

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

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**KA 13-01341**

PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND VALENTINO, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DUSK A. TOCHA, DEFENDANT-APPELLANT.

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

JAY D. CARR, SPECIAL PROSECUTOR, OLEAN, FOR RESPONDENT.

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Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered September 17, 2012. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]), defendant contends that his sentence is unduly harsh and severe. Although defendant's waiver of his right to appeal does not encompass his challenge to the severity of the sentence "inasmuch as [County] Court did not explain during the course of the allocution concerning the waiver of the right to appeal that he was waiving the right to appeal any issue regarding the severity of the sentence" (*People v Donaldson*, 130 AD3d 1486, 1486), we nevertheless perceive no basis in the record to modify the negotiated sentence as a matter of discretion in the interest of justice (see CPL 470.15 [6] [b]).

Entered: November 20, 2015

Frances E. Cafarell  
Clerk of the Court