

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

1086

KA 10-01394

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

EDWIN MONTANEZ, DEFENDANT-APPELLANT.

DONALD R. GERACE, 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 (Barry M. Donalty, J.), rendered January 28, 2008. The judgment convicted defendant, upon his plea of guilty, of rape 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 rape in the third degree (Penal Law § 130.25 [2]). Contrary to defendant's contention, we conclude that he validly waived his right to appeal (see *People v Lopez*, 6 NY3d 248, 256). Although the further contention of defendant that his plea was not knowingly, intelligently or voluntarily entered survives his valid waiver of the right to appeal, "defendant failed to preserve that contention for our review because . . . he failed to move to withdraw the plea or to vacate the judgment of conviction" (*People v Connolly*, 70 AD3d 1510, 1511, *lv denied* 14 NY3d 886). In any event, defendant's contention lacks merit. During the plea colloquy, defendant denied having any mental or physical impairments, denied that his plea was induced by threats or promises and admitted that he engaged in conduct that constituted rape in the third degree pursuant to Penal Law § 130.25 (2). Based on the record of the plea colloquy, we conclude that defendant understood the nature and consequences of the plea and that it was knowingly, intelligently, and voluntarily entered (see *People v White*, 85 AD3d 1493; *People v Watkins*, 77 AD3d 1403, 1403-1404, *lv denied* 15 NY3d 956; *Connolly*, 70 AD3d at 1511).

Entered: November 10, 2011

Patricia L. Morgan
Clerk of the Court