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

446

KA 09-02156

PRESENT: SMITH, J.P., CENTRA, LINDLEY, SCONIERS, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DORENE K. DORN, DEFENDANT-APPELLANT.

FRANK POLICELLI, UTICA, FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered May 11, 2009. The judgment convicted defendant, upon a jury verdict, of grand larceny in the second degree and conspiracy in the fourth degree.

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

Memorandum: On appeal from a judgment convicting her following a jury trial of grand larceny in the second degree (Penal Law § 155.40 [1]) and conspiracy in the fourth degree (§ 105.10 [1]), defendant contends that County Court violated her constitutional right to present a defense when it precluded her from introducing letters and statements from the deceased victim (*see generally Chambers v Mississippi*, 410 US 284). Contrary to the contention of defendant, that constitutional challenge must be preserved for our review, and she failed to do so (*see People v Gonzalez*, 54 NY2d 729, 730; *People v Simmons*, 283 AD2d 306, *lv denied* 96 NY2d 924). After each of the prosecutor's objections concerning those letters and statements, defense counsel proceeded with his direct examination of defendant, "never calling to the . . . court's attention the purpose of the [evidence] . . . or in any way attempting to call the court's attention to the nature of the alleged error" (*People v George*, 67 NY2d 817, 819; *see People v Crawford-Brown*, 270 AD2d 825, *lv denied* 95 NY2d 795; *see also People v Rivera*, 281 AD2d 155, *lv denied* 96 NY2d 833). In any event, defendant's contention involves facts outside the record on appeal and must therefore be raised by way of a CPL article 440 motion (*see generally People v Exum*, 66 AD3d 1336; *People v Lando*, 61 AD3d 1389, *lv denied* 13 NY3d 746).

Defendant also failed to preserve for our review her contention that the court "improperly penalized [her] for exercising [her] right to a jury trial [because she] did not raise the issue at the time of

sentencing" (*People v Tannis*, 36 AD3d 635, *lv denied* 8 NY3d 927; *see People v Griffin*, 48 AD3d 1233, 1236-1237, *lv denied* 10 NY3d 840). In any event, that contention lacks merit. " '[T]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting [her] right to trial' " (*People v Chappelle*, 14 AD3d 728, 729, *lv denied* 5 NY3d 786; *see People v Murphy*, 68 AD3d 1730), and "the record shows no retaliation or vindictiveness against the defendant for electing to proceed to trial" (*People v Shaw*, 124 AD2d 686, 686, *lv denied* 69 NY2d 750; *see People v Brown*, 67 AD3d 1427; *People v Slater*, 61 AD3d 1328, 1329, *lv denied* 13 NY3d 749). Although defendant received a greater sentence than her coconspirator, we conclude that the disparity is justified under the circumstances of this case and that the sentence is not unduly harsh or severe.

Entered: March 19, 2010

Patricia L. Morgan
Clerk of the Court