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

1520

KA 08-02221

PRESENT: SCUDDER, P.J., FAHEY, CARNI, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROGER P. ZULIANI, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM 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 September 15, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the third degree and driving while intoxicated.

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 criminal possession of a weapon in the third degree (Penal Law §§ 110.00, 265.02 [1]) and driving while intoxicated (Vehicle and Traffic Law § 1192 [3]). The record establishes that defendant knowingly, intelligently, and voluntarily waived his right to appeal, and that valid waiver encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256; *People v Hidalgo*, 91 NY2d 733, 737), as well as his challenge to the factual sufficiency of the plea allocution (*see People v Lopez*, 71 NY2d 662, 665; *People v Bailey*, 49 AD3d 1258, *lv denied* 10 NY3d 932).

Although the contention of defendant that his plea was not voluntarily, knowingly, and intelligently entered survives his waiver of the right to appeal, defendant failed to move to withdraw his plea or to vacate the judgment of conviction and thus failed to preserve that contention for our review (*see People v Harris*, 269 AD2d 839). We reject defendant's contention that this is one of those rare cases in which the exception to the preservation requirement applies (*see Lopez*, 71 NY2d at 666). After defendant advised County Court that he had taken prescription pain medication, the court conducted an inquiry that "was sufficient to ensure that the plea was voluntary," and defendant advised the court that he was thinking clearly and understood the proceedings (*People v Brown*, 305 AD2d 1068, 1069, *lv denied* 100 NY2d 579).

Defendant further contends that he received ineffective assistance of counsel based on defense counsel's failure to request an adjournment until defendant was no longer taking pain medication. That contention survives the guilty plea and the valid waiver of the right to appeal "only to the extent that defendant contends that his plea was infected by the alleged ineffective assistance" (*People v Nieves*, 299 AD2d 888, 889, *lv denied* 99 NY2d 631; *see People v Kapp*, 59 AD3d 973, *lv denied* 12 NY3d 818), and we conclude that defendant's contention is lacking in merit. "[D]efendant receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404; *see Nieves*, 299 AD2d 888).

Entered: December 30, 2009

Patricia L. Morgan
Clerk of the Court