

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

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**KA 07-01825**

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WAYNE R. HINKSON, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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JOHN E. TYO, SHORTSVILLE, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES B. RITTS OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered February 14, 2006. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree (three counts) and menacing 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 three counts of criminal possession of a weapon in the third degree (Penal Law § 265.02 [former (4)]) and one count of menacing in the third degree (§ 120.15). Defendant failed to move to withdraw his plea or to vacate the judgment of conviction and thus failed to preserve for our review his challenge to the factual sufficiency of the plea allocution with respect to the menacing count (see *People v Lopez*, 71 NY2d 662, 665; *People v Dorrah*, 50 AD3d 1619, *lv denied* 11 NY3d 736). In any event, that challenge is without merit. Defendant admitted during the plea colloquy that he formed his hand into the shape of a gun and pushed it into the victim's abdomen with the intent to place the victim in fear of physical injury (see § 120.15; *Matter of Pedro H.*, 308 AD2d 374). "Defendant admitted each of the elements of [menacing in the third degree], and [his] factual allocution therefore was legally sufficient" (*People v Gibbs*, 31 AD3d 1186, *lv denied* 7 NY3d 867). Even assuming, arguendo, that defendant's recitation of the facts underlying the menacing count called into question the voluntariness of the plea, we conclude that County Court conducted the requisite further inquiry to ensure that defendant's plea was knowing and voluntary (see *Lopez*, 71 NY2d at 666; *People v Brow*, 255 AD2d 904, 905).

Entered: February 6, 2009

JoAnn M. Wahl  
Clerk of the Court