendant pleaded guilty to the crime charged (see *People v Min*, 249 AD2d 130, 131-132; cf. *People v Beverly*, 139 AD2d 971). Rather, the court's statement was a proper explanation of defendant's sentence exposure in the event that defendant chose not to plead guilty (see *People v Pagan*, 297 AD2d 582, lv denied 99 NY2d 562). Furthermore, "[t]he fact that [the court] would not extend the [sentencing] offer once the suppression hearing began does not support the inference that the plea was coerced" (*People v Santalucia*, 19 AD3d 806, 807, lv denied 5 NY3d 856).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court