Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D21526
Y/prt

_____AD3d_____ Submitted - November 25, 2008

STEVEN W. FISHER, J.P.
ANITA R. FLORIO
EDWARD D. CARNI
CHERYL E. CHAMBERS, JJ.

2007-07866 DECISION & ORDER

The People, etc., respondent,
v Bruce D. Hamm, appellant.

(Ind. No. 07-00320)

Salvatore C. Adamo, New York, N.Y., for appellant.

Francis D. Phillips II, District Attorney, Goshen, N.Y. (Luke E. Bovill of counsel), for respondent.

Appeal by the defendant from a judgment of the County Court, Orange County (De Rosa, J.), rendered August 8, 2007, convicting him of grand larceny in the third degree, upon his plea of guilty, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant argues "that he received ineffective assistance of counsel in that counsel permitted him to plead guilty and [to] waive his right to appeal without filing a motion to dismiss the indictment, in the interest of justice, pursuant to *People v Clayton* (41 AD2d 204)." He argues, "defense counsel had no strategic or legitimate explanation for [the] failure [to file a *Clayton* motion]."

Contrary to this contention, the record on appeal contains no indication that a *Clayton* motion (*see* CPL 210.40) would have had the slightest chance of success, and thus the defendant's former attorney cannot be said to have been ineffective based only on his failure to make such a motion. "There can be no denial of effective assistance of . . . counsel arising from counsel's failure to 'make a motion or argument that had little or no chance of success'" (*People v Caban,* 5 NY3d 143, 152, quoting *People v Stultz,* 2 NY3d 277, 287).

In light of the defendant's waiver of his right to appeal, which was, by all appearances, completely voluntary, the defendant's argument concerning the alleged excessiveness of his sentence is not properly before this Court (*see People v Finn*, 56 AD3d 490; *People v Jackson*, 56 AD3d 492; *People v Gallo*, 54 AD3d 964).

FISHER, J.P., FLORIO, CARNI and CHAMBERS, JJ., concur.

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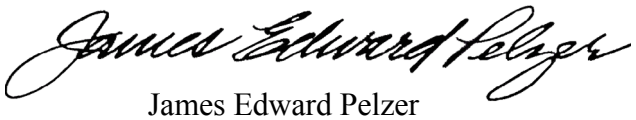

James Edward Pelzer
Clerk of the Court