

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

D25554  
C/kmg

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Submitted - December 2, 2009

MARK C. DILLON, J.P.  
HOWARD MILLER  
RANDALL T. ENG  
L. PRISCILLA HALL  
SANDRA L. SGROI, JJ.

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2008-10667

DECISION & ORDER

The People, etc., respondent,  
v Brian Marcinak, appellant.

(Ind. No. 08-00376)

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

Francis D. Phillips II, District Attorney, Goshen, N.Y. (Elizabeth L. Guinup and Andrew R. Kass of counsel), for respondent.

Appeal by the defendant from a judgment of the County Court, Orange County (De Rosa, J.), rendered November 7, 2008, convicting him of driving while ability impaired by drugs, upon his plea of guilty, and imposing sentence.

ORDERED that the judgment is affirmed.

We agree with the defendant's contention that the purported waiver of his right to appeal was invalid (*see People v Woods*, 67 AD3d 829; *People v Dongo*, 244 AD2d 353, 353; *cf. People v Silent*, 37 AD3d 625). The defendant's contention that his plea of guilty was not knowingly, voluntarily, and intelligently entered is unpreserved for appellate review because he failed to move to withdraw his plea of guilty prior to sentencing (*see CPL 220.60*[3]; *People v Velez*, 64 AD3d 799, 799; *People v Finn*, 63 AD3d 755, 756). In any event, the record demonstrates that the defendant's plea of guilty was entered knowingly, voluntarily, and intelligently (*see People v Owens*, 67 AD3d 1029; *People v Woods*, 67 AD3d 829). The defendant's contention that he was denied the effective assistance of counsel is without merit (*see People v Finn*, 63 AD3d at 756). Furthermore, since the defendant pleaded guilty with the understanding that he would receive the sentence which

was thereafter actually imposed, he has no basis to now complain that his sentence was excessive (*see People v De Alvarez*, 59 AD3d 732, 733; *People v Fanelli*, 8 AD3d 296, 296; *People v Mejia*, 6 AD3d 630, 631; *People v Kazepis*, 101 AD2d 816, 816-817).

DILLON, J.P., MILLER, ENG, HALL and SGROI, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive style with a large, sweeping initial "J".

James Edward Pelzer  
Clerk of the Court