

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

965.1

KA 08-01385

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KENNETH MAYNARD, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered April 1, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted arson in the third 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 attempted arson in the third degree (Penal Law §§ 110.00, 150.10 [1]). The waiver by defendant of the right to appeal does not encompass his contention that Supreme Court erred in enhancing the sentence without affording him an opportunity to withdraw the plea " 'because there was no discussion of that issue at the time of the plea' " (*People v Fortner*, 23 AD3d 1058). We nevertheless conclude that defendant failed to preserve his contention for our review (*see People v Belile*, 59 AD3d 1002; *People v Evans*, 302 AD2d 893, *lv denied* 100 NY2d 561), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]; cf. People v Waggoner*, 53 AD3d 1143, 1144).

Entered: July 2, 2009

Patricia L. Morgan
Clerk of the Court