

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

1537

KA 08-02014

PRESENT: HURLBUTT, J.P., SMITH, CENTRA, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BEVERLY J. READING, 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 (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered September 3, 2008. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the crime victim assistance fee and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [4]). We note at the outset that we agree with defendant that her waiver of the right to appeal is invalid "inasmuch as the record fails to 'establish that [she] understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Hendrix*, 62 AD3d 1261, 1262, *lv denied* 12 NY3d 925, quoting *People v Lopez*, 6 NY3d 248, 256). Thus, her contention that Supreme Court erred in imposing a crime victim assistance fee because she had paid restitution in full at the time of sentencing is not encompassed by that invalid waiver. Although defendant failed to preserve her contention for our review (*see generally People v King*, 57 AD3d 1495; *People v Saladeen*, 12 AD3d 1179, 1180-1181, *lv denied* 4 NY3d 767), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]*; *Saladeen*, 12 AD2d at 1180-1181; *see also People v Ramos*, 60 AD3d 1317, 1317-1318, *lv denied* 12 NY3d 928). A defendant shall not be required to pay a crime victim assistance fee where, as here, he or she has paid restitution (*see Penal Law § 60.35 [6]*; *People v Quinones*, 95 NY2d 349, 352), and we therefore modify the

judgment accordingly.

Entered: December 30, 2009

Patricia L. Morgan
Clerk of the Court