

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

**424**

**KA 09-00502**

PRESENT: SMITH, J.P., CENTRA, FAHEY, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

THOMAS FARRELL, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL C. WALSH OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered February 18, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first 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 sexual act in the first degree (Penal Law § 130.50 [4]). As the People correctly concede, a valid waiver by defendant of the right to appeal would not encompass his challenge to the severity of the sentence because he purportedly waived his right to appeal before Supreme Court advised him of the maximum sentence he could receive (*see People v Rizek* [appeal No. 1], 64 AD3d 1180, *lv denied* 13 NY3d 862; *People v Mingo*, 38 AD3d 1270). Nevertheless, we conclude that the sentence is not unduly harsh or severe. Although a valid waiver by defendant of the right to appeal also would not encompass his contention that the court failed to take into account the jail time credit to which he is entitled in determining the duration of the order of protection (*see People v Allen*, 64 AD3d 1190, *lv denied* 13 NY3d 794), defendant failed to preserve that contention for our review (*see People v Nieves*, 2 NY3d 310, 315-317). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see People v Owens*, 66 AD3d 1428; *Allen*, 64 AD3d 1190).

Entered: March 19, 2010

Patricia L. Morgan  
Clerk of the Court