

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

570

**KA 11-02324**

PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND LINDLEY, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOEY D. BARR, ALSO KNOWN AS JOSEPHINE BARR,  
DEFENDANT-APPELLANT.

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LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (ROBERT TUCKER OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JASON A. MACBRIDE  
OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered April 27, 2011. The judgment convicted defendant, upon her plea of guilty, of attempted criminal sale of a controlled substance in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of attempted criminal sale of a controlled substance in the second degree (Penal Law §§ 110.00, 220.41 [5]). Defendant contends that the prosecutor's failure to instruct the grand jury as to a lesser offense of unlawful sale of an imitation controlled substance (Public Health Law § 3383 [2]) impaired the fundamental integrity of the grand jury proceeding, requiring dismissal of the indictment. By pleading guilty, defendant forfeited her right to seek our review of that contention (*see generally People v Hansen*, 95 NY2d 227, 231-232; *People v Palo*, 299 AD2d 871, 871, *lv denied* 99 NY2d 618). Defendant also failed to preserve that contention for our review (*see People v Davis*, 87 AD3d 1332, 1333, *lv denied* 18 NY3d 858, *reconsideration denied* 18 NY3d 956; *People v Estes*, 202 AD2d 516, 517, *lv denied* 84 NY2d 825). In any event, defendant's contention is without merit inasmuch as the People are "free to seek an indictment for the highest crime the evidence will support" (*People v Valles*, 62 NY2d 36, 39).

Entered: June 7, 2013

Frances E. Cafarell  
Clerk of the Court