

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

262

KA 08-00236

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RAHEIM HOWELL, DEFENDANT-APPELLANT.

WAGNER & HART, OLEAN (JANINE C. FODOR OF COUNSEL), FOR
DEFENDANT-APPELLANT.

EDWARD M. SHARKEY, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered January 14, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]), defendant contends that County Court abused its discretion in denying his motion to withdraw his plea at the time of sentencing. We reject that contention. According to defendant, he entered the guilty plea under the mistaken belief that the sentence imposed would run concurrently with a sentence to be imposed in a matter pending in federal court. It is well settled, however, that a court's " 'refusal to permit withdrawal does not constitute an abuse of . . . discretion unless there is some evidence of innocence, fraud, or mistake in [the inducement of] the plea' " (*People v Thomas*, 17 AD3d 1047, 1047, lv denied 5 NY3d 770; see CPL 220.60 [3]; *People v Pillich*, 48 AD3d 1061, lv denied 11 NY3d 793). There is no such evidence here. Rather, the record establishes that the terms of the sentencing commitment were "susceptible to but one interpretation" (*People v Cataldo*, 39 NY2d 578, 580; see *People v Ramos*, 56 AD3d 1180; *People v Reyes*, 167 AD2d 920, 921, lv denied 77 NY2d 842), and the court adhered to that sentencing commitment (see *Cataldo*, 39 NY2d at 580).

The challenge by defendant to the factual sufficiency of the plea allocation is unpreserved for our review (see *People v Lopez*, 71 NY2d 662, 665), and it also is encompassed by his valid waiver of the right to appeal (see *People v Grimes*, 53 AD3d 1055, lv denied 11 NY3d 789; *People v Jackson*, 50 AD3d 1615, lv denied 10 NY3d 960). In any event,

his challenge is without merit.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court