

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

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KA 08-00245

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID C. PETTIGREW, SR., DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVID C. PETTIGREW, SR., DEFENDANT-APPELLANT PRO SE.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Peter L. Broderick, Sr., J.), rendered December 19, 2007. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree and criminal contempt in the first 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 sexual abuse in the first degree (Penal Law § 130.65 [2]) and criminal contempt in the first degree (§ 215.51 [b] [vi]). Contrary to the contention of defendant, his waiver of the right to appeal was voluntarily, knowingly, and intelligently entered (see *People v Lopez*, 6 NY3d 248, 256; *People v Lococo*, 92 NY2d 825, 827). The challenge by defendant to the severity of the sentence is encompassed by his valid waiver of the right to appeal (see *Lopez*, 6 NY3d at 256; *People v Hidalgo*, 91 NY2d 733, 737). The contention of defendant in his pro se supplemental brief concerning alleged prosecutorial vindictiveness is based upon matters outside the record and thus must be raised by way of a motion pursuant to CPL article 440 (see *People v Hoeft*, 42 AD3d 968, 969-970, lv denied 9 NY3d 962). The further contention of defendant in his pro se supplemental brief that he was denied effective assistance of counsel "does not survive his guilty plea or his waiver of the right to appeal because there was no showing that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of his attorney['s] allegedly poor performance" (*People v Dean*, 48 AD3d 1244, 1245, lv denied 10 NY3d 839 [internal quotation marks omitted]). We have reviewed the remaining contentions of defendant in his pro se supplemental brief and conclude that none

requires reversal or modification of the judgment.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court